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
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

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I. INTRODUCTION

1. Further to Justice D.R.G. Thomas' reasons for judgment dated December 17, 2015,[1] the Sawridge First Nation ("Sawridge") was served with two applications by the Public Trustee of Alberta (the "Public Trustee") on January 29, 2016. In both of its applications, the Public Trustee is seeking orders to compel Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court*. One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "Beneficiary Application"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "Settlement Application").

2. It is Sawridge's position that the Public Trustee should not be entitled to all of the records that it is seeking as part of its two applications. With regards to the Beneficiary Application, the Public Trustee has been provided with information that would allow it to identify the number and identity of the minors who it represents and who it may represent. Furthermore, the Public Trustee has failed to specify what records it is requesting from Sawridge as part of this application.

3. Insofar as the Settlement Application, a number of the Public Trustee's requests for records are irrelevant, as they do not concern the settlement of the assets into the 1985 Sawridge Trust; rather, a number of those requests are focused on quantifying the assets in the 1985 Sawridge Trust, and on attempting to determine how certain assets were disposed of well before the trust's inception. Those requests, it is submitted, are irrelevant to what Justice Thomas described as "potential irregularities" related to the settlement of the assets in the 1985 Sawridge Trust.

II. BENEFICIARY APPLICATION

A. *BACKGROUND*

4. In his reasons for judgment, Justice Thomas directed Sawridge to provide the Public Trustee with information that would allow the Public Trustee to identify the following:

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[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ["***Sawridge #2***"]. **[Tab B1]**

1. The names of individuals who have:

    a) made applications to join Sawridge which are pending; and

    b) had applications to join Sawridge rejected and are subject to challenge; and

2. The contact information for those individuals where available.[2]

5. Pursuant to that direction, Sawridge sent a letter to the Public Trustee on January 18, 2016, which included all of the above-listed information. As part of that letter, Sawridge provided a table containing a list of all of the adult individuals who had applied to join Sawridge, but whose applications were still pending with their contact information. Sawridge also provided a list of all of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge in accordance with the relevant limitations period under the Sawridge Constitution and its laws. A copy of that letter has been included as **Tab C1** of these submissions. The attached copy of the letter does not contain the tables referred to above, as those tables contain private and confidential information.

6. On January 29, 2016, the Public Trustee served Sawridge with the Beneficiary Application. According to the Public Trustee's application, it is seeking the following records from Sawridge:

> In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.

7. The undertaking response referred to in the above paragraph was included in the Public Trustee's document titled, "excerpts from pleadings, transcripts, exhibits and answers to undertakings," which was filed on June 12, 2015, at pp. 153-155. That undertaking response is a

[2] *Ibid*, at para 57.

two-page table that outlines all of the minors who are currently members of Sawridge, and indicates whether those minors are currently beneficiaries of the 1985 Sawridge Trust.

B. SUBMISSIONS

8. As noted above, the production of records by a non-party to an action is governed by Rule 5.13 of the *Rules of Court*. That rule creates a narrow exception to the general rule that parties are typically only allowed disclosure from other parties to an action. It states as follows:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.[3]

9. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party. Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.[4]

10. The party seeking the records from a third party has the burden of establishing that the Court should order the production of those records.[5]

11. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the

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[3] *Rules of Court*, at 5.13. [**Tab A1**]
[4] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) [“***Ed Miller***”], at para 13 [**Tab B2**]; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 [“***Trimay***”], at paras 13 and 18. [**Tab B3**]
[5] *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA), at para 4. [**Tab B4**]

third party has those records.[6] Failing to adequately describe a record is fatal to an application under Rule 5.13.[7] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[8]

12. In *Trimay Wear Plate v Way*, for example, Justice Graesser held that the defendants were not entitled to certain records sought from a third party under the previous version of Rule 5.13 (Rule 209), because of a lack of specificity in their request. The defendants' requests in that action were drafted in the following manner:

> (a) documents surrounding 735458's [the Third Party] ownership of Trimay [the Plaintiff], which they say are relevant to whether any proprietary processes or technology exist;
>
> (b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;
>
> (c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and
>
> (d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.[9]

13. Justice Graesser held that the defendants' requests were not worded with sufficient specificity to determine if the third party had any relevant or material records. As such, the application was (with the exception of two requests specific documents) dismissed.[10]

14. In his reasons for judgment, Justice Thomas identified three categories of minors who were potential recipients of a distribution of the 1985 Sawridge Trust:

(a) Minors who are children of members of Sawridge;

(b) Children of adults who have unresolved applications to join Sawridge; and

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[6] *Ed Miller*, supra note 4, at paras 13-17. [**Tab B2**]
[7] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144, at paras 12 and 13. [**Tab B5**]
[8] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. [**Tab B6**]
[9] *Trimay*, supra note 4, at para 12. [**Tab B3**]
[10] *Ibid*, at para 24. [**Tab B3**]

(c) Children of adults who have applied for membership in Sawridge, but have had their application rejected and are challenging that rejection by appeal or judicial review.[11]

15. Sawridge, in its letter of January 18, 2016, provided the Public Trustee with all of the information that would allow it to identify the minors in the last two of the categories listed above. Insofar as the second category, Sawridge provided a list of the adults who had pending applications to Sawridge, as well as a list of adults who had made applications for membership on behalf of their minor children. With regards to the third category, Sawridge confirmed that no appeals had been commenced or could be commenced in relation to any membership applications. As such, and given that information concerning the minors who are currently members of Sawridge was already provided to the Public Trustee as part of Mr. Bujold's undertaking responses, it is Sawridge's position that the Public Trustee does not require any further documents related to same.

16. Furthermore, even if additional records were necessary to identify the minor beneficiaries that the Public Trustee is representing, the Public Trustee's request under Rule 5.13 fails to articulate what documents it is seeking with any level of precision. As noted in the above-cited cases, an applicant is required to provide a precise description of what records it is seeking from a third party under Rule 5.13. Rather than specifying what documents it is seeking, the Public Trustee has simply requested all documents that "may" assist in identifying the minor beneficiaries. That request, it is submitted, is far too broadly worded to be permitted under Rule 5.13.

17. Another issue raised by the manner in which the Public Trustee has framed its request for records is that Sawridge is unable to determine if any of the records that are being sought are producible, or if Sawridge would oppose their production. Some of the records being requested by the Public Trustee may contain confidential information regarding applicants for membership or regarding Sawridge itself. Given that the Public Trustee has not specified which documents it is seeking, Sawridge is unable to say if any records containing confidential

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[11] *Sawridge #2*, supra note 1, at para 56. **[Tab B1]**

information are being sought, and is accordingly unable to know whether it needs to raise an objection related to same.

18. The issue of identifying what is being sought by the Public Trustee is rendered even more difficult by the fact that the Public Trustee has indicated in its application that it is relying on, "all relevant materials filed to date" in this action. As a non-party, Sawridge has not necessarily been privy to all of the filings in this action. Importantly, the Public Trustee has failed to provide any indication of what evidence it will rely on, and is instead suggesting that Sawridge should comb through the tomes of records that have been filed in order to guess what the Public Trustee deems is a "relevant document" for the purpose of this application. This failure to specify what evidence is being relied upon runs contrary to the principle of precisely framing a request under Rule 5.13.

III. SETTLEMENT APPLICATION

A. *BACKGROUND*

19. The first Order pronounced in this action is dated August 31, 2011. That Order was pronounced by Justice Thomas, and outlines the scope of the application being made by the 1985 Sawridge Trust's trustees for advice and direction.[12] That Order notes at paragraph 1(b) that one of the purposes of this action is to seek direction, "with respect to the transfer of assets to the 1985 Sawridge Trust."

20. In the Affidavit of Mr. Bujold filed by the trustees of the 1985 Sawridge Trust in support of their application for advice and direction, Mr. Bujold noted the following regarding the advice and direction being sought:

> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.[13]

21. In his reasons for judgment, Justice Thomas indicated that certain questions had been raised regarding the settlement of the assets in the 1985 Sawridge Trust. Accordingly, he

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[12] Order of Justice D.R.G. Thomas, dated August 31, 2011. **[Tab C2]**
[13] Affidavit of Paul Bujold, sworn September 12, 2011, at para 25. **[Tab C3]**

ordered that the Public Trustee could serve Sawridge with an application under Rule 5.13 concerning the assets settled in the 1985 Sawridge Trust. [14]

22. On January 29, 2016, the Public Trustee served Sawridge with the Settlement Application. In that application, the Public Trustee indicated that it was seeking ten different categories of records from Sawridge. Those various categories are outlined at paragraph 1 of the Settlement Application.

B. *SUBMISSIONS*

23. Case law is clear that the Public Trustee must demonstrate that the records that it is seeking from Sawridge are relevant and material to the issues in dispute in this action. The *Rules of Court* affirm that a party is only required to disclose records that are relevant and material. Relevance and materiality are generally defined by the parties' pleadings:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*][15]

24. In addition to reviewing the parties' pleadings, a Court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.[16] With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the

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[14] *Sawridge #2*, supra note 1, at paras 45-47. [**Tab B1**]
[15] *Rules of Court*, at R.5.2. [**Tab A2**]
[16] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. [**Tab B7**]

parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.[17]

25. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.[18] If a moving party fails to meet its burden of proving that a record should be produced, then a Court must dismiss that party's application for disclosure.[19]

26. From the outset of this action, the issue regarding the settlement of the assets in the 1985 Sawridge Trust has not concerned the quantification of those assets. At no time has an application been brought for an accounting of those assets; nor has any tracing-type application been brought in relation to the assets.

27. Rather, and as indicated in the first Order pronounced by Justice Thomas and in Mr. Bujold's Affidavit, the issue regarding the settlement of the assets concerns the actual transfer of those assets to the 1985 Sawridge Trust. That transfer, as was noted in Mr. Bujold's Affidavit, occurred in April of 1985. Accordingly, it is Sawridge's position that the only documents related to the assets in the 1985 Sawridge Trust that are relevant and material to this action are those that concern the actual transfer of the assets into that trust.

28. Based on its position regarding the Public Trustee's requests for records, Sawridge provided the Public Trustee with a response to its request in paragraph 1(c). That response was provided via letter on March 11, 2016. A copy of that letter has been included at **Tab C4** of these submissions. Sawridge indicated that it did not have any other records concerning the subject matter of that request.

29. A number of the Public Trustee's requests for records concern matters that predate the transfer of the assets to the 1985 Sawridge Trust. Specifically, certain requests concern records related to assets held by certain individuals in the 1970s (paragraph 1(a)), to the settlement of certain assets in the 1982 Sawridge Trust (paragraphs 1(b) and 1(j)), and to other

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[17] *Ibid*, at paras 16-17. [**Tab B7**]
[18] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. [**Tab B8**]
[19] *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2, at paras 21 and 42 – 44. [**Tab B9**]

matters that predate April of 1985 (paragraphs 1(e), 1(f), and 1(h)). These records are neither relevant nor material to the issue that is the subject of this action, being the actual transfer of the assets to the 1985 Sawridge Trust.

30. Similarly, a number of the other requests concern the identification of the assets located in the 1985 Sawridge Trust. The requests for records concerning transfers that occurred into the trust following its settlement in April of 1985 (paragraph 1(d)) and concerning certain matters in the 1985 Sawridge Trust's financial statements (paragraph 1(g)) are again irrelevant and not material to the issue of the transfer of the assets into the 1985 Sawridge Trust. As eluded to above, the Trustees of the 1985 Sawridge Trust are not seeking an accounting of the trust's assets, or any similar remedy.

31. With regards to paragraph 1(i) of the Public Trustee's application, Sawridge again takes the position that the records being sought regarding the transfers of funds that purportedly occurred in 1984 and 1985 are irrelevant to this action. Additionally, no evidence has been provided to support this request by the Public Trustee. An applicant under Rule 5.13 has the burden of proving that a third party possesses a record. As no evidence has been referred to by the Public Trustee in relation to this request, it is Sawridge's position that the Public Trustee's request under paragraph 1(i) should be dismissed.

32. Sawridge also takes the position that the Public Trustee's request under paragraph 1(j) is irrelevant to the issue of the transfer into the 1985 Sawridge Trust. The Public Trustee has requested records that concern the assets that certain individuals intended to be included in the 1982 Sawridge Trust. The question of intent in these circumstances is irrelevant to the actual transfer that took place.

33. In conclusion, Sawridge's position is that the Public Trustee's requests in the Settlement Application run contrary to Justice Thomas' attempt to refocus the role of the Public Trustee in this action. Justice Thomas was clear in his reasons for judgment that an application under Rule 5.13 was, "not intended to facilitate a 'fishing trip'."[20] The Public Trustee has ignored Justice Thomas' finding in this regard, and has attempted to request a number of records that are not clearly identified and that are irrelevant and immaterial to this action.

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[20] *Sawridge #2*, supra note 1, at para 16. **[Tab B1]**

IV. RELIEF REQUESTED

34. For the above reasons, the respondent Sawridge prays that the contested portions of the Public Trustee's applications for disclosure be dismissed, with costs payable by the Public Trustee on the basis that these costs shall not be paid by the Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

A. LEGISLATION AND RULES

B. CASE LAW

C. PRIOR ORDERS

Tab A1

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 128/2015

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Order for record to be produced

5.11(1) On application, the Court may order a record to be produced if the Court is satisfied that

(a) a relevant and material record under the control of a party has been omitted from an affidavit of records, or

(b) a claim of privilege has been incorrectly or improperly made in respect of a record.

(2) For the purpose of making a decision on the application, the Court may

(a) inspect a record, and

(b) permit cross-examination on the original and on any subsequent affidavit of records.

Penalty for not serving affidavit of records

5.12(1) In addition to any other order or sanction that may be imposed, the Court may impose a penalty of 2 times the amount set out in item 3(1) of the tariff in Division 2 of Schedule C, or any larger or smaller amount the Court may determine, on a party who, without sufficient cause,

(a) does not serve an affidavit of records in accordance with rule 5.5 or within any modified period agreed on by the parties or set by the Court,

(b) does not comply with rule 5.10, or

(c) does not comply with an order under rule 5.11.

(2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court.

(3) A penalty imposed under this rule applies irrespective of the final outcome of the action.

Obtaining records from others

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

(a) the record is under the control of that person,

(b) there is reason to believe that the record is relevant and material, and

(c) the person who has control of the record might be required to produce it at trial.

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

Inspection and copying of records

5.14(1) Every party is entitled, with respect to a record that is relevant and material and that is under the control of another party, to all of the following:

(a) to inspect the record on one or more occasions on making a written request to do so;

(b) to receive a copy of the record on making a written request for the copy and paying reasonable copying expenses;

(c) to make copies of the record when it is produced.

(2) This rule does not apply to a record for which a claim of privilege is made unless the Court orders the record to be produced for inspection.

(3) The Court or a party to an action who receives a computer-generated document that was filed with the court clerk may request the person filing that document or causing it to be issued to provide a copy of it in an electronic format.

Admissions of authenticity of records

5.15(1) In this rule, "authentic" includes the fact that

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been, and

(b) a document that is said to be a copy is a true copy of the original.

(2) Subject to subrules (3), (4), (5) and (6), a party who makes an affidavit of records or on whose behalf an affidavit of records is filed and a party on whom an affidavit of records is served are both presumed to admit that

(a) a record specified or referred to in the affidavit is authentic, and

Tab A2

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 128/2015

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(b) the plaintiff is entitled to a costs award against the defendant for having responded to the discontinued defence.

Part 5
Disclosure of Information

Purpose of this Part

5.1(1) Within the context of rule 1.2, the purpose of this Part is

(a) to obtain evidence that will be relied on in the action,

(b) to narrow and define the issues between parties,

(c) to encourage early disclosure of facts and records,

(d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and

(e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.

(2) The Court may give directions or make any order necessary to achieve the purpose of this Part.

Division 1
How Information Is Disclosed

Subdivision 1
Introductory Matters

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

(2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

Tab B1

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

In the Matter of the Trustees 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust, Respondents and Public Trustee of Alberta, Applicant

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015
Judgment: December 17, 2015
Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human Rights

Headnote

Aboriginal law — Practice and procedure — Discovery — Miscellaneous

Band set up trust to hold Band property on behalf of its members — Trustees sought court advice and direction with respect to proposed definition to term "beneficiaries" of trust — Public Trustee brought successful application to be appointed litigation representative of interested minors, on condition that costs would be paid by trust and that it would be shielded from any costs liability — Public Trustee brought application for production of records and information from band — Information sought concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and

material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc. (2008), 2008 SCC 8, 2008 CarswellBC 411, 2008 CarswellBC 412, 75 B.C.L.R. (4th) 1, [2008] 4 W.W.R. 1, 50 C.P.C. (6th) 207, 290 D.L.R. (4th) 193, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 372 N.R. 95, (sub nom. *Juman v. Doucette*) [2008] 1 S.C.R. 157, (sub nom. *Doucette v. Wee Watch Day Care Systems Inc.*) 252 B.C.A.C. 1, 422 W.A.C. 1 (S.C.C.) — referred to

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Gainers Inc. v. Pocklington Holdings Inc. (1995), 30 Alta. L.R. (3d) 273, [1995] 9 W.W.R. 117, 169 A.R. 288, 97 W.A.C. 288, 1995 CarswellAlta 200 (Alta. C.A.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 1132, 258 N.R. 246, 2000 CarswellNat 5603 (Fed. C.A.) — referred to

Kaddoura v. Hanson (2015), 2015 ABCA 154, 2015 CarswellAlta 780, [2015] 6 W.W.R. 535, 67 C.P.C. (7th) 376, 600 A.R. 184, 645 W.A.C. 184, 15 Alta. L.R. (6th) 37 (Alta. C.A.) — referred to

Poitras v. Sawridge Band (2013), 2013 FC 910, 2013 CF 910, 2013 CarswellNat 3938, 2013 CarswellNat 3939, (sub nom. *Poitras v. Sawridge Indian Band*) 438 F.T.R. 264 (Eng.) (F.C.) — considered

Royal Bank of Canada v. Trang (2014), 2014 ONCA 883, 2014 CarswellOnt 17254, 379 D.L.R. (4th) 601, 123 O.R. (3d) 401, 327 O.A.C. 199 (Ont. C.A.) — referred to

Stoney v. Sawridge First Nation (2013), 2013 FC 509, 2013 CarswellNat 1434, 2013 CF 509, 2013 CarswellNat 2006, 432 F.T.R. 253 (Eng.) (F.C.) — referred to

Strickland v. Canada (Attorney General) (2015), 2015 SCC 37, 2015 CSC 37, 2015 CarswellNat 2457, 2015 CarswellNat 2458, 386 D.L.R. (4th) 1, 87 Admin. L.R. (5th) 60, 473 N.R. 328, [2015] 2 S.C.R. 713 (S.C.C.) — considered

Toronto Dominion Bank v. Sawchuk (2011), 2011 ABQB 757, 2011 CarswellAlta 2131, 86 C.B.R. (5th) 1, 530 A.R. 172 (Alta. Master) — referred to

Trimay Wear Plate Ltd. v. Way (2008), 2008 ABQB 601, 2008 CarswellAlta 1330, 456 A.R. 371 (Alta. Q.B.) — referred to

Wasylyshen v. Canadian Broadcasting Corp. (September 5, 2006), Doc. 0403-08497 (Alta. Q.B.) — referred to

Weatherill Estate v. Weatherill (2003), 2003 ABQB 69, 2003 CarswellAlta 81, 49 E.T.R. (2d) 314, 11 Alta. L.R. (4th) 183, 337 A.R. 180, 40 E.T.R. (2d) 314 (Alta. Q.B.) — referred to

Z. (H.) v. Unger (2013), 2013 ABQB 639, 2013 CarswellAlta 2121, 49 C.P.C. (7th) 122, 573 A.R. 391 (Alta. Q.B.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.)*) 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee)*) 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee)*) 583 W.A.C. 324 (Alta. C.A.) — referred to

783783 Alberta Ltd. v. Canada (Attorney General) (2010), 2010 ABCA 226, 2010 CarswellAlta 1379, 2010 D.T.C. 5125 (Eng.), [2010] 6 C.T.C. 194, 89 C.P.C. (6th) 21, 322 D.L.R. (4th) 56, 76 C.C.L.T. (3d) 32, 29 Alta. L.R. (5th) 37, [2010] 12 W.W.R. 472, 482 A.R. 136, 490 W.A.C. 136 (Alta. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Indian Act, R.S.C. 1985, c. I-5
Generally — referred to

s. 2(1) "band" — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
s. 209 — referred to

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

Pt. V — referred to

R. 5.2 — referred to

R. 5.5-5.9 — referred to

R. 5.13 — considered

R. 5.13(1) — considered

R. 6.3 — considered

R. 9.19 — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175

Generally — referred to

APPLICATION by Public Trustee for production of records and information from band.

***D.R.G. Thomas J.*:**

I Introduction

1 This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) ["*Sawridge #1*"], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ["*Sawridge #2*"]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

2 On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

3 The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

4 One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, 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. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

5 Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;

2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and

3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;

- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and

- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],

- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. ("September 2/3 Order")

October 5, 2015 - I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

6 Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

7 This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

8 *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.
>
> [11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.
>
> [12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.
>
> [13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

9 This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

10 The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,

2. candidates who have or are seeking membership with the SFN,

3. the processes involved to determine whether individuals may become part of the SFN,

4. records of the application processes and certain associated litigation, and

5 how assets ended up in the 1985 Sawridge Trust.

11 The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

12 The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in *Sawridge #1* because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

13 It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

14 The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

15 The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: *Trimay Wear Plate Ltd. v. Way*, 2008 ABQB 601, 456 A.R. 371 (Alta. Q.B.); *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.).

16 The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (*Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 94 A.R. 17, 63 Alta. L.R. (2d) 189 (Alta. Q.B.)) or compel disclosure (*Gainers Inc. v. Pocklington Holdings Inc.* (1995), 169 A.R. 288, 30 Alta. L.R. (3d) 273 (Alta.

C.A.)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, 16 A.C.W.S. (3d) 286 (Alta. Q.B.).

17 The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; *Weatherill Estate v. Weatherill*, 2003 ABQB 69, 337 A.R. 180 (Alta. Q.B.).

18 The SFN takes the position that *Sawridge #1* ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in *Sawridge #1* did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

19 Privacy interests and privacy legislation are also factors: *Royal Bank of Canada v. Trang*, 2014 ONCA 883 (Ont. C.A.) at paras 97, (2014), 123 O.R. (3d) 401 (Ont. C.A.) ; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.). The cost to produce the materials is substantial.

20 The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In *Sawridge #2* at para 29, the Court of Appeal had stressed that the order in *Sawridge #1* that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

21 The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

22 The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

23 They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.). Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) at para 5, (2000), 258 N.R. 246 (Fed. C.A.). Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

24 The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in *Sawridge*

#1, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

25 Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

26 The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

27 I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v. Way*, at para 17.

28 If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

29 The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v. Sawchuk*, 2011 ABQB 757, 530 A.R. 172 (Alta. Master); *Z. (H.) v. Unger*, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*; *Gainers Inc. v. Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

30 The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

31 I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

32 It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

33 In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v. Sawridge First Nation* on the operation of the SFN's membership process.

34 Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56 (Alta. C.A.), the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v. Canada (Attorney General)*, 2015 SCC 37 (S.C.C.), the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

35 The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. 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 the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

36 It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. 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 that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

37 Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;

2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and

3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

38 The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

39 I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

40 The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

41 I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

42 On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

43 The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

44 If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

45 There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

46 The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

47 A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

48 The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and

2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

49 I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

50 As Aalto, J. observed in *Poitras v. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

51 The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

52 While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

53 The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

54 This 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 that application is evaluated, or the result of that process.

55 I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

56 In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;

2. Minors who are children of members of the SFN;

3. Adults who have unresolved applications to join the SFN;

4. Children of adults who have unresolved applications to join the SFN;

5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and

6. Children of persons in category 5 above.

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:

a) made applications to join the SFN which are pending (category 3); and

b) had applications to join the SFN rejected and are subject to challenge (category 5); and

2. The contact information for those individuals where available.

58 As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

59 This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

60 These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

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

Task 4 - General and residual distributions

62 The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

63 Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

64 As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

65 A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

66 At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

67 First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

68 Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

69 As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

70 I believe that the instructions given here will refocus the process on Tasks 1 - 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v. Sawridge First Nation*. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

71 As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Application dismissed.

End of Document

Tab B2

1988 CarswellAlta 219
Alberta Court of Queen's Bench

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.

1988 CarswellAlta 219, [1988] A.J. No. 1005, 12 A.C.W.S. (3d) 157, 63 Alta. L.R. (2d) 189, 94 A.R. 17

ED MILLER SALES & RENTALS LTD. v. CATERPILLAR TRACTOR CO. et al.

Wachowich J.

Judgment: November 2, 1988
Docket: Edmonton No. 8003-12393

Counsel: *J.B. Laskin*, for plaintiff.
M.H. Dale, Q.C., for defendants.
D.N. Jardine, for Bank of Nova Scotia.

Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — Bank records

Civil procedure -- Discovery -- Discovery of documents — Documents subject to production — Documents in possession or control of non-party — Rule 209(1) of Rules of Court providing for production of documents in possession or control of non-party — Certain documents in possession of non-party bank intimately involved in plaintiff's day-to-day operations being producible to defendant -- Probable relevance test applying — Court discussing nature of test and documents producible.

The defendants applied for an order directing the plaintiff bank, which was not a party to the action, to produce a series of documents relating to the bank's dealings with the plaintiff. The defendants had been unable to obtain those documents from the plaintiff. A special and unique relationship existed between the plaintiff and the bank during this extremely lengthy and complex litigation which had commenced in 1980. From the time that the plaintiff first began dealing with the bank until the date the bank put the plaintiff into receivership, the bank was intimately involved in the day-to-day operations of the plaintiff. In addition, being the sole unsatisfied secured creditor, the bank would be the only one to benefit if the action were successful.

Held:

Application granted in part.

Rule 209(1) of the Rules of Court permits the court to direct a third person not a party to an action to produce documents related to the matters in issue. The standard of "probable relevance" is the test for determining whether to order production in such a situation. This test provides that: the party seeking production cannot go on a fishing expedition to discover whether or not a person is in possession of a document; the documents need not necessarily be admissible in evidence at trial; the documents must be adequately described; the third party's objections to production must be considered, but are not determinative; and the rule cannot be used as a method of obtaining discovery of a person not a party to the action.

Here, the special circumstances, especially the bank's intimate involvement in the day-to-day operations of the plaintiff, justified the use of R. 209(1) to allow discovery of many of the documents in the bank's possession relating to this matter.

The bank should be ordered to produce: material supplied by the plaintiff to the bank, such as financial statements, executive summaries and budgets; minutes of meetings and records of verbal discussions in which bank officials participated together with officers of the plaintiff; and communications from the bank to the plaintiff, both written and oral. However, the bank should not be required to produce documents representing the bank's internal communications and analyses, including interoffice memoranda and internal reports.

Table of Authorities

Cases considered:

Markowitz v. Toronto Transit Comm., [1965] 2 O.R. 215 (H.C.) — *applied*

Rhoades v. Occidental Life Ins. Co. of California, [1973] 3 W.W.R. 625 (B.C.C.A.)*applied*

Rules considered:

Alberta Rules of Court

R. 209(1)

Application for order directing plaintiff's bank, not a party to action, to produce documents.

***Wachowich J.*:**

1 This is a motion by the Caterpillar defendants for an order directing the Bank of Nova Scotia ("the bank"), which is not a party to the action, to produce a series of documents described in Sched. D to the defendants' notice of motion and which relate to the bank's dealings with the plaintiff.

2 The defendants rely on the provisions of R. 209(1) of the Rules of Court (Alberta), which provides as follows:

209. (1) When a document is in possession of a third person not a party to the action and it is alleged that any party has reason to believe that the document relates to the matters in issue, and the person in whose possession it is might be compelled to produce it at the trial, the court may on the application of any party direct the production of the document at such time and place as the court directs and give directions respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions.

3 In Sched. D the defendants set out 13 categories of documents which they are seeking from the bank; however, they notified the court that they are no longer pursuing the request in para. 13. The bank objects to producing any of the requested documents, with the exception of documents given to it by the plaintiff. This is the type of documentation sought in paras. 1 and 10, and the bank indicated to the court that this will be supplied.

4 Counsel for the bank divides the types of documents requested in Sched. D into four broad categories:

5 1. Material supplied by the plaintiff to the bank, such as financial statements, executive summaries and budgets.

6 2. Minutes of meetings and records of verbal discussions in which bank officials participated together with officers of the plaintiff.

7 3. Communications from the bank to the plaintiff, both (i) written, and (ii) oral.

8 4. Documents representing the bank's internal communications and analyses, including interoffice memoranda and internal reports.

9 In support of its motion, the defendants submitted an affidavit of Sona Holt, assistant secretary of Caterpillar Incorporated (formerly Caterpillar Tractor Co.). Among other things, this affidavit attests to the special and unique relationship which existed between the plaintiff and the bank in this extremely lengthy and complex litigation which commenced in May 1980. From the time that the plaintiff first began dealing with the bank in January 1980 until the date of receivership in November 1986, the bank was intimately involved in the day-to-day operations of the plaintiff company. For example, during most of this period the plaintiff was required to report to the bank before making any acquisitions, and an officer from the bank visited the plaintiff company on a twice weekly basis.

10 Another special circumstance of this case, the defendants argue, is that the bank was responsible for putting the plaintiff company into receivership, and is now the sole unsatisfied secured creditor; as such, it would be the sole one to benefit if this action is successful. The defendants also state that it has proven to be very difficult and sometimes impossible to get necessary information from the plaintiffs, and that they have good reason to believe that much of this information is in the possession of the bank.

11 The British Columbia Court of Appeal in *Rhoades v. Occidental Life Ins. Co. of California*, [1973] 3 W.W.R. 625, set out the standard of "probable relevance" as the basis test for determining whether to order production of documents in the hands of a person not a party to the action. In considering the scope of O. 31, R. 20A of the rules of the Supreme Court (the equivalent of Alberta R. 209(1)), McFarlane J.A. stated at p. 629:

> In the present case it is clear that the mental and physical condition of the insured during the period preceding her death is relevant to the issues in the action. It is shown that the University has in its possession, through Dr. Miles, records which are probably relevant to that condition. Therefore, "This is no fishing expedition", to use the words of Keith J. in *Coderque v. Mutual of Omaha Insur. Co.*, [1970] 1 O.R. 473 at 477, [1969] I.L.R. 1-297.

12 The court attached four caveats to the "probable relevance" test:

13 1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.

14 2. The documents need not *necessarily* be admissible in evidence at trial.

15 3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.

16 4. The third party's objections to production must be considered, but are not determinative.

17 I accept this approach, with the additional condition that the rule cannot be used as a method of obtaining discovery of a person not a party to the action. As Mr. Justice Thompson of the Ontario High Court said in *Markowitz v. Toronto Transit Comm.*, [1965] 2 O.R. 215 at 217, when considering the Ontario equivalent of R. 209(1):

> Rule 349 was never intended to be used merely as a means of obtaining discovery from a stranger to the action; nor for exploratory purposes alone ...

18 In this case, I feel that the special circumstances, especially the bank's intimate involvement in the day-to-day operations of the plaintiff company, justify the use of R. 209(1) to allow discovery of many of the documents in the possession of the bank relating to this matter. However, I appreciate the bank's argument that an unlimited order for production of documents would work a hardship on them in this situation, since the total documentation would amount to thousands of pages. I also accept their submission that that internal bank memoranda expressing the private opinions of bank officials are of no relevance in this

action. Further, some of the defendants' requests, as set out in Sched. D., are so broadly worded that they have all appearances of exploratory "fishing expeditions" or attempts to obtain examination for discovery of a third party.

19 With these principles in mind, I order that the bank produce all the documents which fall into the first three of the four categories described by counsel for the bank. All documents which properly fall into category 4, including all internal bank communications and memoranda relating to the plaintiff's business, ought not to be produced. This will exclude the documents sought in paras. 3, 5 and 9 of Sched. D, and will limit the documents producible under paras. 4, 7, 8, 11 and 12.

20 If the matter of costs has not been agreed upon counsel may speak to me in regards to the same.

Application granted in part.

End of Document

Tab B3

2008 ABQB 601
Alberta Court of Queen's Bench

Trimay Wear Plate Ltd. v. Way

2008 CarswellAlta 1330, 2008 ABQB 601, [2009] A.W.L.D. 1351, 172 A.C.W.S. (3d) 880, 456 A.R. 371

Trimay Wear Plate Ltd. (Plaintiff) and Keith Way and Premetalco Inc., carrying on business under the firm name and style Wilkinson Steel and Metals (Defendants)

R.A. Graesser J.

Heard: May 20, 2008
Judgment: September 30, 2008
Docket: Edmonton 9703-22138

Counsel: Donald J. Wilson for Plaintiff
Robert P. James for Defendants
Louis Belzil for Third Parties

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Discovery — Production of documents

Table of Authorities

Cases considered by *R.A. Graesser J.*:

Berube v. Wingrowich (2005), 2005 CarswellAlta 670, 2005 ABQB 367, 382 A.R. 189 (Alta. Q.B.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17, 1988 CarswellAlta 219 (Alta. Q.B.) — followed

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, 1989 CarswellAlta 714 (Alta. Q.B.) — referred to

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1990), 74 Alta. L.R. (2d) 262, 1990 CarswellAlta 95, 41 C.P.C. (2d) 222, 108 A.R. 161 (Alta. C.A.) — referred to

Koenen v. Koenen (2001), 277 A.R. 265, 242 W.A.C. 265, 2001 ABCA 46, 2001 CarswellAlta 241, 15 R.F.L. (5th) 101 (Alta. C.A.) — referred to

Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd. (March 8, 1996), Doc. 15519, 15594, 15767 (Alta. C.A.) — considered

Wasylyshen v. Canadian Broadcasting Corp. (September 5, 2006), Doc. 0403-08497 (Alta. Q.B.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
R. 209 — considered

R.A. Graesser J.:

Introduction

1 The Defendants apply for an order under Rule 209 directing two non-party corporations to produce records they claim are relevant to the action.

2 Trimay seeks damages or an accounting of profits from the Defendants, claiming that Way breached fiduciary duties owed to Trimay and misappropriated proprietary information of Trimay, for the benefit of his new employer Premetalco Inc. Way left Trimay's employ in 1996 and immediately went to work for Premetalco. Trimay alleges that Way and Premetalco used Trimay's confidential and proprietary information to compete with it in the wear plate business. Trimay also alleges that Way improperly solicited clients and prospective clients of Trimay. The Defendants deny the allegations. The action, commenced in 1997, is now being case managed by me.

3 This application arose in the course of case management.

Facts

4 The non-party corporations are 735458 Alberta Inc. and Alberta Industrial Metals Ltd. The evidence before me is that 735458 is the sole shareholder of Trimay. Alberta Industrial is the sole shareholder of 735458. Maurice Shugarman and Garry Stein are officers of Trimay. They are directors of Alberta Industrial, and they or their holding companies are shareholders in that company. Stein is a director of 735458.

5 The evidence discloses that Trimay purchases materials from Alberta Industrial. Both Trimay and 735458 operate out of the same facility. 735458 and Alberta Industrial lease equipment to Trimay, which Trimay uses in the production of wear plate. Alberta Industrial has invested in Trimay. Alberta Industrial was involved in an investigation into the activities of a former senior manager of Trimay, which the Defendants allege are relevant to the qualification of Trimay's damage claim.

6 The records sought to be produced from 735458 and Alberta Industrial are described as:

(a) documents relating to the alleged "proprietary" nature of Trimay's technology and processes; and

(b) documents relating to the damages claimed by Trimay.

7 Production of these records was sought by the Defendants when examining officers of Trimay for discovery, and the Plaintiff has since refused to produce records of 735458 and Alberta Industrial.

Argument

8 The Defendants rely on Rule 209, which provides:

209(1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when

(a) the record is in the possession, custody or power of a person who is not a party to the action,

(b) a party to the action has reason to believe that the record is relevant and material, and

(c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

(1.1) The Court may also give directions respecting the preparation of a certified copy of the record, which may be used for all appropriate purposes in place of the original.

(2) A person producing a record is entitled to receive such conduct money as the person would receive if examined for discovery.

(3) The costs of the application shall in the first instance be borne by the party making the application but if it thereafter appears to the Court that by reason of the production there has been a saving of expense the Court may award the whole or part of the costs to the party making the application.

9 The Defendants allege that one of the fundamental issues in the action is whether or not Trimay had any proprietary or confidential information in the first place. The Defendants deny they are liable to Trimay for damages or an accounting, and dispute the amount of damages being claimed by Trimay. Damages are very much in issue

10 Trimay has not yet elected whether it will seek damages (its own losses) arising out of the alleged misconduct of the Defendants, or whether it will seek an accounting of the Defendants' profits (disgorgement). The Defendants dispute Trimay's losses and claim, amongst other things, that Trimay's losses for some of the relevant time resulted from or were contributed to by mismanagement of the former senior manager.

11 The Defendants rely on *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1990), 74 Alta. L.R. (2d) 262 (Alta. C.A.) and *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189 (Alta. Q.B.).

12 With reference to the records sought, the Defendants are particularly interested in the purchase agreement whereby 735458 acquired the shares in Trimay, although they seek:

(a) documents surrounding 735458's ownership of Trimay, which they say are relevant to whether any proprietary processes or technology exist;

(b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;

(c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and

(d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.

13 The Defendants reference the tests for production from third parties as set out in *Ed Miller Sales*:

- the documents should be "probably relevant";
- the application is not a fishing expedition;
- the documents need not necessarily be admissible;
- the documents must be adequately described;
- the third party's objections must be considered; and
- the application is not a means of obtaining discovery from a stranger to the action.

14 Since *Ed Miller Sales* and *Esso Resources* were decided, Rule 209 has been amended to apply to records that are "relevant and material". At the time of those decisions, documents could be sought from third parties which "any party has reason to believe...relates to the matters in issue". As is obvious, the current rule provides a narrower scope of production than was the case when *Ed Miller Sales* and *Esso Resources* were decided.

Response

15 735458 and Alberta Industrial resist the application, and cite *Koenen v. Koenen*, 2001 ABCA 46 (Alta. C.A.), *Berube v. Wingrowich*, 2005 ABQB 367 (Alta. Q.B.), *Ed Miller Sales* (*supra*), *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374 (Alta. Q.B.) Aff'd (1990), 108 A.R. 161 (Alta. C.A.), *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.), and *Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.*, [1996] A.J. No. 291 (Alta. C.A.). They also refer to the commentary on Rule 209 in Stevenson and C_t_, *Alberta Civil Procedure Handbook*, vol. 1 (Edmonton: Juriliber, 2005) at 215-216.

16 In essence, the third parties argue that the application should fail for lack of specificity of the Defendants' requests. Instead of seeking production of specific documents, the Defendants seek discovery in general areas of questioning. The third parties point to a lack of evidence that the purchase documents dealt with proprietary processes or technology. They also point out that many of the records relating to business transactions between Trimay and the third parties can be obtained through Trimay.

Analysis

17 As noted by Veit J. In *Berube*, the mere fact that entities are associated with a party is not a sufficient basis to require production. A close affiliation between the target entity and a litigant does not remove the requirements of Rule 209 that the records sought be relevant and material (at para. 4).

18 *Wasylyshen*, referring to the *Alberta Civil Procedure Handbook*, notes that Rule 209 is to be interpreted narrowly and is to be used only to gain access to *specific* records.

19 Lack of specificity was key to the Court of Appeal denying the application for production in *Metropolitan Trust*.

20 Here, the Defendants have identified only 2 specific documents: the purchase agreement between 735458 and the former owner of Trimay's shares, and a lease agreement between Trimay and 735458 of a welding machine.

21 There is no evidence before me that any of the records sought relating to business transactions between Trimay and 735458 and Alberta Industrial are unavailable through Trimay. The Defendants are apparently seeking to corroborate the accuracy of information that has been provided to them by Trimay, although there is no evidence to suggest that the information provided by Trimay is unreliable.

22 The Defendants have already had extensive discovery of Trimay's officer and Messrs. Stein and Shugarman concerning management issues surrounding Trimay and the investigation of the former senior manager. Production of records from the third parties is apparently sought to corroborate the information already provided by Trimay's officers. Again, there is no evidence to suggest that the information already provided is inaccurate.

23 In argument, there was considerable discussion about the lease of the welding machine, which apparently could not be located by Trimay. There was also considerable discussion about what may or may not be in the share purchase agreement.

Decision

24 On the evidence and submissions before me, I am not satisfied that the Defendants have provided the degree of specificity required to establish that the third parties have any relevant and material records, other than with respect to the purchase agreement and the lease of the welding machine.

25 The lease has not been produced by Trimay, and should be produced by 735458. It is relevant to an item of expense, which is relevant to Trimay's costs of production of the products in issue in the lawsuit.

26 The purchase agreement is relevant to the extent that it may disclose whether proprietary processes or technology were considered in the purchase of the shares. This is clearly relevant to the existence of trade secrets. 735458 should produce this agreement, but in producing it, is entitled to expurgate irrelevant and confidential information such as the purchase price and financial details.

27 Otherwise, I am of the view that the records sought are of tertiary relevance to the issues in the lawsuit, at best. Records relating to corroboration of information already provided, or only testing credibility, may be relevant, but are not generally material. I am not convinced of the materiality of any of the records sought, other than the lease and purchase agreement discussed above.

28 Other than with respect to the two specific documents, the Defendants' application is dismissed.

29 There has been mixed success on the application. I will leave costs in the cause on this application. In the event that the Plaintiff succeeds in this action, the third parties should also have their costs of the application. If the Defendants succeed, their costs of this application are recoverable from the Plaintiff, but not the third parties.

End of Document

Tab B4

1996 CarswellAlta 274
Alberta Court of Appeal

Metropolitan Trust Co. of Canada v. Peters

1996 CarswellAlta 274, [1996] A.W.L.D. 437, [1996] A.J. No. 291, 38 Alta. L.R. (3d) 150, 62 A.C.W.S. (3d) 39

Metropolitan Trust Company of Canada (Respondent / Plaintiff) and Robert George Peters (Appellant / Defendant) and 337807 Alberta Ltd., Rocky Mountain Land Company Inc. and R. Kent Remington, also known as Dr. Kent Remington (Not Parties to Appeal / Defendants) and Paul Caron (Respondent / Not a Party); Metropolitan Trust Company of Canada (Respondent / Plaintiff) and Robert George Peters (Appellant / Defendant) and 337807 Alberta Ltd., Rocky Mountain Land Company Inc. and R. Kent Remington, also known as Dr. Kent Remington (Not Parties to Appeal / Defendants) and Michael J. Tims and Gordon Roper (Appellants / Not Parties); Metropolitan Trust Company of Canada (Respondent / Plaintiff) and Robert George Peters (Appellant / Defendant) and 337807 Alberta Ltd., Rocky Mountain Land Company Inc. and R. Kent Remington, also known as Dr. Kent Remington (Not Parties to Appeal / Defendants)

Hetherington, Russell and Hunt JJ.A.

Oral reasons: March 8, 1996
Docket: Calgary Appeal 15519, 15594, 15767

Counsel: *C. Nicholson*, for plaintiff.
D. Weyant, for appellant.
R.D. Maxwell, for Paul Caron.
L. Burt, for Michael J. Tims and Gordon Roper.

Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents

Practice --- Discovery — Examination for discovery — Who may be examined

Practice — Discovery — Examination for discovery — Who may be examined — General — Defendant wanting to examine plaintiff's solicitor for discovery as officer.

The defendants appealed the decision of the chambers judge who refused to order the plaintiff's solicitor to submit to examination for discovery as the plaintiff's officer. They also appealed an order requiring them to produce documents which were assembled by their solicitors from the files of third parties, and an order requiring the defendants' agent to comply with undertakings.

Held:

First and third appeals dismissed; second appeal allowed.

As the evidence produced to the present point in the proceedings suggested that the plaintiff's solicitor acted only as its solicitor, the application to examine the solicitor was premature. As for the documents prepared by the solicitors from the files of the third parties, as there was no evidence of their content or relevance, they were not producible. There was no reason to disturb the chambers judge's finding that the agent was in fact an agent and not an independent contractor.

Table of Authorities

Cases considered:

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143, affirmed (1990), 41 C.P.C. (2d) 222, 74 Alta. L.R. (2d) 262, 108 A.R. 161 (C.A.) — *considered*

Rules considered:

Alberta Rules of Court

R. 200*referred to*

Appeals from interlocutory orders. For related proceedings, see *Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.*, 25 C.P.C. (3d) 273, 20 Alta. L.R. (3d) 415, [1994] 9 W.W.R. 15, 154 A.R. 58 (Master).

Memorandum of judgment delivered orally from the bench. *Hetherington J.A.*:

1 Madam Justice Hunt will deliver the unanimous decision of the Panel in all of these cases.

***Hunt J.A.* (for the Court):**

2 The first appeal arises from a decision of a Chambers Judge who refused to order a solicitor to submit to examination for discovery as an "officer" under Rule 200. The solicitor in question, Mr. Caron, had been a solicitor for the plaintiff, Metropolitan Trust. It was conceded before us that the evidence to date would suggest that he has acted only in the capacity of a solicitor. The pleadings in this case raise an issue as to whether solicitor/client privilege has been waived by Metropolitan Trust. That legal issue has not yet been determined. In these circumstances, it seems to us that the application to examine Mr. Caron was premature. Therefore, given the present state of the evidence, we dismiss the appeal without commenting upon whether, in circumstances such as this case, and in the face of evidence that may become available in the future, Mr. Caron could be characterized as an "officer" for the purposes of Rule 200.

3 The second appeal concerns the production of documents in the hands of third parties, copies of which documents are listed by number only on the affidavit of documents of Mr. Peters, one of the defendants. Mr. Peters has claimed privilege in regard to the copies of these documents, which were assembled by his solicitor from the files of the third parties. The third parties are Mr. Roper, an accountant with Ernst Young, and Mr. Tims, a partner of Mr. Peters and an employee of Peters & Company. Both of these individuals were close personal advisors to Mr. Peters and assisted him with the project that has given rise to this litigation.

4 The documents at issue have been described entirely by reference to the affidavit of documents of Mr. Peters. In that affidavit, the documents are described only by numbers and by the titles preceding the numbers, those titles being, "Peters & Company Limited/Michael J. Tims" and "Ernst & Young/Gordon Roper". Given the lack of specificity in this description of the documents, we are unable to tell whether these documents are "relevant" or "probably relevant" to quote the words of the decision in *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*, (1989) 98 A.R. 374, aff'd. (1990) 74 Alta. L.R. (2d) 262 (C.A.) where it is stated at paragraph 25, "Rule 209 should not be used to permit discovery of a person not a party if it amounts to a fishing expedition" and, at paragraph 29, "relevance or probable relevance must be established by the applicant". Therefore, we allow this appeal, set aside the order below, and order that the appellants Tims and Roper have their costs both here and below.

5 The third appeal raises the issue of whether Mr. Roper (who was, as I have said, an accountant who worked for the accounting firm Ernst & Young) was an agent of Mr. Peters in the matters giving rise to this litigation, or whether he was an independent contractor. If he was an agent, Mr. Peters would be required to comply with the disputed undertakings which arose on his examination for discovery. The evidence before the Chambers Judge on the question of agency or independent contractor was slender, such evidence arising from the examination for discovery of Mr. Peters. Nevertheless, the Chambers Judge made a finding based on that evidence. We are not convinced that the ruling he made was in error and, accordingly, this appeal is dismissed.

6 (Discussion as to costs)

***Hetherington, J.A.* (for the Court):**

7 Costs will follow the event.

Counsel: In respect to Mr. Caron, since he is not a party to the litigation, may I ask that they be payable forthwith, which has been the order below?

***Hetherington, J.A.* (for the Court):**

8 Yes, I would think that since he is not a party to the litigation, those costs should be paid forthwith. That should follow in connection with any person not a party to the litigation.

One appeal allowed; other appeal dismissed.

End of Document

Tab B5

1990 CarswellAlta 95
Alberta Court of Appeal

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.

1990 CarswellAlta 95, [1990] A.W.L.D. 458, [1990] A.J. No. 479, 108 A.R. 161, 21 A.C.W.S. (3d) 724, 41 C.P.C. (2d) 222, 74 Alta. L.R. (2d) 262

ESSO RESOURCES CANADA LIMITED et al. v. STEARNS CATALYTIC LTD. et al.

Harradence, Stevenson and Hetherington JJ.A.

Heard: February 9, 1990
Judgment: May 29, 1990
Docket: Calgary No. 11313

Counsel: *R.J. Simpson*, for plaintiffs (respondents).
W.E. Code, Q.C., and *L.A. Taylor*, for respondent (insurers).
M.A. Putnam, Q.C., and *D.J. Cichy*, for defendants (appellants) Stearns Catalytic Ltd. et al.
S.F. Goddard, Q.C., and *J.K. McFadyen*, for defendant (appellant) Air Products & Chemicals Inc.
C.A. Kent, for third parties.
S.I.E.M. Lobay, for intervener, the Crown.

Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — General

Civil procedure — Discovery — Discovery of documents — Parties subject to discovery — Plaintiffs having unresolved claims against insurers — Defendants seeking declaration under R. 187 that action brought for benefit of plaintiffs' insurers — Legal entitlement to share in proceeds not being enough to bring insurer within scope of R. 187 — Appeal court confirming dismissal of application.

Civil procedure — Discovery — Discovery of documents — Availability — Defendants applying for direction under R. 209 that insurers produce documents — Use of rule against non-party being inappropriate unless document in existence and unavailable through other means — Appeal court confirming dismissal of application.

The plaintiffs' claim arose out of an industrial fire causing damage necessitating repairs and giving rise to loss of income. Insurance claims made by the plaintiffs were not fully resolved, although some payments had been made. The insurers acknowledged they would seek to share in the proceeds of any recovery, and claimed a "subrogated" interest to that extent. The plaintiffs produced documents relating to their claims under the policies, but the defendants applied for a declaration that the action was brought for the benefit of the plaintiffs' insurers within the meaning of R. 187, thus entitling the defendants to production of documents by the insurers. In the alternative, the defendants sought to require the insurers to

produce a series of documents under R. 209, which permits the court to order the production of documents which could be required for trial purposes. The defendants appealed the dismissal of both applications.

Held:

Appeals dismissed.

Per Stevenson J.A.:

No claim for subrogation could be made until the plaintiffs were fully indemnified by the insurers. Even if the insurers could be said to be "subrogated" by statute, the matter had been settled by an earlier decision of this court which was correctly decided and indistinguishable. The fact that a person has some legal entitlement to share in the proceeds is not enough to make it a person "for whose benefit an action is prosecuted" within the meaning of R. 187. There was no material to show that the insurers were the real litigants or had any real part in formulating the claim.

Rule 209 should not be used against a non-party unless it can be shown that the document exists and is unavailable through other means (in this case, through a party). If the document was relevant and was in the plaintiffs' possession, they were required to disclose its existence under R. 186 and could be asked about its disposition during oral discovery. This form of production should be related to specific documents of probable relevance and is not a form of discovery of a non-party.

Per Hetherington J.A. (Harradence J.A. concurring) (concurring in the result):

It was unnecessary to decide the subrogation question. This court was bound by its earlier decision which prevented the defendants from succeeding in their application under R. 187.

Table of Authorities

Cases considered:

Gullion v. Burtis, [1945] 1 W.W.R. 242, [1945] 1 D.L.R. 382 (Alta. C.A.) — *followed*

Rules considered:

Alberta Rules of Court

R. 186

R. 187

R. 201

R. 209

Authorities considered:

Stevenson and Côté, Civil Procedure Guide (1989), p. 539.

Appeal from dismissal of application, 98 A.R. 374, under R. 187 for declaration that action brought for benefit of plaintiffs' insurers; Appeal from application under R. 209 for direction that insurers produce documents.

Stevenson J.A. **(Memorandum of judgment):**

1 At the conclusion of argument for the appellants, we advised counsel that the appeal [from 98 A.R. 374] was dismissed. We were not persuaded that the Chief Justice was in error. We advised counsel that this memorandum would follow.

2 The defendants applied for a declaration that the action was brought for the benefit of the plaintiffs' insurers within the meaning of R. 187, thus entitling the defendants to production of documents by the insurers. They alternatively sought to require the insurers to produce a series of documents under R. 209, which permits the court to order the production of documents which could be required for the purposes of trial.

3 The issue with respect to the first application is whether the insurers come within the rule, as "person[s] for whose benefit an action is prosecuted". The second application depended upon the defendants' identifying any document which they could compel the insurer, as a non-party, to produce at trial.

4 The facts were agreed upon and for the purpose of this appeal may be shortly stated. The plaintiffs' claim arises out of a fire which caused substantial damage to an oil sands plant necessitating extensive repairs and giving rise to a loss of income. The plaintiffs had insurance against some, if not all, their losses, and made claims against their insurers. Those claims have not been resolved in full, but some payments have been made. The insurers acknowledge that they will seek to share in the proceeds of any recovery and claim a "subrogated" interest to that extent. The plaintiffs acknowledge that they have insurance for some of the loss but do not admit that the insurers are subrogated. The action was brought by the plaintiffs, not the insurers. The plaintiffs produced documents relating to their claims under the policies, but the defendants now seek the documents held by the insurers.

5 In my view, the question of whether the insurers came within R. 187 has already been decided by a decision of this court, *Gullion v. Burtis*, [1945] 1 W.W.R. 242, [1945] 1 D.L.R. 382. The defendants sought, firstly, to distinguish that case. At a later stage in the argument they took the position that it was not distinguishable, but wrongly decided. They pressed us with a comment in the Civil Procedure Guide, at p. 539, that the case "seems odd and may be distinguishable on special facts". In that case the Workmen's Compensation Board was, by statute, subrogated to the claim of an injured workman. The plaintiff had the concurrence of the board to sue, but the board expressly declined to participate in the action except to assert that it would have a right to share in the judgment.

6 In the case at bar, the insurers' position is not distinguishable. No claim for subrogation in the proper sense of that word can be made until the plaintiffs are fully indemnified by the insurer. The insurers here are not subrogated in the correct sense of that expression. Even if they can be said to be "subrogated" by statute their position cannot be distinguished from that of the board in *Gullion*.

7 In the *Gullion* case, the statute said the board was subrogated if a workman applied for compensation. The board, in that case, had made some payment, but the amount was not settled, and the board declined to participate in the case, but expressly reserved its rights to participate in any recovery.

8 The case is not distinguishable. The insurers are not "participating" in this case any more than the board was a participant in *Gullion*. The issue is settled by *Gullion*. The defendants were, in my view, correct in finally conceding indistinguishability. We do not ordinarily entertain an argument that a decision of this court is wrong without a panel having granted leave to so argue. There is some authority for the proposition that the court is not, strictly speaking, bound by its own practice decisions. That view arose at a time when the court considered itself bound by its own previous decisions in other cases. Since then we have established a procedure for obtaining leave, in a proper case, to argue that any previous decision was wrongly decided.

9 We would have been inclined, in this case, simply to refuse to permit the argument that *Gullion* was wrongly decided. We add, however, that the defendants failed to persuade us that *Gullion* was wrongly decided. It is clearly not enough that the person sought to be equated to a party will benefit; that would permit the examination of a mere creditor. It is not enough that the person has some legal entitlement to share in the proceeds.

10 This is a counterpart of R. 201, dealing with oral discovery. While there is a tendency to broaden discovery, there are countervailing considerations in not unnecessarily subjecting persons who are not party litigants to the examination process and in not permitting "fishing trips". There is no material here to show that the insurers are the real litigants or, more significantly, that they have any real part in formulating the claims. I am not persuaded that, in these circumstances, there is any injustice in applying the previous decision.

11 I turn now to the second application. The defendants now take the alternative position that the insurers are not parties, and seek production of groups of documents under R. 209.

12 Again, I am not persuaded the chambers judge erred. I agree with him that what was sought here is, in essence, document discovery of a non-party. We challenged the defendants, during argument, to show us one identifiable document that met the tests for production under this rule. We were taken to the plaintiff's production and referred to documents showing correspondence with an insurer with reference to enclosures which were not separately produced by the plaintiffs. In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means; in this case, through a party. If the document is relevant, and was in the possession of the plaintiffs, they are required to disclose its existence under R. 186, and may be asked about its disposition in the course of oral discovery.

13 I also agree with the Chief Justice that this form of production should be related to specific documents of at least probable relevance and is not a form of discovery of a non-party.

14 The appeals must be dismissed. The respondents will have their costs of the appeal.

15 Counsel for Her Majesty the Queen, plaintiff in a parallel action, sought to intervene. We reserved that application, expressing doubt about whether the tests for intervention have been met. At the conclusion of argument, counsel for the other parties indicated their view that the Crown should have been permitted to intervene and to have costs as it had filed a factum. In these particular circumstances the Crown is given leave to intervene to support the plaintiffs (on the appeal only) and will have its costs.

***Hetherington J.A.* (*Harradence J.A.* concurring) (concurring in the result):**

16 The facts which are relevant to this appeal are set out in the judgment of Stevenson J.A.

17 The appellants applied under R. 187 of the Rules of Court for a declaration that this action was brought for the benefit of the insurers of some of the respondents. Had they been successful, the insurers would then have been regarded as parties for the purposes of discovery of documents. However, the chambers judge refused to make the declaration sought. This appeal followed.

18 In our view the chambers judge did not err in refusing to declare that this action was brought for the benefit of the insurers. Even if the insurers are subrogated to the rights of the respondents, which we need not and do not decide, the decision of this court in *Gullion v. Burtis*, [1945] 1 W.W.R. 242, [1945] 1 D.L.R. 382, prevents the appellants from succeeding in their application under R. 187. It cannot be distinguished, and is binding on us.

19 The appellants also applied under R. 209 for a direction that the insurers produce documents. The chambers judge refused to make this direction. For the reasons given by Stevenson J.A. we are of the view that the chambers judge made no error in arriving at this decision.

20 We would therefore dismiss the appeal. We agree with the disposition as to costs proposed by Stevenson J.A.

Appeals dismissed.

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Tab B6

1995 CarswellAlta 200
Alberta Court of Appeal

Gainers Inc. v. Pocklington Holdings Inc.

1995 CarswellAlta 200, [1995] 9 W.W.R. 117, [1995] A.W.L.D. 735, 169 A.R. 288, 30 Alta. L.R. (3d) 273, 56 A.C.W.S. (3d) 9, 97 W.A.C. 288

GAINERS INC. v. POCKLINGTON HOLDINGS INC., POCKLINGTON FINANCIAL CORPORATION and POCKLINGTON FOODS INC.

Hunt J.A.

Heard: June 15, 1995
Judgment: June 19, 1995
Docket: Doc. Edmonton Appeal 9503-0423-AC

Counsel: *Alan R. Gray*, for respondent (plaintiff and defendant by counterclaim).
Scott J. Hammel, for appellants (defendants and plaintiffs by counterclaim).

Subject: Civil Practice and Procedure

Headnote

Practice --- Practice on appeal — Staying of proceedings pending appeal — Stay of execution

Civil procedure — Appeals — Stay pending appeal — Case management judge granting order allowing plaintiff to request documents directly from third parties in event defendants failing to do so by certain date and requiring third parties to comply — Defendants appealing and seeking stay pending appeal — Preliminary assessment of merits of appeal indicating arguable points to be made, irreparable harm existing in sense that appeal might be rendered nugatory if third parties providing documents in compliance with order, and balance of convenience requirement being met with imposition of conditions requiring defendants to pursue production of documents and take actions to expedite appeal.

Civil procedure — Discovery — Discovery of documents — Availability — Documents in possession or control of non-party — Case management judge granting order allowing plaintiff to request documents directly from third parties in event defendants failing to do so by certain date and requiring third parties to comply — Defendants appealing and seeking stay pending appeal — Preliminary assessment of merits of appeal indicating arguable points to be made, irreparable harm existing in sense that appeal might be rendered nugatory if third parties providing documents in compliance with order, and balance of convenience requirement being met with imposition of conditions requiring defendants to pursue production of documents and take actions to expedite appeal.

The plaintiff sought repayment from the defendants of certain sums allegedly expended by the plaintiff for goods and services that actually benefitted the defendants. The case management judge issued an order providing in part that if the defendants failed to provide by a certain date information and documents from persons providing any services for which the plaintiff had paid, the plaintiff might request the persons who had provided such services to provide such information directly. The order further provided that in any event the plaintiff was entitled to request any person providing any services for which the plaintiff had paid to provide information and documents relating to those services and those persons "shall" provide such information. The original order contained the word "which" instead of "shall" but was later amended. The defendants appealed within the required time period after the amendment, but after expiry of the time period following the original order. The defendants sought a stay of execution of the above paragraphs of the order.

Held:

Application allowed on conditions.

The parties honestly held differing views as to whether the amendment was merely a correction of a typographical error or whether the amendment made an important difference in the effect of the order. In these circumstances, and based only on the oral submissions of counsel, the court was not in a position to determine that the appeal period ran from the original order. There would be a serious difficulty in excising unamended paragraphs from the order for the purposes of appeal.

A preliminary assessment of the merits of the appeal indicated that there were arguable points to be made concerning the scope of authority of a case management judge, the extent of the court's authority over third parties outside the jurisdiction and the scope of certain *Rules of Court*. Irreparable harm could be found in the sense that if the stay was not granted, an appeal could be rendered nugatory as the disputed information might already have been provided. The balance of convenience require ment would be met if certain conditions were imposed. Accordingly, the stay would be granted on conditions requiring the defendants to request relevant documents from suppliers, to provide the plaintiff with lists of documents which would be produced or for which privilege would be claimed, and requiring the defendants to cooperate in expedition of the appeal.

Table of Authorities

Cases considered:

Canadian Newspapers Co. v. Manitoba (1985), [1986] 2 W.W.R. 411 (Man. C.A.) — *referred to*

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189, 94 A.R. 17 (Q.B.) — *referred to*

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1989), 98 A.R. 374, 45 C.C.L.I. 143 (Q.B.) [affirmed (1990), 74 Alta. L.R. (2d) 262, 41 C.P.C. (2d) 222, 108 A.R. 161 (C.A.)] — *referred to*

Glover v. Glover (1980), 29 O.R. (2d) 401, 18 R.F.L. (2d) 126, 18 C.P.C. 107, 113 D.L.R. (3d) 174, 42 N.R. 475, affirmed (sub nom. *Glover v. Bell Canada*) [1981] 2 S.C.R. 563, 25 R.F.L. (2d) 334, 130 D.L.R. (3d) 382, 42 N.R. 472 — *referred to*

Horsemen's Benevolent & Protective Assn. of Alberta v. Alberta (Racing Commission) (1989), 97 A.R. 287 (C.A.) — *referred to*

Permanent Investment Corp. v. Ops & Graham (Township), [1967] 2 O.R. 13, 62 D.L.R. (2d) 258 (C.A.) — *referred to*

Saunders v. Nelson (December 23, 1994), Doc. Vancouver B921203, Sinclair Prowse J. (S.C.), [1995] B.C.W.L.D. 536 — *referred to*

Specialty Underwriting Services Ltd. v. Corp. of Lloyd's (January 15, 1993), Doc. CA016518, Prowse J.A. (C.A.), [1993] B.C.W.L.D. 569 — *referred to*

Rules considered:

Alberta Rules of Court

R. 209*referred to*

R. 219*referred to*

R. 506*referred to*

Application for stay of execution of order with respect to production of documents from third parties.

***Hunt J.A.* (Written memorandum of judgment):**

1 This is an application for a stay of execution, pending appeal, of paras. 4 and 5 of an Order of Mr. Justice McDonald entered May 15, 1995. Although the Notice of Motion referred also to para. 3 of the Order, that part of the application was not pursued in oral judgment. The paragraphs of the Order sought to be stayed read as follows:

> 4. In the event that, by April 7, 1995, the Defendants have not provided to the Plaintiff the information and documents which the officers of the Defendants have undertaken to obtain from persons, firms, and corporations that have provided any services for which the Plaintiff has paid; the Plaintiff may request those persons, firms, and corporations to provide the information and documents relating to those services, and the persons, firms, and corporations shall provide the requested information and documents with the protection of this Court from any claim with respect to production of the information and documents.
>
> 5. In any event, the Plaintiff may request any person, firm, or corporation, that has provided any goods or services for which the Plaintiff has paid (including, without restricting the generality of the foregoing, Davis Ward & Beck, Carrera Management Inc., Regio-Con Western Services Ltd., Government Consultants International Inc., Ogilvie & Company, Robert V. Lloyd, Robert V. Lloyd Professional Corporation, Fred Doucet, Fred Doucet Consulting International Inc., Bell Felesky Flynn, Kemp Risk Management & Analysis Ltd., Wisener & Partners Company Ltd., Airacre Management Ltd., Morban & Company, Reed Stenhouse, Thompson & Mitchell, KPMG Peat Marwick, G.W. Linton & Associates Ltd., F.E. Horton, Kasian Architects, The Hathaway Corporation, Linnell Taylor & Associates Ltd., Jeffrey Goodman & Associates Inc., 390306 Alberta Ltd., Grant Naylor, Henry Van Nistelrooy, Eggertson and Associates Ltd., Kevin Sept., Touche Ross, Bank of Montreal, Barclay's Bank, Campbell Moss Limited, General Appraisal Corporation, and Palmer & Jarvis Associates) to provide information and documents relating to those services; and the persons, firms, and corporations *shall* provide the requested information and documents with the protection of this Court from any claim with respect to production of the information and documents. [italics added]

2 It was put to me in the course of argument on the motion that McDonald J. gave the above Order in his capacity as a case management judge pursuant to the authority of R. 219, which contemplates pre-trial conferences in which the court may consider matters that may aid in the disposition of the action and give such directions as it considers advisable.

3 The Order was first made on March 24, 1995 and entered on April 28, 1995. The wording was later changed. The original Order had contained the word "which" in place of the word "shall" in para. 5 italicized above. The Amended Order was entered on May 15, 1995.

4 The Respondent, Gainers Inc., argues that the appeal is out of time because it was not filed within the time required by R. 506. It says the Order really being appealed is the Order entered on April 28, 1995. It says that Order is exactly the same in substance as the Amended Order and that the reason for the amendment was a typographical error, the result of which was that the Order did not make sense. It is further argued that, in any event, no change was ever made to para. 4, so the appeal period has clearly expired in that regard.

5 The Appellants say the amendment was made only after both counsel had listened to the clerk's recording, which made it clear what the Order had actually been. They argue further that it was not their understanding that the intent of the original para. 5 was to *compel* the third parties to produce the mentioned information and documents upon request; it was only upon hearing the tape that it became clear to them that this was indeed the intent of the Order, and thus the Amended Order was entered. In other words, they say there is an important difference in the effect of the Amended Order, which effect has caused them to appeal it.

6 I have some sympathy for the argument of the Respondent, as I too had some difficulty comprehending the sense of para. 5 as it was originally drafted. On the other hand, based only on their oral submissions, I am hardly in a position to decide which counsel is correct about the reasons why the original Order was amended. Under the circumstances I think I must accept that they honestly hold differing views on the subject. Given this, I cannot agree that the appeal period ran from the original Order. See *Permanent Investment Corp. v. Ops & Graham (Township)* (1967), 62 D.L.R. (2d) 258 (Ont. C.A.).

7 Moreover, while I am sympathetic to the arguments (discussed in more detail below) made by the Respondent concerning the timing of this trial, I note that the original Order was not entered for more than a month after it was granted. This is hardly the sort of assiduous pursuit one might have expected given the urgency of the trial coming on. Whatever the reason for the amendment, the Order was not amended for more than two weeks after the original Order was entered. Under these circumstances I find complaints by the Respondent about foot-dragging on the part of the Appellants a little less compelling than they might otherwise have been.

8 As for the argument that, in any event, the appeal period as to para. 4 has expired, I think there would be a serious difficulty in trying to excise parts of the Order for the purposes of an appeal. There is certainly a link between the two paragraphs, and I am not convinced that it is appropriate to deal with one on the appeal and not the other.

9 Accordingly, I am unable to conclude that the appeal is out of time. I turn to an outline of the background and substance of this stay application.

10 Briefly, in this litigation the Respondent seeks repayment from the Appellants of approximately $7.5 million, claiming that such sums were expended by the Respondent for goods and services that actually benefitted the Appellants. During the material times Peter Pocklington was the sole Director of all four corporate parties, which corporate parties, roughly speaking, formed a chain of subsidiaries of one another. (As a result of certain pledge agreements and defaults on loans granted by the Government of Alberta, the Respondent is now controlled by the Government.)Of particular interest in the context of this application are legal services, accounting services, and business consulting services which are alleged to have been paid for by the Respondent but to have been for the benefit of the Appellants. The individuals, firms and companies specifically listed in para. 5 are said to have provided such services and been paid by the Respondent.

11 During discoveries, the Respondent says it sought to ascertain from Pocklington the nature of various of these services paid for by the Respondent, and whether the services were for the benefit of the Appellants. Pocklington was generally not able to answer such questions in detail and made various undertakings to provide information about the nature of the services provided by a number of named individuals, firms and companies.

12 During discoveries, he was also asked to undertake to "provide a general authorization to obtain whatever information or documents may be in the possession of any of the professionals or other people who provided services to Gainers as indicated in the pleadings" (discovery transcript, p. 664). As I understand it, he declined to provide this broad undertaking, in part taking the position that the Respondent was free to approach whomever it wished to approach. It is my understanding that there has now been compliance with most of the relevant undertakings or that compliance is in process (and I do not concern myself generally with that matter because, if there is not compliance, appropriate remedies are available to the Respondent). The Respondent says that the impugned Amended Order was made by the case management judge to facilitate the obtaining of information that has proven difficult to obtain from third parties, and to facilitate preparation for trial, a date having been secured in September (i.e., about three months hence).

13 The Respondent took no issue with the Appellants' position that, in order to grant a stay, the Court should go through three steps:

1. A "preliminary and tentative" assessment of the merits of the appeal.

2. Consider whether the applicant for the relief otherwise would suffer irreparable harm. This step may merge into or be part of the third step.

3. Consider the balance of convenience for granting the relief.

See *Horsemen's Benevolent & Protective Assn. of Alberta v. Alberta (Racing Commission)* (1989), 97 A.R. 287 (C.A.), at p. 290.

The Merits of the Appeal

14 The Respondent says, quite simply, that the Amended Order was a valid exercise of the case management judge's authority pursuant to R. 219.

15 The Appellant says it has a myriad of good grounds of appeal. Among these are the following:

16 — The chambers judge had no jurisdiction to make the order he did. Rule 209 sets out a procedure for obtaining production of documents from third parties; this procedure was not followed in the Amended Order. Case law under R. 209 makes it clear that the Rule cannot be used to go on a fishing expedition, that the documents must be adequately described, and, that while they are not determinative, the third parties' objections to production must be considered. See *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 63 Alta. L.R. (2d) 189 (Q.B.), and *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374 (Q.B.). Moreover, the Amended Order is so broad that it goes beyond the production of documents and purports to compel third parties to "provide information". This is tantamount to examination for discovery of third parties, which our *Rules of Court* do not contemplate. In addition, para. 5 of the Amended Order is overly broad in referring to "any person, firm, or corporation, that has provided any goods or services for which the Plaintiff has paid", without regard to services for which repayment is sought in this action.

17 — The affected third parties ought to have been notified. Although R. 209 does not require this, case law such as *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (supra), and *Glover v. Glover* (1980), 113 D.L.R. (3d) 174 (Ont. C.A.), affirmed S.C.C. [[1981] 2 S.C.R. 563], implies this is a requirement.

18 — The Appellants have never been asked, through undertakings, to obtain information from the vast majority of the third parties specified in para. 5. Thus, the relief granted by the Amended Order was premature. See *Specialty Underwriting Services Ltd. v. Corp. of Lloyd's*, [1993] B.C.J. 188 (C.A.), January 15, 1993.

19 — Alberta courts do not have the authority to order parties from outside the jurisdiction to produce documents and answer questions. See *Specialty Underwriting Services Ltd. v. Corp. of Lloyd's* (supra) and *Saunders v. Nelson*, [1994] B.C.J. 3039 (S.C.), December 23, 1994.

20 I am satisfied that this branch of the test has been met. Among other matters, there are arguable points to be made concerning the scope of the authority of a case management judge in light of the other *Rules of Court*, the extent of the Court's authority over third parties outside the jurisdiction, and the scope of R. 209.

Irreparable Harm

21 The Appellants argue that, without a stay, the third parties will have to comply with the Amended Order. They may produce material that is privileged or that is totally irrelevant to the action. Given the general nature of the Amended Order, they may have to produce vast amounts of material that is unnecessary. Some of the parties mentioned are corporate entities now controlled by parties other than those who controlled them at the material times; such parties will be ill-equipped to know

what to produce in the absence of a more specific order. If the material is produced, an appeal will be rendered nugatory. See *Canadian Newspapers Co. v. Manitoba* (1985), [1986] 2 W.W.R. 411 (Man. C.A.).

22 The Respondent says that, in the action, the Appellants have argued that all the services were provided for the Respondent. If the Appellants are correct about this, there can be no question of privilege. (Of course, if the Respondent's position — that the services were provided for the benefit of the Appellants — is correct, there could be a question of privilege, at least as regards the legal advice. I agree that it is hard to see how privilege could arise in relation to the accounting or business consulting services, although it is possible that arguments of commercial confidentiality might arise in that context.)

23 The Respondent also notes that the Appellants' counsel does not represent the third parties; if the third parties wish to object to having to comply with the Amended Order, they are free to do so.

24 I agree that, if the stay is not granted, an appeal could be rendered nugatory in that the disputed information may already have been provided.

Balance of Convenience

25 The Appellants say that, if the appeal is unsuccessful, there will have been no harm done to the Respondent as it will then be entitled to obtain the disputed information. They concede that the appeal may interfere with the September 20 trial date, but note that, although the action was commenced in early 1990, the original Order was obtained as recently as March 1995. The Appellants have proposed conditions for expediting the appeal and for obtaining some of the disputed information in the meantime. In view of their arguments about the effect of the Amended Order, they say they pursued the appeal as expeditiously as possible.

26 Although I am mindful of the fact that the stay could affect the September trial, I am satisfied that the legal issues being raised justify the possible delay. Moreover, I accept the argument made by the Appellants that, since the Respondent obtained the disputed Order so late — more than five years after the action was commenced — the Respondent must bear some responsibility for the delay, if there is any. I have heard submissions from both sides about proposed conditions.

27 The stay will be granted on the following conditions:

28 1. The Appellants shall, by June 21, 1995, send letters by registered mail (hereinafter called "the Requests") to all of the persons, corporations, and firms listed in para. 5 of the Amended Order (hereinafter called the "Suppliers"), which can be located with reasonable efforts, requesting that, by July 3, 1995, they produce for inspection any documents which they have in their possession relating to any goods or services for which the Respondent has paid and claims reimbursement in this Action.

29 2. The Appellants shall provide copies of the Requests to counsel for the Respondent.

30 3. The Suppliers may produce the documents requested in the Requests, with the protection of this Court from any claim arising from the production of the documents.

31 4. Within 10 days of being advised that any document will be produced by any of the Suppliers, the Appellants shall:

32 (a) Advise counsel for the Respondent as to where and when the document will be made available for inspection by counsel for the Respondent; or

33 (b) Provide counsel for the Respondent with a written statement (hereinafter called "Claim") claiming that the document is irrelevant to this action, confidential, or privileged, and providing a description of the document adequate to allow counsel for the Respondent to consider the Claim.

34 5. In the event the Respondent wishes to challenge any Claim, such Claim shall be determined by the Case Management Justice in the manner directed by him.

35 6. Counsel for the Respondent shall be entitled to examine the Appellants' designated officer for discovery on any Claim, as though conducting an examination on an affidavit of documents.

36 7. Any documents received by the Respondent or its counsel subsequent to June 7, 1995, from any third party to whom the Respondent or its counsel has sent a copy of the Amended Order, and any copies of the documents made, shall be provided to counsel for the Appellants immediately and such documents shall become subject to the terms of this stay.

37 8. The Appellants shall:

38 (a) Provide counsel for the Respondent with a proposed agreement as to contents of the appeal book, by June 21, 1995;

39 (b) File the agreement as to contents of appeal book or set an application for the determination of contents of the appeal book by June 23, 1995;

40 (c) File and serve the appeal book, within seven days after counsel for the Respondent signs an agreement as to the contents of the appeal book or those contents are determined by this Honourable Court; and

41 (d) File the Appellant's factum within seven days after the appeal book has been filed and served.

42 9. Counsel for the Appellants and counsel for the Respondent shall jointly apply to have this Appeal heard in the special sittings of this Honourable Court opening on July 24, 1995.

43 10. This Order shall not affect any rights the Respondent may have to obtain directly from the Suppliers any information or documents relating to goods or services provided by them.

Application allowed on conditions.

End of Document

Tab B7

2003 ABQB 69
Alberta Court of Queen's Bench

Weatherill Estate v. Weatherill

2003 CarswellAlta 81, 2003 ABQB 69, [2003] A.W.L.D. 170, [2003] A.J. No. 88, 119 A.C.W.S. (3d) 729, 11 Alta. L.R. (4th) 183, 337 A.R. 180, 40 E.T.R. (2d) 314, 49 E.T.R. (2d) 314

MALORA LEE, TRUSTEE OF THE ESTATE OF MARY LOUISE WEATHERILL, Plaintiff (Respondent) and WILLIAM WEATHERILL, DIANE WEATHERILL and BONNIE WALD, Defendant (Appellants)

Slatter J.

Heard: January 21, 2003
Judgment: January 28, 2003
Docket: Edmonton 0103-14560

Counsel: *G.H. Crowe*, for Plaintiff / Respondent
S. Pride-Boucher, for Defendant / Appellant

Subject: Estates and Trusts; Civil Practice and Procedure

Headnote

Estates --- Testamentary capacity and undue influence — Undue influence — Practice and procedure — Evidence — General

Plaintiff gave instructions to solicitor for will, which was executed in May 1998 — Plaintiff was declared incompetent by her physician in 1999, but prepared holograph will in January 2000 — Plaintiff agreed to transfer land to son for less than fair market value in May 2000 — Trustee was appointed for plaintiff, and action was brought against defendant son and son's wife — Defendants brought application for production of 1998 will, which was dismissed by master — Defendants appealed — Appeal allowed — Making of will in 1998 was relevant to plaintiff's capacity to transfer land in 2000 — Contents of will were relevant to issue of undue influence — No compelling reason was shown why production would be abusive — Expense of production was not issue — As plaintiff had alleged undue influence, she could not claim that documents relating to her motivation to dispose of her property should be kept confidential.

Practice --- Discovery — Discovery of documents — Resisting production

Plaintiff gave instructions to solicitor for will, which was executed in May 1998 — Plaintiff was declared incompetent by her physician in 1999, but prepared holograph will in January 2000 — Plaintiff agreed to transfer land to son for less than fair market value in May 2000 — Trustee was appointed for plaintiff, and action was brought against defendant son and son's wife — Defendants brought application for production of 1998 will, which was dismissed by master — Defendants appealed — Appeal allowed — Making of will in 1998 was relevant to plaintiff's capacity to transfer land in 2000 — Contents of will were relevant to issue of undue influence — No compelling reason was shown why production would be abusive — Expense of production was not issue — As plaintiff had alleged undue influence, she could not claim that documents relating to her motivation to dispose of her property should be kept confidential.

Table of Authorities

Cases considered by *Slatter J.*:

Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate*) [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman Estate*) 81 D.L.R. (4th) 211, 127 N.R. 241, 1991 CarswellAlta 91, 1991 CarswellAlta 557 (S.C.C.) — referred to

Tulick Estate v. Ostapowich, 62 Alta. L.R. (2d) 384, 91 A.R. 381, 1988 CarswellAlta 194 (Alta. Q.B.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 186.1 [en. Alta. Reg. 277/95] — considered

R. 187.1(2) [en. Alta. Reg. 172/99] — considered

APPEAL from order of master dismissing application for production of document.

***Slatter J.*:**

1 This appeal from the Master involves the question of whether the Plaintiff is required to produce a certain document (a 1998 will of the Plaintiff) as part of the discovery process. The learned Master dismissed the application for production of the will, and the Defendants appeal.

Facts

2 As this is an interlocutory application, and none of the facts have been proven, I will only comment on them to the extent that is necessary. I am merely repeating the allegations in the pleadings, without making any specific findings about matters in dispute.

3 This is a family dispute about a particular piece of land. The Plaintiff and her late husband owned the land for many years. There is some evidence on the record that the lands were always "earmarked" for the Defendant William Weatherill. In the 1980's he entered into an agreement to purchase the land, but the agreement was frustrated by the untimely death of his father. At a meeting in 2000 there was a "family agreement" that William should purchase these lands, and not pay the full price in anticipation of an inheritance from the Plaintiff. In May of 2000 the Defendant William and his wife entered into an agreement with the Plaintiff to purchase these lands. On the face of it, the purchase price appears to be below the fair market value of the lands, and this transfer is now challenged. Allegations of undue influence are made in the pleadings, and the pleadings also question the capacity of the Plaintiff to contract at the relevant times.

4 A little more background is necessary in order to understand the present dispute about discovery of documents. In May of 1998 the Plaintiff attended before a solicitor, Richard Wyrozub, and gave him instructions for the preparation of a will. The will was apparently prepared and executed, and it is the production of this will that is in dispute. It is alleged that after the will was executed the Plaintiff discussed her will with her children, and advised that "the lands would go to the boys".

5 In November of 1998 Reginald Weatherill, another son of the Plaintiff and a brother of the Defendant William, had Mr. Wyrozub prepare a farm lease for the lands. This ten-year lease was executed in February of 1999. It is alleged that the other members of the family did not know about this lease. The validity of this lease is also being challenged in collateral litigation between William and Reginald, to which the present Plaintiff has been added as a third party.

6 The Plaintiff had executed an enduring power of attorney. On September 7, 1999 this power was triggered when her physician issued a declaration of incapacity.

7 On January 8, 2000, the Plaintiff prepared a holograph will. This will is listed in the affidavit of records filed by the Plaintiff.

8 In May of 2000, the challenged transfer of the lands took place.

9 In 2001 a trustee was appointed for the Plaintiff, and this action was commenced. On March 18, 2002, it was ordered that this action and the action concerning Reginald's lease should be tried together. The Defendants in this action applied for production of a copy of the 1998 will, but on September 23, 2002 the Master dismissed that application. After referring to *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.) the learned Master stated in a brief memorandum that he had "concluded there is nothing in that case that leads me to believe that a will executed in 1998, before the declaration of incapacity [by the physician in 1999], can help the Defendants overcome the presumed undue influence in May of 2000."

The Duty to Discovery Documents

10 The parties are in agreement as to the duty of a litigant to discover records. The only dispute is over the application of the law to the facts. Both parties note that Rule 187.1(2) requires the parties to "disclose relevant and material records". They both then refer to Rule 186.1 which reads:

> **186.1** For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

The Defendants argue that the making of the will in 1998 is relevant to the capacity of the Plaintiff in 2000 when the disputed transaction took place. They also argue that the contents of the will are relevant to the issue of undue influence, because the will may show the intention of the Plaintiff to deal with the lands in a way that is consistent with the challenged transaction. In an argument that the Master accepted, the Plaintiff argues that the real issue is the capacity of the Plaintiff in the year 2000, and that the events of 1998 are too remote to be "relevant and material".

11 Up until 1999 discovery in Alberta was very wide-ranging. Generally discovery was available on anything "touching the matters". This form of discovery was found to be excessive. It was requiring the production of documents and the answering of questions that were only relevant in the remotest sense. It was felt that some parties were abusing the Rule by relying on literal compliance with it; demands were being made for the production of endless lists of documents that had little bearing on any real issue. As a result, the Rules Committee recommended that discovery be limited to matters that are "relevant and material". The purpose of the Rule was to control abuses and to limit the costs of litigation, while still allowing an appropriate degree of pre-trial discovery.

12 In my view the courts should take a pragmatic view of the scope of discovery. Too formalistic an application of the Rule serves to increase the costs of litigation, rather than decreasing them. This case is a good example. The cost of photocopying the disputed will would have been a few dollars. Instead of that, the parties have spent thousands of dollars arguing about whether the document is producible. This was not the result intended by the amendment to the Rule.

13 The pragmatic counsel who is called upon to produce a document which is arguably irrelevant, or at least not materially relevant, will analyze the situation as follows. First of all, the document cannot help or hurt counsel's client. If the document can help or hurt, then it is material. If the document is truly harmless, the pragmatic counsel will produce it rather than fight over it.

14 The pragmatic counsel might nevertheless decline to produce such harmless documents for a number of reasons:

(a) Floodgates. Counsel may be concerned that the request for one or a few documents is merely a precursor to a flood of similar requests. At some point the floodgates must be closed. Controlling excessive demands for documents was one purpose of the new Rule.

(b) Confidentiality. Harmless documents may be confidential. The confidentiality in question may be personal, or it may relate to business secrets. While confidentiality is not a bar to discoverability, it may be a factor that prompts the pragmatic counsel to decline to produce a record which is not materially relevant, but which could easily and cheaply be produced.

(c) Expense. There may be harmless documents that will be very expensive to collect and obtain. This may be because the document is filed in a way that makes it difficult to access, or it may be in the control of a third party who demands a fee, or for other reasons. In these instances the pragmatic counsel might decline to incur the expense of producing what appears to be a marginally relevant document.

I do not suggest that the Rule over the discoverability of a document should be determined by the expediency of the day. Parties are not required to produce the documents that are not material and relevant, and they should be entitled to refuse to produce if they so choose. However, the above factors can be explored by the Court in trying to understand why production of a particular document is resisted. If the records being requested are modest in number, they are not confidential, and they are not expensive to obtain, then why is the litigant fighting so hard to avoid production, given that the documents are by definition supposedly harmless? Is the production of the document within the mischief the 1999 amendments were designed to prevent? These are factors that can certainly be taken into consideration when costs are considered.

15 Examination for discovery now is narrower than it used to be. It is however still quite wide, and is perhaps still wider than the test for admissibility at trial. Certainly discovery is not narrower than admissibility at trial. In interpreting the Rules, the Court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery, which the litigant could quite clearly introduce at the trial.

16 In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

17 That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

18 It is sometimes said that the new Rules prevent the discovery of "tertiary" issues. This is one way of saying that the 1999 amendments were intended to prevent excessive discovery. However, as a working tool the search for "tertiary" issues is unhelpful in many cases. There is no clear dividing line between primary, secondary, and tertiary evidence. As I have indicated, some facts can only be proven by tertiary or even more remote evidence. A good example is an attempt to prove a negative. The application of the new Rule to particular fact situations must be primarily pragmatic.

19 The Defendants argue that the will is relevant to two issues. The first is the capacity of the Plaintiff. It seems clear from the record that the Plaintiff did not suffer any sudden and catastrophic loss of capacity. At worst she is experiencing the normal effects of the aging process. It is not uncommon for medical experts to testify that this sort of loss of capacity is gradual, and perhaps exists before it is apparent. The passage of time between the will in October of 1998 and the challenged transfer in May of 2000 is not so great that a court might not draw an inference on capacity in 2000, from capacity in 1998. Now that the two actions have been combined for trial, the capacity of the Plaintiff at the time of the 1999 lease is also in issue. It would seem artificial to say that the will is producible in the lease action, but not in this action. It is not necessary for the purpose of this application to decide if the Court would draw any inferences on capacity in 2000, based on capacity in 1998; it is a possible line of reasoning and not mere speculation, and the record would appear to be materially relevant. It may assist in determining an issue at trial.

20 The Defendants argue that the contents of the will are not relevant to any issue of capacity. It is true that the circumstances surrounding the making of this will perhaps have more to say about the Plaintiff's capacity than the actual contents. However, if the contents of the will bear a rational relationship to her family's circumstances and her estate as it existed at that time, that is some evidence of her capacity. Evidence of this type is routinely introduced in trials involving capacity and undue influence.

21 Likewise, the will is relevant to the issue of undue influence. In such cases it is important to know whether it was truly the transferor's intention to transfer the property, or whether that intention was imposed on her. As I have indicated, there is some family history suggesting that these lands were always earmarked for the Defendant. If the 1998 will left the lands to William, that would be compelling evidence. Likewise, if the will said anything about Reginald being entitled to farm the lands, that too would be relevant. If the will is silent, or disposes of the land in some inconsistent way, that is also relevant. Again, whether the trial judge will draw any inferences from this need not be decided at this point; it is only necessary to show that the inference is possible.

22 The Defendants argue that a person's intention in a testamentary instrument is not necessarily the same as that same person's *inter vivos* intention. That is undoubtedly true, but it is not uncommon for people to commence distribution of their estates prior to their death. The acceleration of inheritances is not unknown. These are all factors that the trial judge must take into account in deciding whether to draw the inferences the Defendants urge. The ability of a party to make the argument at trial should not be foreclosed by too limited a view of discovery.

23 The Defendants point out that the law suggests that the onus of disproving undue influence will fall on them. There are cases that suggest that undue influence will be presumed where transfers are made at an undervalue and the donee is in a position of confidence with the donor: *Tulick Estate v. Ostapowich* (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381 (Alta. Q.B.). If this law was found to apply to the facts of this case, the Defendants would have the burden of proving a negative, namely that there was no undue influence. They are also required to prove the mental state of the Plaintiff. Such issues are notoriously hard to prove, and they are impossible to prove directly. Accordingly, in a case like this there is a wider category of discovery that would be "material".

24 It seems clear to me that on this record the Defendants would be entitled to call Mr. Wyrozub at trial as a witness, and ask him how he assessed the Plaintiff's capacity in 1998 when the will and the lease were prepared. It seems unlikely that the trial judge would rule that his evidence is so unlikely to be relevant that he could not even be called. If his evidence can be called at trial it seems particularly artificial to say that documents surrounding his evidence are not producible on discovery.

25 Viewed from the other side, no compelling reason has been shown why production would be abusive. Production of the will might well trigger production of Mr. Wyrozub's file, but that in itself would not be a major undertaking. There is no floodgates issue. The Plaintiff protests that the Defendants are asking for something which is "none of their business". The privacy interest in question would be that of the Plaintiff. Having alleged in this claim that she was unduly influenced, she does not have a strong argument that documents relating to her motivation to dispose of her property should now be kept confidential. Furthermore, there is evidence that she discussed the contents of her will with her family. Expense is not an issue. As I have mentioned, the will could be photocopied for a few dollars.

26 In all of the circumstances, it appears that the document in question might well assist the Court in making the findings of fact that are required regarding capacity and undue influence. Those are notoriously difficult issues to prove, and they are almost invariably proved indirectly and by inference. The production of this document is not within the mischief that the 1999 amendments to the Rules were designed to prevent. I have concluded that the document is relevant and material, and it should be produced.

27 The parties may speak to costs within 30 days of the date of these reasons, if they are unable to agree.

Appeal allowed.

End of Document

Tab B8

1988 CarswellAlta 118
Alberta Court of Queen's Bench

Re/Max Real Estate (Edmonton) Ltd. v. Border Credit Union Ltd.

1988 CarswellAlta 118, [1988] 6 W.W.R. 146, [1988] A.W.L.D. 1350, 11 A.C.W.S. (3d) 117, 60 Alta. L.R. (2d) 356, 90 A.R. 15

RE/MAX REAL ESTATE (EDMONTON) LTD. and BOYLES REAL ESTATE (1979) LTD. v. BORDER CREDIT UNION LIMITED

Master Funduk [in Chambers]

Judgment: July 25, 1988
Docket: Edmonton No. 8703 28941

Counsel: *J.G. Skinner*, for plaintiffs.
S.A. McLachlin, for defendant.

Subject: Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Affidavit of documents — Sufficiency where production objected to — Statement of grounds of privilege

Civil procedure — Discovery — Discovery of documents — Affidavit of documents — Form and content — Affidavit to list all documents relating to any matter or questions in the action — Claim of privilege not being ground for exclusion of relevant documents from affidavit.

Civil procedure — Discovery — Discovery of documents — Affidavit of documents — Further and better affidavit — Defendant withholding relevant documents from affidavit of documents on basis of solicitor-client privilege — Court ordering defendant to discover all relevant documents relating to the matters or questions in issue, producible or not, in accordance with R. 186(2).

In an action for commission on the sale of certain lands, the plaintiffs claimed the defendant had not discovered all relevant documents as required under R. 186(2). Counsel for the defendant had indicated in a letter to counsel for the plaintiffs that there were other relevant documents which had not been discovered because the latter thought they were not producible on the basis of solicitor-client privilege. The plaintiffs applied for an order requiring the defendant to deliver a further and better affidavit of documents.

Held:

Application granted.

The discovery of documents is not the same as the production of documents. Under R. 186(2) any document which "relates to any matter or question in the action" must be discovered, whether the document is producible or not. The probative value of documents is not to be determined by the defendant nor can the defendant say the documents will not assist the plaintiff. In Alberta, the relevancy of documents is determined within the framework of R. 186(2), for the purpose of R. 194(1). An order for a further and better affidavit of documents under R. 194(1) may be granted where the applicant meets

the burden of satisfying the court that relevant documents have not been discovered. Here, the letter written by counsel for the defendant effectively conceded that there were other relevant documents and an error was made by counsel for the defendant in thinking that documents need not be discovered if they are not producible.

Table of Authorities

Cases considered:

British Assn. of Glass Bottle Mfr. Ltd. v. Nettlefold, [1912] A.C. 709 (H.L.) — *considered*

Chertkow v. Retail Credit Co., 26 Alta. L.R. 291, [1932] 1 W.W.R. 905, [1932] 3 D.L.R. 390 (C.A.) — *considered*

Farrer v. Kelso, [1917] 2 W.W.R. 1024 (Sask. Dist. Ct.) — *not followed*

Gainers Ltd. v. C.N.R., [1926] 2 W.W.R. 79 (Alta. S.C.) — *considered*

Hutchinson and Dowding v. Bank of Toronto, 48 B.C.R. 315, [1934] 1 W.W.R. 446 (S.C.) — *referred to*

Irwin v. Jung (1912), 17 B.C.R. 69, 1 W.W.R. 524, 1 D.L.R. 153 (C.A.) — *referred to*

Jones v. Monte Video Gas Co. (1880), 5 Q.B.D. 556 (C.A.) — *not followed*

Lazin v. Ciba-Geigy Can. Ltd., [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.) — *referred to*

Louden v. Consol.-Mouton Trimmings Ltd., [1956] O.W.N. 552, 15 Fox Pat. C. 167, 24 C.P.C. 77 (H.C.) — *considered*

Mark Fishing Co. v. United Fishermen & Allied Wkrs. Union (1968), 64 W.W.R. 530, 68 D.L.R. (2d) 410 (B.C.C.A.) — *referred to*

Nova, An Alta. Corp. v. Guelph Engr. Co., 30 Alta. L.R. (2d) 183, [1984] 3 W.W.R. 314, 42 C.P.C. 194, 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, 50 A.R. 199 (C.A.) — *referred to*

Ritholz v. Man. Optometric Soc. (1958), 66 Man. R. 226, 24 W.W.R. 504 (Q.B.) — *referred to*

Skoye v. Bailey, [1917] 1 W.W.R. 144 (Alta. C.A.) — *applied*

Stapley v. Canadian Pacific Railway (1912), 5 Alta. L.R. 341 at 344, 6 D.L.R. 180, 2 W.W.R. 1010, 22 W.L.R. 85, 1912 CarswellAlta 176 (Alta. S.C. en banc) — not followed

Strass v. Goldsack, [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.) — *referred to*

Rules considered:

Alberta Rules of Court, 1914

R. 372(1) [now R. 194(1)]

Alberta Rules of Court

R. 186(2)

R. 194(1)

Authorities considered:

Stevenson and Côté, An Annotation of the Alberta Rules of Court (1981).

Application for order requiring defendant to deliver a further and better affidavit of documents.

***Master Funduk*:**

1 This is an application by the plaintiffs for an order requiring the defendant to deliver a further and better affidavit of documents.

2 It is necessary to look at the issues raised in the pleadings.

3 The plaintiffs say that in April 1987 land owned by Little Albert's was listed for sale with Borden. The plaintiffs say that if a sale occurred Borden would receive a commission. The plaintiffs say that the listing was to expire 1st August 1987.

4 The plaintiffs say that in July 1987 they solicited an offer from one Torris and that a few days later a sale agreement was entered into for $125,000.

5 The plaintiffs further say that the land was at all relevant times subject to a mortgage to the defendant. The plaintiffs say that on 3rd September the defendant acquired title to the land from Little Albert, that the defendant adopted the sale agreement with Torris or alternatively received an assignment of the vendor's interest in the agreement, and that the defendant completed the sale to Torris on 29th September.

6 It should be noted that the allegations about when the defendant acquired title, when it adopted the agreement or had it assigned to itself, and when it completed the sale to Torris, indicate those steps occurred after the expiration of the listing. However, the plaintiffs also allege that the listing agreement provides that any sale made within 90 days after 1st August to any person who had been contacted about or had been shown the land during the currency of the listing agreement would entitle Borden to a commission.

7 The plaintiffs say that they are entitled to a commission based on the listing agreement or alternatively on a quantum meruit basis. There is a further alternative claim which I need not detail.

8 In its defence the defendant first denies everything except "where specifically hereafter admitted". It then goes on to make certain specific denials. There are no admissions.

9 The effect of the defence is that *everything* alleged by the plaintiffs is denied by the defendant. That means that *everything* alleged by the plaintiffs is in issue.

10 The plaintiffs say that the defendant has not *discovered* all relevant documents. The plaintiffs say that there are four files which the defendant has in its possession or power relating to the matters or questions in this action. The plaintiffs say that the defendant has not *discovered* all documents in those four files. The plaintiffs want a proper *discovery* of all documents relating to the matters or questions in issue. That is the scope of what the plaintiffs seek at this time.

11 I emphasize discovery because it appears that counsel for the defendant has confused the discovery of documents with the production of documents.

12 The sole criterion for discovering documents is that set out in R. 186(2). Any document which "relates to any matter or question in the action" *must* be discovered. A party cannot refuse to discover a document on the ground it is not producible, for whatever reason.

13 If any judicial authority is needed for the statement that discovery and production are different things, and that discovery does not hinge on producibility, resort can be had to *Skoye v. Bailey*, [1971] 1 W.W.R. 144 (Alta. C.A.). Johnson J.A., speaking for the court, states at pp. 145-46:

> This appeal is concerned solely with what documents must be included in the affidavit of production. We are not concerned with what documents must subsequently be produced.
>
> Since the inception of this province, a party to a cause or matter has been required to discover all documents "in his possession or power" relating to the matter in question in the cause. The words used until recently in the English Rule were "possession, custody or power". The authorities agree that there is no difference in the scope of the documents that are required to be discovered under these Rules. Possession as it relates to discovery of documents has a much wider meaning than when applied to the actual production of the documents. As Jessel M.R. said during argument in the case of *Swanston v. Lishman* (1881), 45 L.T. 360 at p. 361:
>
> > The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession, whether you are bound to produce them or not, ...
>
> It is conceded by the grounds for appeal which have been quoted that Alberta Gas Trunk Line Company Limited has documents in its possession which relate to the pipe line and the explosion which caused the tragedy. It is not disputed that some or maybe all of the defendants have had possession of these documents for the purpose of their employment. These documents have been retained by the company and are in its possession and certain of these defendants, as officers or employees of the company who are charged with the preservation of these documents, are in possession of them within the interpretation of this Rule and they should be disclosed.
>
> It was suggested that because of changes in the Rules of Court, these older decisions can no longer be applied. No changes have been made in these Rules which would have that effect.
>
> It is true that by R. 191 a party is entitled to obtain production for inspection of any documents referred to "in the pleadings, particulars or affidavits of any other party" but the Rule specifically does not apply to any documents referred to in the affidavit of documents, "the production of which is therein objected to". Rule 193 provides that a party who omits to give notice of the time for inspection "or objects to give the inspection, the party desiring it may apply to the court for an order of inspection." On such an application the Chamber Judge will consider any objection to the production of documents. That stage has not been reached in these proceedings.

14 *Skoye* probably says it all in relation to the present application.

15 Counsel for the defendant says that the affidavit of documents is conclusive: *Jones v. Monte Video Gas Co.* (1880), 5 Q.B.D. 556 (C.A.). I do not agree.

16 One Court of Queen's Bench judge recently said that any practice decision more than 20 years old is not worth considering. He might point to *Jones* as justification for that proposition.

17 An affidavit of documents is the discovery of documents. The scope of discoveries, be it a discovery of documents by affidavit or at an oral discovery, or the usual pre-trial oral discovery, is a "broad ... process": *Nova, An Alta. Corp. v. Guelph Engr. Co.*, 30 Alta. L.R. (2d) 183, [1984] 3 W.W.R. 314, 42 C.P.C. 194, 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, 50 A.R. 199 (C.A.).

18 The judicial trend to requiring a full disclosure is summed up in two sentences by Moir J.A. in *Strass v. Goldsack*, [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.), at p. 165:

> ... one must not forget the object of litigation is to assist the court in arriving at the truth. In reaching the truth, and a just result, anything that stands in the way of justice must be restricted.

19 The matter is really one of practice, not substantive law. As indicated in *Nova*, the courts are the masters of their own practice. There is no good reason why today the courts of this province should be bound by English practice decisions, if we ever were.

20 In the face of the plain language of R. 194(1), the matter should be approached in the same manner as any other application is approached. The applicant has the burden of satisfying the court that it should grant the order sought.

21 How the applicant makes it "appear to the court" that a document has been omitted is a matter of evidence. What evidence is allowable is dictated by the rules of evidence. It is a matter of relevancy and it then becomes a matter of the probative value of that evidence which is properly admissible and whether the applicant has made out a case for what it seeks on a balance of probabilities.

22 The burden lies on the plaintiffs to make out a case for the order sought: *Lazin v. Ciba-Geigy Can. Ltd.*, [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. C.A.).

23 *Jones* is an 1880 English Court of Appeal decision on a matter of practice. It is not, and never was, binding on Alberta courts. The principle enunciated is not acceptable to this court.

24 Counsel for the defendant also relies on *Hutchinson and Dowding v. Bank of Toronto*, 48 B.C.R. 315, [1934] 1 W.W.R. 446 (S.C.); *Farrer v. Kelso*, [1917] 2 W.W.R. 1024 (Sask. Dist. Ct.); *Loudon v. Consol.-Moulton Trimmings Ltd.*, [1956] O.W.N. 552, 15 Fox Pat. C. 167, 24 C.P.R. 77 (H.C.); *Irwin v. Jung* (1912), 17 B.C.R. 69, 1 W.W.R. 524, 1 D.L.R. 153 (C.A.); *British Assn. of Glass Bottle Mfr. Ltd. v. Nettlefold*, [1912] A.C. 709 (H.L.).

25 I do not see how *Hutchinson* assists the defendant. It merely states that which should be self-evident. A party need not discover a document which is not relevant to the issues raised in the pleadings. The point is summed up in two sentences at p. 447:

> The point made upon the present application is this: That upon the case set up in this pleading all questions relating to the company's insolvency or the bank's knowledge thereof are irrelevant. With this contention I agree.

26 In Alberta, the relevancy of documents is determined within the framework of R. 186(2), for the purpose of R. 194(1).

27 *Farrer* applies *Jones*. I say no more about *Farrer*.

28 *Loudon* says that prima facie an affidavit of documents is conclusive. If it is following the principle in *Jones*, I do not agree. If it says that, *without more*, the party cannot be ordered to provide a further and better affidavit of documents, I agree. An order under R. 194(1) is not granted merely by the asking. He who wants the order must "make it appear" to the court that relevant documents have not been discovered.

29 *Irwin* also follows *Jones*. I say no more about it other than that I agree with one point, that the matter is a "rule of practice".

30 *British Assn.* says that as a general rule an affidavit of documents is conclusive. If that means that *without more* the affidavit stands, I have no difficulty. If it means the affidavit is unimpeachable and cannot be contradicted, I do not agree.

31 In any event, this court is not bound by a 1912 English practice decision.

32 *Stapley v. C.P.R.* (1912), 5 Alta. L.R. 341, 2 W.W.R. 1010, 6 D.L.R. 180 (Alta. S.C. en banc), also states that [p. 1011]:

> The general rule is that an affidavit on production is conclusive and must be accepted as true by the opposite party respecting not only the documents that are or have been in the possession of the party making discovery and their relevancy ...

33 However, *Stapley v. Canadian Pacific Railway* has been overtaken by what is now R. 194(1), which clearly negates the "conclusive" effect that was given to an affidavit of documents.

34 R. 194(1) can be traced back to the 1914 Rules and R. 372(1).

35 *Stapley v. Canadian Pacific Railway* was decided in 1912, which is obviously prior to the 1914 Rules.

36 I do not find it necessary to research if in 1912 there was a like rule to the 1914, R. 372(1). That would involve going back to the North West Territories Judicature Ordinance as it stood in 1905 when Alberta became a province and also seeing if there were any changes by Alberta between 1905 and 1912.

37 In *Gainers Ltd. v. C.N.R.*, [1926] 2 W.W.R. 79 (Alta. S.C.), Master Blain indicates that the relevant rule did not exist in 1912. He states at p. 80:

> *Stapley v. C.P.R.* was decided in 1912 and C.R. 372 came into force in 1914. The English practice and procedure was being followed in Alberta in 1912, but is not now and for some years has not been in force in this province. C.R. 372 provides that:
>
> > If it be made to appear to a judge that any document in the possession or power of a party has been omitted or that a claim of privilege has been improperly made in an affidavit of documents filed, he may order a further and better affidavit.
>
> C.R. 382 provides for the cross-examination of the person who has made an affidavit of documents. As I stated, on the argument, the right to so cross-examine was to get away from the practice in England, which was not thought to be a good practice for this province, and to enable a party to discredit the affidavit of documents of the opposite party. I have since the argument consulted Mr. Justice Beck, a member of the Rules Commission, who tells me he suggested this right of cross-examination for the express purpose of getting away from the English practice.

38 I would conclude that Master Blain did the research which led him to say that in 1912 there was not a rule like the 1914, R. 372.

39 Stevenson and Côté, Alberta Rules of Court, also appear to be of the view that the 1914, R. 372 is new. They say that the present R. 194(1) is designed to get around the principle of unimpeachability found in *Stapley v. Canadian Pacific Railway*.

40 I agree.

41 There is a troubling statement in *Chertkow v. Retail Credit Co.*, 26 Alta. L.R. 291, [1932] 1 W.W.R. 905, [1932] 3 D.L.R. 390 (C.A.), that [pp. 908-909] "the true facts cannot be established by any other affidavit contradicting [the affidavit of documents]." That appears to be a reversion to the English practice of not allowing a contrary affidavit. In light of the scope of R. 194(1), I am not able to rationalize *Chertkow*. I would say that was not the issue before the court, so the statement was made without the benefit of submissions by counsel on that point.

42 In my view, the better approach to this kind of issue is that found in *Mark Fishing Co. v. United Fishermen & Allied Wkrs. Union* (1968), 64 W.W.R. 530, 68 D.L.R. (2d) 410 (B.C.C.A.).

43 Counsel for the defendant submits that the plaintiffs are going on a "fishing expedition". That description of some thing has been so overworked it is virtually meaningless.

44 The plaintiffs merely want the defendant to discover documents in accordance with R. 186(2). That can never be called a "fishing expedition".

45 Counsel for the defendant submits that the plaintiffs are hoping to find something to show there was an adoption by the defendant of the agreement for sale between Little Albert's and Torris, but that there is nothing which would show this.

46 Again, the simple answer is R. 186(2). If a document "relates to any matter or question" in the action it must be discovered. Its probative value is another matter.

47 It is not an answer to say that the documents will not assist the plaintiffs. That is for the trier of fact to decide. The defendant does not sit in judgment.

48 The comments in *Chertkow*, at p. 911, negate that kind of answer.

49 The plaintiffs' witness says that there are four "files" relating to the issues, all being files which it is alleged the defendant's counsel had opened.

50 There is an alleged "mortgage file", an alleged "quit claim" file, an alleged "sale to Torris" file, and the file that is "listed" in the affidavit. It is the contents of the first three files that are the subject matter of this application. The plaintiffs' witness has even given the solicitors file numbers.

51 The affidavit of documents does list some documents which would appear to come from some of these "files".

52 The simple evidentiary answer to the application is the written admission by counsel for the defendant, found in a letter dated 29th June 1988 by him to counsel for the plaintiffs. It reads:

> We have your letter of May 31, 1988.
>
> We have disclosed in our Affidavit of Documents *all relevant non-privileged documents* both in our possession and in the possession of Border Credit Union Limited in each of the four files referred to in your letter and in the files of Border Credit Union Limited.
>
> All documents passing between our office as solicitors for Border Credit Union and Border Credit Union on each of those four files are privileged as between solicitor and client. Solicitor and client privilege is not dependant upon litigation being in progress or contemplated. [emphasis mine]

53 It is that letter which leads me to conclude that counsel for the defendant has confused discovery of documents with production of documents.

54 Rule 186(2) requires the discovery of all relevant documents, producible or not.

55 The clear conclusion from the letter is that there are other relevant documents which have not been discovered because counsel thinks they are not producible. That is not the way to deal with relevant documents which, it is claimed, are not producible, for whatever reason.

56 I do not interpret the letter as saying that other documents are privileged from production because they are irrelevant. That would be an illogical position. If a document is irrelevant it is irrelevant. A claim for privilege from production cannot logically arise for that kind of document. That kind of fallacy is pointed out in *Ritholz v. Man. Optometric Soc.* (1958), 66 Man. R. 226, 24 W.W.R. 504 (Q.B.).

57 The claim for privilege founded on a "solicitor-client" basis necessarily means counsel for the defendant concedes that there are other relevant documents.

58 Counsel for the defendant has made a "mistake in principle" to use the phrase in *British Assn.* Even the English decisions accept that as a basis for ordering better discovery of documents.

59 There will be an order in accordance with the plaintiffs' notice of motion originally returnable on 11th July for both items 1 and 2.

60 Any claim to not being required to *produce* documents should be claimed in the affidavit in accordance with the Rules.

61 Any possible dispute about the production of any documents is a future issue. I have already referred to *Nova*. It is the latest (and probably final) decision on that kind of issue. It is recommended (mandatory) reading.

62 For the record, the counsel who appeared for the defendant on this application is not the counsel conducting the action for the defendant and he is not the author of the letter.

Application granted.

End of Document

Tab B9

2015 ABQB 2
Alberta Court of Queen's Bench

Dow Chemical Canada Inc. v. Nova Chemicals Corp.

2015 CarswellAlta 9, 2015 ABQB 2, [2015] A.W.L.D. 1101, [2015] A.W.L.D. 1166, 248 A.C.W.S. (3d) 791

Dow Chemical Canada Inc. and Dow Europe GmbH, Plaintiffs (Defendants by Counterclaim) Applicant and Nova Chemicals Corporation, Defendant (Plaintiff by Counterclaim) Respondent

Neil Wittmann C.J.Q.B.

Heard: December 15, 2014
Judgment: January 2, 2015
Docket: Calgary 0601-07921

Counsel: B.C. Yorke-Slader, Q.C., B.R. Crump, A.D. Grosse, for Plaintiffs / Defendants by Counterclaim, Dow Chemical Canada Inc. and Dow Europe GMBH
W.J. Kenny, Q.C., C.C.J. Feasby, M.E. Comeau, T. Gelbman, for Defendant / Plaintiff by Counterclaim, Nova Chemicals Corp.

Subject: Civil Practice and Procedure; Evidence; Natural Resources

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Application for order for production — General principles

Defendant operated three plants that manufactured ethylene using ethane as feedstock — It was sole owner of two and co-owner with plaintiffs of third — It operated third pursuant to joint venture and other agreements — Plaintiffs commenced action alleging defendant had improperly taken ethylene from and failed to optimize production at co-owned plant — It claimed losses and damages exceeding $800 million — Defendant claimed it had been necessary to reallocate ethylene during period in issue in order to optimize production as result of ethane shortage — During course of discovery, defendant produced some 102,671 records consisting of 653,566 pages — Plaintiffs claimed that it had failed to produce certain documents related to polyethylene reactor defendant planned to construct, alleged conversion, daily distribution of ethylene and ethane shortage — Plaintiffs applied for order directing defendant to produce above-noted documents — They also applied for order striking defence in respect of plant capacity and ethane shortage for failure to comply — Trial scheduled for four months commencing January 2015 — Applications dismissed — Each party legally obliged to disclose all relevant and material records — Under s. 5.2(1) of Alberta Rules of Court, records considered relevant and material only if they could reasonably be expected to significantly help determine one or more issues raised in pleadings or ascertain evidence that could reasonably be expected to do so — Relevance determined with reference to pleadings — Materiality questioned whether information could assist directly or indirectly in proving fact in or disproving issue — Defendant had already produced documents, as ordered, in relation to polyethylene reactor it planned to construct — Plaintiffs' suspicion that there must be more was insufficient to warrant further order for production — While historical screen shots of computer program used to allocate ethylene from co-owned plant each day might be relevant and material, requiring defendant to create such documents would be abusive — Defendant provided adequate explanation for delay in production of records that had been misplaced when one employee left and another took over — In result, court not satisfied defendant had failed, without sufficient cause, to disclose relevant and material records in timely way.

Natural resources --- Oil and gas — Practice and procedure — Miscellaneous

Defendant operated three plants that manufactured ethylene using ethane as feedstock — It was sole owner of two and co-owner with plaintiffs of third — It operated third pursuant to joint venture and other agreements — Plaintiffs commenced action alleging defendant had improperly taken ethylene from and failed to optimize production at co-owned plant — It claimed losses and damages exceeding $800 million — Defendant claimed it had been necessary to reallocate ethylene during period in issue in order to optimize production as result of ethane shortage — During course of discovery, defendant produced some 102,671 records consisting of 653,566 pages — Plaintiffs claimed that it had failed to produce certain documents related to polyethylene reactor defendant planned to construct, alleged conversion, daily distribution of ethylene and ethane shortage — Plaintiffs applied for order directing defendant to produce above-noted documents — They also applied for order striking defence in respect of plant capacity and ethane shortage for failure to comply — Trial scheduled for four months commencing January 2015 — Applications dismissed — Each party legally obliged to disclose all relevant and material records — Under s. 5.2(1) of Alberta Rules of Court, records considered relevant and material only if they could reasonably be expected to significantly help determine one or more issues raised in pleadings or ascertain evidence that could reasonably be expected to do so — Relevance determined with reference to pleadings — Materiality questioned whether information could assist directly or indirectly in proving fact in or disproving issue — Defendant had already produced documents, as ordered, in relation to polyethylene reactor it planned to construct — Plaintiffs' suspicion that there must be more was insufficient to warrant further order for production — While historical screen shots of computer program used to allocate ethylene from co-owned plant each day might be relevant and material, requiring defendant to create such documents would be abusive — Defendant provided adequate explanation for delay in production of records that had been misplaced when one employee left and another took over — In result, court not satisfied defendant had failed, without sufficient cause, to disclose relevant and material records in timely way.

Table of Authorities

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Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin*) [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin*) 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin*) 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — referred to

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Dow Chemical Canada Inc. v. Nova Chemicals Corp. (2010), 2010 ABQB 524, 495 A.R. 338, 2010 CarswellAlta 1778, 35 Alta. L.R. (5th) 51 (Alta. Q.B.) — referred to

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Marcotte c. Longueuil (Ville) (2009), 62 M.P.L.R. (4th) 1, [2009] 3 S.C.R. 65, 2009 SCC 43, 2009 CarswellQue 9842, 2009 CarswellQue 9843, (sub nom. *Usinage Pouliot inc. v. Longueuil (Ville de)*) 311 D.L.R. (4th) 1, (sub nom. *Marcotte v. Longueuil (Ville)*) 394 N.R. 1 (S.C.C.) — considered

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Sun Life Assurance Co. of Canada v. Tom 2003-1 Ltd. Partnership No. 2 (2010), 516 A.R. 95, 2010 ABQB 815, 2010 CarswellAlta 2783 (Alta. Q.B.) — referred to

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Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 3.68(4) — considered

R. 3.68(4)(b) — considered

R. 3.68(4)(b)(ii) — considered

R. 3.68(4)(b)(iii) — considered

R. 5.2(1) — considered

R. 5.10 — considered

R. 5.11 — considered

R. 6.11 — considered

R. 6.11(1) — referred to

APPLICATION by plaintiff co-owners for disclosure of documents, and to have defence of defendant company struck out.

Neil Wittmann C.J.Q.B.:

Introduction

1 The Plaintiffs, Dow Chemical Canada Inc. and Dow Europe GmbH ("Dow") have brought two applications. On November 4th, 2014, no formal application was filed, only a brief ("the First Application") stating that "the Plaintiffs apply for relief in respect of Nova's multiple failures to make record discovery." The relief sought by Dow was that Nova be "directed immediately to produce ... documents as more specifically discussed above". The second application by Dow seeks relief for "Defendant's non-compliance with Court Orders and other significant deficiencies". The Defendant, Nova Chemicals Corporation ("Nova") opposes the applications.

2 The second application ("the Striking Application") does not appear to be dated but was returnable November 26th, 2014 at 10:00 a.m. at which time a case management court appearance was scheduled. Dow, by way of a Supplementary Brief has asked this Court for a remedy pursuant to the *Alberta Rules of Court* ("ARC"), specifically ARC 3.68(4). Dow submits that Nova's defence ought to be struck out as it relates to the capacity of E3 as well as any assertion or defence by Nova that there was an ethane shortage.

3 The applications did not proceed November 26th, 2014 because, according to counsel for Dow, just prior to the scheduled hearing on November 24th, 2014, Nova served three affidavits and a brief seeking to avoid the relief sought in the First Application, that is a direction that the documents requested be ordered produced. Nova also raised fresh complaints about Dow's record production and about undertaking responses which Dow says were not yet due. The Court was notified by counsel that these matters were adjourned by consent to December 15th, 2014 at 10:00 a.m. The trial is scheduled to begin January 13th, 2015 for an estimated period of four months.

Background

4 The nature of the dispute between Dow and Nova in this litigation has been described earlier by this Court in *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABQB 38 (Alta. Q.B.) and 2010 ABQB 524 (Alta. Q.B.).

5 As previously stated in those decisions, there are three ethylene plants at or near Joffre, Alberta called E1, E2 and E3 by the parties, where ethylene is manufactured using ethane as a feed stock. The ownership of E1 and E2 is solely Nova but E3 is jointly owned by Nova and Dow. The operator of E3 is Nova by virtue of a Joint Venture Agreement made between Dow and Nova. There are other agreements, including an Operating and Services Agreement ("OSA") and a Plant Co-owners Agreement and a Liquid Co-Products Marketing Agreement.

6 Key allegations by Dow include that Nova has improperly taken some of the ethylene from E3 owned by Dow and that Nova failed to optimize production at E3. The subsidiary allegations in dispute surrounding Dow's "Optimization Claim" include Nova's defence to it, namely, that it was necessary to reallocate ethylene during the period in issue in order to optimize production because of an ethane shortage. The documents in issue in this application, which Dow alleges Nova has failed to produce, surround the productive capability to optimize E3's ethylene production. Dow alleges this puts in issue the production capacity of E3, as well as whether there was an ethane shortage as alleged by Nova.

7 A trial judge has been assigned and has met with the parties' counsel at least once and has corresponded with the parties' counsel with respect to technical requirements in the courtroom. According to Nova's brief, Nova has produced "102,671 records consisting of 653,566 pages." Moreover, expert reports have been exchanged according to previous Case Management Orders, not necessarily by the stated deadlines, but as modified by agreement of counsel. Thus, all of the witnesses to be called by the parties appear ready to proceed with the trial as scheduled, including the expert witnesses.

Recent History

8 Dow's application surrounds allegations about Nova's failure to produce documents, first, documents relating to R3 as described; secondly, MIMI documents reflecting the alleged conversion of Dow's E3 ethylene; third, Nova's failure to produce many spreadsheets used to calculate its daily distribution of ethylene for Nova and Dow. Finally, Dow complains about Nova's "piece-meal" production of the Tulk ethane files.

9 By way of a "Supplementary Brief" dated December 10th, 2014, Dow asserts striking is the only appropriate remedy in the circumstances. This remedy is based on ARC 3.68(4). Nova's brief in response was not received by the Court until approximately one hour before the application began on December 15th, 2014; that is at 9:00 a.m. Nova did transmit the brief electronically to the Court's Executive Assistant after 8:00 p.m. on Friday, December 12th, 2014, but of course neither the Executive Assistant, nor the Court was aware of this email until Monday, December 15th, 2014.

10 During the oral hearing, it was disclosed that Dow intended to file a Fifth Amended Statement of Claim and that accordingly, Nova would be filing a Fifth Amended Statement of Defence and Third Amended Counterclaim. These pleadings were received by the Court by Friday afternoon, December 19th, 2014. Dow's Fifth Amended Statement of Claim alleges losses and damages "currently estimated to exceed $800,000,000."

11 At the conclusion of the hearing, the Court indicated that it would not decide the Striking Application unless and until the amended pleadings had been received by the Court. Dow submitted that if I were inclined to accept the remedy asked for, that I simply state the concept and that later the pleadings could be struck accordingly. The Court rejected that notion and said that the Court wanted the pleadings so that the Court could see for itself those portions that may be affected by any Order the Court might make. Also, the Court indicated that it may not render a decision prior to the commencement of the trial but that it would not adjourn the trial absent any application to do so. None was made. In any event, it appears the Court is able to make a decision on the relief asked for by Dow in both the First Application and the Striking Application. It is also noteworthy that two additional days of questioning were scheduled for Nova to question Dow's corporate representative on December 18th and 19th, 2014. The Court made it clear that should any further document production be forthcoming, that parties would have the ability to question on it, even after the commencement of the trial, if necessary, assuming the trial proceeds as scheduled. I will detail each category of documents in controversy, come to a conclusion as to whether Nova ought to be subject to an Order for further document production and then deal with the ARC 3.68(4) remedy.

Document Production - Relevant and Material

12 In bygone days, the process of document production and oral examinations for discovery was governed by the test of whether any question or document was "touching the matters in question", as per the old ARC 200, prior to 1999: *Czuy v. Mitchell* (1976), 1 A.R. 434 (Alta. S.C. (App. Div.)).

13 The Court of Appeal in *H. (G.R.) v. Alberta (Public Trustee)*, 2002 ABCA 29 (Alta. C.A.) made it clear that the 1999 amendments "narrowed the scope of relevance for written and oral discovery excluding tertiary relevance": (para. 2).

14 The new ARC, applicable to both production of records and questioning is ARC 5.2(1) which states as follows:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

15 The Court of Appeal in *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABCA 244 (Alta. C.A.) at paragraph 17, after quoting ARC 5.2(1), indicated that relevance is primarily determined with reference to the pleadings, but materiality

concerns whether the information can assist directly or indirectly to prove a fact in issue (para. 17). The point is that the scope of document production or production of records as it is now called, and questioning, formerly oral examination for discovery, has been narrowed since 1999. Secondly, it is to be remembered that it is the legal obligation of the party producing records or delivering an Affidavit of Records to decide what is relevant and material and what is not. That is not to say that differences cannot arise. But it is the obligation of a party, assisted by counsel, where available, to disclose relevant and material records.

16 Structurally, I will deal with the First Application asking the Court to order the production of certain documents followed by a consideration of the Striking Application.

The First Application

The R3 records

17 R3 is a proposed polyethylene reactor that Nova plans to construct. R3 will make polyethylene from ethylene and the R3 reactor will require ethylene from Nova. Dow asserts that Nova has not added any ethylene producing capacity at Joffre and reasons that Nova plans to use some unused capacity from E3, for R3 or for new merchant ethylene sales. This Court ordered the production of R3 documents in paragraph 2(a) of its Case Management Order pronounced July 15th, 2014 which states as follows:

> 2. Nova shall provide the following by September 1, 2014:
>
> (a) Records created for senior management or the Board of the Defendant [Nova] during the R3 approval process relative to the projected ethylene production volumes or capacity of E3.

18 Dow has made an argument that the R3 documents have not been produced in violation of this Court's July 15th, 2014 Order. Its first argument is based on the premise that there must be more documents from the R3 team than have already been produced because of the size of the team - over 50 members - and the lack of any e-mail traffic from or to 30 members of it, which Dow says is "inconceivable". Secondly, Dow submits that the Board of Directors of Nova, in their meetings, have materials prepared for the Nova CEO or Senior Executives, presenting slides to the Board and that no complete Board Meeting Minutes for any one meeting have been produced.

19 Dow goes on to suggest that of the Board Minutes produced, there are no pre-read materials or backups produced, but for four sets. Dow asserts that almost no corresponding speaker notes have been produced with slide decks from 19 Board meetings, nor has there ever been any drafts of speaker notes produced. In addition, Dow says Nova's consultant Bain, hired to analyze R3 and "Western Feed Stock Supply" issues from 2009 to 2012, has resulted in only a few of those emails produced. Nova, in response to its ongoing dispute with Dow over the R3 production wrote counsel for Dow, October 8th, 2014 and indicated that they had that day completed the R3 production.

20 Randy Woelfel, the former Chief Executive Officer of Nova, was examined December 4th and 5th, 2014 in Santa Fe, New Mexico. He attended questioning and the entire transcript was put before the Court and excerpts were referred to by both Dow and Nova at the hearing of these applications. It is apparent to the Court that Dow's Supplementary Brief supporting the Striking Application was made based on the questioning of Woelfel. More detail on that questioning as it relates to any of the document production issues on the First Application, will be dealt with later under the Striking Application.

21 Based on the filed materials and the submissions of counsel, this Court will not make a further Order for document production as it pertains to R3 records. Dow has not established, on the balance of probabilities that relevant and material records either exist, or if they exist, have been withheld by Nova. Nova has repeatedly stated that their outside counsel has reviewed all of the documents Dow says must exist, using the criteria of what is relevant and material. The Court comments parenthetically that drafts of speaking notes for a presentation to a Board or a CEO need not be produced, if they are not "relative to the projected ethylene production volumes or capability of E3." The Court has no reason to doubt the integrity or diligence of Nova's counsel when they make the assertions they have made in this regard. As will be seen below, where a mistake has been

made or document overlooked, Nova has acknowledged its mistake or error. No such mistake or error has been made evident when it comes to the relevant and material records relative to the projected ethylene production volumes or capability of E3 during the R3 approval process. Thus, this Court dismisses Dow's request that more R3 Records be produced.

The MIMI Documents

22 Next, Dow asserts that Nova has failed to produce MIMI documents "reflecting its conversion of Dow's E3 ethylene". MIMI is computer software that Nova used that was linked to meters at Joffre, in order to divide E3's ethylene between Dow and Nova. It is common ground between the parties that the MIMI software code had default settings to divide E3's ethylene production 50/50 between Nova and Dow, based on the relevant joint venture project agreements between the parties. According to the questioning of Joyce Choma, November 22 nd , 2010, at the material time she was Nova's Ethylene Contract Administrator. Her practice would be to access the MIMI program by overriding the default on a daily basis and manually replacing the values deviating from 50% percent for Dow and 50 % percent for Nova.

23 Apparently Ms. Choma personally maintained hard copy printouts of the input allocations for sharing E3 production back to 2000. What Dow has asked for is an Order that Nova be ordered "immediately to cease the rolling destruction of the data and to produce whatever remains of it to Dow". Dow also asked the Court to order the most knowledgeable Nova Information Technology person to be produced to state how the data came to be destroyed during the action.

24 In her Affidavit sworn November 24 th , 2014 (the Choma Affidavit), Ms. Choma confirms the 50% percent allocation on the input screen for MIMI as the default position and that there are situations when she would have to manually enter a number different from 50% percent. Exhibit "A" to the Choma Affidavit is a screenshot of the input screen dialogue box. Ms. Choma swears that it is not a "record" that she would preserve, use or refer to in the ordinary course of business and that it is nothing more than a data entry tool. Exhibit "B" to the Choma Affidavit is a report called "TOP 773-1". Ms. Choma swears that each co-owners' (Dow's and Nova's) percentage ethylene take is entered and the MIMI reporting reflects the change on the TOP 773-1 report. It shows what the historical input data was. She then states that some of her answers to questioning August 7 th , 2012 were incorrect because she could not in fact review the historical input screens back to 2006 and that no historical input data was available prior to 2006. At paragraph 26, she states that "Historical Input Screens" are accessible for a rolling 12 month period that she can access historical input screens going back a year.

25 During oral argument, Nova's counsel said that they could have Ms. Choma take screen shots back for 395 days and sit in front of a screen for 2 or 3 days "for absolutely no benefit whatsoever. It is abusive and it's a waste of time."

26 Further, Nova's counsel said that Dow has minute by minute plant data, they have reports, they know exactly what came out of E3 and they know exactly whether they got 50% percent or not. Dow does not dispute that the percentage from E3 actually allocated to Dow on a daily basis has been disclosed on the TOP 773 Reports. But, it says the percentage allocation would be more easily ascertained were the screen shot input data to be produced. Counsel for Nova states that the MIMI Input Screen is not relevant or material and that the percentage for any given day can be calculated from the stated volumes on the TOP 773 Reports.

27 I do not agree with Nova that the MIMI screen shots are not relevant and material. They are. I do agree that there is a practical difficulty in taking screen shots. In view of the difficulty and in view of the actual information produced to Dow as to their daily allocation and the ability to calculate a percentage, to require Nova to create screen shots would be abusive. Therefore, I am not going to order Nova to produce screen shots unless they intend to adduce screen shots in evidence at the trial. If so, they will be required to produce them to Dow forthwith.

28 Secondly, there will be no order to Nova to change their technology methodology in terms of ethylene allocation. Therefore, this aspect of Dow's application for further documents as they relate to MIMI and the MIMI software program is dismissed.

The Striking Application

29 Some of the submissions made by Dow and Nova in the Striking Application overlap with the First Application, in terms of content and the alleged failure of Nova to produce relevant material documents in a timely manner. The authority to strike a pleading or portions of a pleading is found in ARC 3.68(4)(b)(ii)(iii) which states as follows:

> 3.68(4) The Court may
>
> (b) strike out all or any pleadings if a party without sufficient cause does not
>
> (ii) comply with rule 5.10, or
>
> (iii) comply with an order under rule 5.11.

30 Rule 5.10 states that when a party, having served an Affidavit of Records on other parties, later discovers or obtains control of a relevant material record, it is obliged to notify the other party and serve a Supplementary Affidavit of Records. ARC 5.11 indicates that on application, the Court may order a Record to be produced, if relevant and material, if it has been omitted from an Affidavit.

31 Nova, in response to Dow's Striking Application makes the case that the parties agreed, with the Court's concurrence, that they would not file and serve formal Affidavits of Records, so that the remedy asked for by Dow under ARC 3.68(b) (ii) or (iii) cannot be granted. Nova submits that this is "not merely a technical argument". In the context of the case management of this matter, I reject the submission that it is not a technical argument. It is. That said, Nova's submissions resisting Dow's claim, discussed in more detail below, are basically that Nova has diligently complied with its duty to disclose its records and that there is sufficient cause for not disclosing relevant and materials records in a timely fashion. Thus, Nova argues the Court, acting judicially, ought not to grant the remedy. Moreover, the Court is cautioned by Nova that the striking remedy in this case is tantamount to a summary judgment and Nova cites authority for the proposition that such remedy must be granted with great care, especially in the circumstances of this case.

32 Dow has submitted that the history of this matter demonstrates unequivocally that the *only* proper remedy available to it, in light of Nova's antecedent conduct with respect to its production of relevant and material records, is the striking remedy. It follows that Dow argues there is no sufficient cause for Nova's alleged failure and Dow details Nova's failure to produce relevant and material records.

Authorities of the Parties

33 Nova has cited *Sun Life Assurance Co. of Canada v. Tom 2003-1 Ltd. Partnership No. 2*, 2010 ABQB 815 (Alta. Q.B.); *Wagner v. Petryga Estate*, 2001 ABQB 690 (Alta. Q.B.); *Harden v. Chang*, 2013 SKQB 419 (Sask. Q.B.); *Stacey v. Foy*, 2014 ABCA 394 (Alta. C.A.); *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.); *McElheran v. Canada*, 2006 ABCA 161 (Alta. C.A.); *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) [hereinafter Hryniak]; *Dow Chemical Canada Inc. v. Nova Chemicals Corp.*, 2014 ABCA 244 (Alta. C.A.); *Lay v. Lay*, 2012 ABCA 303 (Alta. C.A.).

34 Dow has also cited *Wagner*, *Sun Life*, and *Harden*. Both parties rely on ARC 3.68(4)(b), 5.10, 5.11 and 6.11(1).

35 ARC 6.11 mandates that a Court may consider certain types of evidence at an application hearing. During oral argument, the Court questioned counsel as to whether there was any dispute whatsoever about materials put before the Court for this application, including documents handed to the Court or included with their briefs, such as the Holloway expert reports which were not presented in an Affidavit. All counsel agreed that all of the materials before the Court could properly be considered to dispose of this application.

Factual Basis for the Striking Application

36 It is plain and obvious from the ordinary meaning of ARC 3.68(4)(b) that the applicant must prove that a party failed, "without sufficient cause", to do an act it is otherwise required to do. As stated earlier, getting past the "technical requirements" referred to by Nova, in the context of this matter, Nova must have failed, without sufficient cause, to disclose a relevant and material record in a timely way, or at all, or pursuant to one of the Case Management Orders of this Court.

Submission of Dow

37 Dow relies on Case Management Orders of this Court; April 26th, 2013, which states that Nova will have "completed its production in response to all outstanding document requests by May 31st, 2013"; September 26th, 2013, wherein Nova was ordered to produce documents from the files of David Tulk ("the Tulk files") and the July 15th, 2014 Order quoted above. Dow says Nova has failed to comply with these Orders. Dow also appears to complain that since on or about December 1st, 2014 Nova "has produced thousands of pages of engineering records concerning E3s maintenance, repair and operation dating all the way back to 2002". Dow says that these documents ought to have been produced long ago, that the pleadings clearly indicate that they ought to have been so produced. Dow was also adamant that the July 15th, 2014 Court Order as quoted above has been ignored and relies heavily on the December 4th and 5th, 2014 questioning of the former CEO of Nova, Woelfel.

38 Dow says that all of the above "confirm that Nova continues to fail to comply with the Court's Order".

Submission of Nova

39 Nova argues that it is largely complied with its obligations, has exercised due diligence at every turn and that to the extent there has been any failure or omission, there is sufficient cause to explain it within the meaning of ARC 3.68(4)(b). Nova argues that the Tulk Records delay in production is explained in the Affidavit of Alba Apuzzo, sworn November 24th, 2014 (the "Apuzzo Affidavit"). That Affidavit states that "some Tulk Records were misplaced as a result of Mr. Tulk leaving Nova's employment in 2009" and, that when answering undertakings Tulk identified and located Tulk records that were not previously known to Apuzzo who, as part of her responsibilities as Director, External Business Relations, Olefins & Feed Stock, has been responsible for coordinating the work of Nova personnel in the action, including record production and answers to undertakings. She also deposes that the Tulk Records in the "Litigation Hold Room" were reviewed in connection with the original production that occurred in late 2009 and that many of these records were produced. As the result of Tulk's questioning in September 2012 and the Court Order of September 26th, 2013, Apuzzo says all of the Tulk Records in the Litigation Hold Room were scanned and produced and that Nova did not know of any relevant Tulk Records other than those. Subsequently, additional Tulk Records were discovered, including electronic records discovered by Mr. Tulk, who was asked to assist in the production.

40 Ms. Apuzzo was not cross-examined on her Affidavit.

41 With respect to the MIMI data, Nova relies on the Choma Affidavit, referenced in the First Application. Ms. Choma was not cross-examined on her Affidavit which was filed in opposition to the Striking Application.

The Woelfel Questioning

42 As indicated earlier on December 4th and 5th, 2014, the former CEO of Nova, Randy Woelfel was questioned by Dow's counsel. Dow frames its argument around the Woelfel questioning in conjunction with a previous questioning of Nova's corporate representative, Flint, as well as the Affidavit of Graeme Flint ("the Flint Affidavit"), sworn November 24th, 2014 in opposition to the Striking Application. Flint was not cross examined on the Flint Affidavit. Dow frames its argument on the basis that the Flint Affidavit deposes to the R3 polyethylene production can be achieved by running E1, E2 and E3 at 105 % percent of name plate capacity. The Flint Affidavit has attached to it as Exhibit "A" an August 31st, 2011 Memorandum setting forth the analysis. Dow complains that this is revision 2 of the Memorandum and that other versions have been "withheld" from production. When Woelfel was questioned, he indicated that he and the Board had never even heard of Flint's 105% percent

theory. Dow did not include, in their written brief or their oral argument, any reference to Woelfel's testimony at pp 205-206, the following:

> Q.: So your understanding of the logic for the Nova planning of R3 and the ethylene for it was that Nova was intending to use the excess capacity at E1 and E2 with no consideration of E3 at all?
>
> A.: That's correct.

43 Dow details through the Woelfel questioning that the Nova Management Board met every two weeks, a total of approximately 100 times during Woelfel's four years as CEO in 2009 through 2014 and there were agendas, minutes and presentations, including a website kept up to date which Nova's senior management had access to. Dow has identified many records from CEO Reports to the Board, which were not produced. What Dow has not identified is whether any of these documents are relevant and material to either E3 capacity or the alleged ethane shortage.

44 I am not satisfied that Dow has satisfied the onus of showing that Nova has, without sufficient cause, withheld or failed to produce relevant material documents pertaining to these issues based on the Woelfel questioning, the Flint Affidavit or the previous questioning of Flint.

Recent E3 Ethylene Production Records - the Holloway Report

45 Dow complains that Nova continues to produce a number of documents comprising of some 4,650 pages on November 13th, 2014 and that Nova states it's still in the process of producing many more such documents which include incident reports, and operator work team weekly meeting minutes dating back to 2005 and the cracking area work team minutes between 2001 and 2005. Dow notified the Court via a letter dated December 30th, 2014 that Nova has produced 63,884 pages of Nova records since December 12th, 2014. According to Dow, most of these records are operational, with more to come. Nova's answer to this alleged late production is that it arose because of the Surrebuttal expert report delivered by Holloway on September 24th, 2014 to Nova, which provided an assessment and recalculation of E3's alleged productive capacity throughout the claim period. Part of that report contained statements in opposition to Nova's expert witnesses, documented reasons for reduced ethylene production. There is disagreement between counsel because of the failure of the Court to set a deadline for the Surrebuttal Report which was already delayed because counsel agreed to delays for the Rebuttal Reports. The Rebuttal to the Holloway Report was to be delayed to May 31st, 2014 but by agreement of counsel, this was extended to June 9th, 2014. Counsel did not agree as to when the Surrebuttal Report was to be delivered nor did the Court make an Order in that regard. Nova says it is producing relevant and material records, responding to the analysis contained in the Surrebuttal Report of Holloway and points out that had Dow had Holloway prepare a "True Report in Chief" in January 2014, or a timely Surrebuttal Report in July 2014, Nova would have been in a position to reassess relevance and materiality at an earlier date and would have proceeded with the production. Dow scoffs at this proposition and states that prudent operation goes to the issue of E3's capacity and that the documents ought to have been produced in any event.

46 Again, on this issue, I am not satisfied that Dow has made out a case to strike the pleadings of Nova as it pertains to E3 capacity. There are many facets to the production capacity of any plant. Regular maintenance, unforeseen breakdown, perhaps even operator error are among them. Dow has put prudent operation in issue through its expert reports. Nova has now focused on that issue. It may have been an oversight not to do so earlier, but the Court need not decide whether those documents ought to have been produced earlier. The ARC 5.10 recognizes that a party may find relevant and material records later, after an affidavit of records has been served. Notice and disclosure to the other party is mandated. That is what happened here. There was sufficient cause within the meaning of ARC 3.68(4) and I so find.

The Redaction Issue

47 There are previous confidentiality orders made in this action by consent. Dow and Nova are competitors. They have other competitors. When something is relevant and material in a document, there is no reason in logic or in fact why other parts

of the document are not irrelevant and immaterial. If there is no reason for the opposite party to see irrelevant and immaterial information, the Court ought not to interfere with a valid redaction. The history of redacted documents, in terms of so called national security cases in this country, especially in a judicial inquiry setting, is such that the suspicion of truth seekers is excited when any document is redacted, for example by governments. To allay that concern, the Court orders that each redacted document produced by Nova be preserved and be available in its un-redacted form and accessible to the trial judge, in the event the redacted document is tendered in evidence. The process for determining whether the redaction is legitimate or not should, in the view of this Court, follow that which would be followed by a Court reviewing a document over which privilege is claimed. In other words, the un-redacted form will be compared to the redacted document and the Court will decide if it has been properly redacted to the extent that the party opposite wishes to raise this as an issue. That said, the details of the process will be solely up to the trial judge.

Electronic Disclosures - Relevant and Material Production

48 The principle of timely and affordable access to civil justice, including proportionality, is now embodied in Canadian Law and in Alberta: *Hryniak* at paras 28-33; *CNRL* at para 5.

49 In *Marcotte c. Longueuil (Ville)*, 2009 SCC 43 (S.C.C.) at paragraph 67, Deschamps J. observed:

> What is clear from these different sources is that the purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The judge is asked to abandon the role of passive arbiter. At first glance, this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right.

50 A helpful discussion is contained in "*The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery*", October 2010, The Sedona Conference. The *Sedona Canada Commentary* sets forth a number of principles including a statement that the concept of proportionality plays an important role in ensuring a fair and just outcome. Justice is not to be denied under the guise of proportionality. Also of significance is a fundamental assumption of cooperation, communication and common sense among and between counsel (page 3). The perception of this Court is that cooperation, communication and common sense among and between counsel has not been consistently present in this case. In *Weatherill Estate v. Weatherill*, 2003 ABQB 69 (Alta. Q.B.), Slatter J. (as he then was) admonished counsel to take a pragmatic view of the scope of discovery. He suggested that rather than spend thousands of dollars on disputing whether a document ought to be produced, counsel ought to produce an arguably irrelevant document, if it cannot help or hurt his client and that "the pragmatic counsel will produce it rather than fight over it" (para 13).

51 It is the view of this Court, that this approach is highly dependent on context. In the context of that litigation, it is wise counsel. In the context of this litigation, producing irrelevant and immaterial documents, spawns a plethora of ill-advised and costly disclosure. The R3 documents appear to this Court, to be an example. Producing thousands of pages of materials that went before the Nova Board on R3 to show that none had anything to do with the capacity of E3, would be an example. What is needed is dimensional pragmatism in the context; otherwise records discovery will regress towards the pre 1999 scope or worse.

Nova's Affidavits in Opposition - The Rule in *Browne v. Dunn*

52 Nova filed three affidavits in opposition to the Striking Application on November 24th, 2014: the Choma Affidavit, the Flint Affidavit and the Apuzzo Affidavit. None of these deponents were cross-examined. But their evidence was impugned by other evidence put forward by Dow in terms of excerpts from the evidence of the prior questioning of Flint, Choma and Apuzzo, the questioning of Woelfel and the questioning of Tulk. The Court was urged on the basis of the other evidence to discount or in fact to disbelieve the evidence contained in the three affidavits, in so far as it assisted Nova's argument that there was sufficient cause for failing to make a timely production of a relevant and material record or Nova's assertion that all relevant and material records had been produced.

53 The rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.), briefly stated, concerns a party that undertakes a cross-examination, failing to put evidence to a witness that contradicts the witness' testimony. The rule later allows the Court to lessen the weight of contradictory evidence usually adduced later in the proceeding. Subsequent authority in Canada has shown that the rule is not a rule, but rather gives rise to the exercise of judicial discretion. It is a guide to fairness. It seems to this Court that the underlying concept or principle surrounding *Browne and Dunn* can be applied here. As stated earlier, the Woelfel questioning on December 4th and 5th, 2014 that seems to have given rise to the Supplementary Brief of Dow in support of its Striking Application. This is evidence led in the application after the three Nova affidavits in opposition to it were filed and left unchallenged by cross-examination. The Woelfel questioning has been used by Dow as a platform for discounting or casting doubt on the veracity of the three affidavits. The lack of cross-examination in these circumstances, coupled by the use of other evidence, namely the questioning of Woelfel and the antecedent questioning of Flint, Tulk and Choma, gives rise to the exercise of this Court's discretion to discount the evidence relied on by Dow. Dow has not proven on the balance of probabilities that Nova's pleadings ought to be struck on the grounds alleged. Therefore, I dismiss that application.

Summary and Conclusion

54 The First Application and the Striking Application are dismissed.

55 Any records disclosed and produced by either party may be questioned on, if no questioning has occurred on those records, even after the commencement of the trial on reasonable terms.

56 Nova will have its costs of these applications to be assessed on a party-and-party basis. In the event of a dispute as to costs, the parties may return to this Court for direction.

Application dismissed.

End of Document

Tab C1

PARLEE McLAWS LLP
BARRISTERS & SOLICITORS | PATENT & TRADEMARK AGENTS

January 18, 2016

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL: 780.423.8506
DIRECT FAX: 780.423.2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-7/EHM

Via email

Hutchison Law
190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3

Attention: Ms Janet Hutchison

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112

Pursuant to the Decision of the Honourable Mr. Justice D.R.G. Thomas rendered on December 17th, 2015, (Schedule "1"), it has been directed that the Sawridge First Nation provide the following:

1.(a) the names of individuals who have made applications to join Sawridge First Nation which are pending (adults who have unresolved applications to join Sawridge First Nation);

1.(b) the names of individuals who have had applications to join Sawridge First Nation rejected and are subject to challenge (adults who have applied for membership in Sawridge First Nation but have had that application rejected and are challenging that rejection by appeal or judicial review); and

2. The contact information for those individuals where available. (Paragraph 56 and 57 of the Reasons for Judgment).

In response to this Direction, we attach as Schedule "2" the names of the adult individuals who Sawridge First Nation advise have made application to join Sawridge First Nation and said applications are pending (adults who have unresolved applications to join Sawridge First Nation) with their contact information (address and phone number).

In relation to individuals who have had applications to join Sawridge First Nation rejected, Sawridge First Nation advises that the last application for membership in Sawridge First Nation that was denied occurred on December 9th, 2013 and there was no appeal in relation to that Decision.

Sawridge First Nation Membership Rules provide that when a Membership Application has been denied, an appeal of such decision to the electors of the Band must be initiated by delivering

Notice in writing to the Band Council at the office of the Band within 15 days after communication to him or her of the Decision of the Band Council.

Sawridge First Nation advises that there are no appeals with respect to denial of Membership outstanding at this time.

Sawridge First Nation also advises that there are no outstanding applications for Judicial Review of denial of any application for membership decided by the Electors of the Sawridge First Nation at this time.

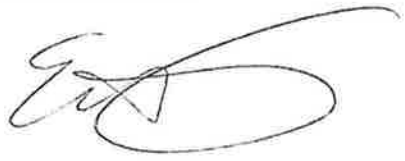
Although the Reasons for Judgment of The Honourable Mr. Justice D.R.G. Thomas did not specifically deal with this matter, Sawridge First Nation has interpreted the spirit of this decision to include the obligation on the part of Sawridge First Nation to provide the names of the adult parents of any minor who has made application for Membership and their application is outstanding.

In this regard, we attach as Schedule "3" a list of the adult parents who have made application for their minor children for Membership in the Sawridge First Nation with the contact information (address and phone number) of the parent.

We are not including the enclosures with the copies of this letter sent to all other counsel in order to maintain confidentiality.

Yours truly,

PARLEE McLAWS LLP



EDWARD H. MOLSTAD, Q.C.

EHM/tlk
Encl.

Tab C2

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
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 (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
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

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

Tab C3

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
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 (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
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD on advice and direction in the 1985 trust**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Attention: Doris C.E. Bonora Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

AFFIDAVIT OF PAUL BUJOLD

Sworn on September 12, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985

Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 Trust"), and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit in support of an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

Issues for this Application

3. At present, there are five trustees of the 1985 Trust: Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland C. Twinn and Walter Felix Twin (hereinafter referred to as the "Trustees").

4. The Trustees would like to make distributions for the benefit of the beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees:

   a. Regarding the definition of "Beneficiaries" contained in the 1985 Trust.

   b. Regarding the transfer of assets into the 1985 Trust.

5. Accordingly, the Trustees seek the opinion, advice and direction of the Court in regard to these matters.

Background

6. In 1966, Chief Walter Patrick Twinn (hereinafter referred to as "Chief Walter Twinn") became the Chief of the Sawridge Band No. 454, now known as Sawridge First Nation (hereinafter referred to as the "Sawridge First Nation" or the "Nation"), and remained the Chief until his death on October 30, 1997.

7. I am advised by Ronald Ewoniak, CA, retired engagement partner on behalf of Deloitte & Touche LLP to the Sawridge Trusts, Companies and First Nation, and do verily believe, that Chief Walter Twinn believed that the lives of the members of the Sawridge First Nation could be improved by creating businesses that gave rise to employment opportunities. Chief Walter Twinn believed that investing a portion of the oil and gas royalties received by the Nation would stimulate economic development and create an avenue for self-sufficiency, self-assurance, confidence and financial independence for the members of the Nation.

8. I am advised by Ronald Ewoniak, CA, and do verily believe, that in the early 1970s the Sawridge First Nation began investing some of its oil and gas royalties in land, hotels and other business assets. At the time, it was unclear whether the Nation had statutory ownership powers, and accordingly assets acquired by the Nation were registered to the names of individuals who would hold the property in trust. By 1982, Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennell held a number of assets in trust for the Sawridge First Nation.

Creation of the 1982 Trust

9. I am advised by Ronald Ewoniak, CA, and do verily believe, that in 1982 the Sawridge First Nation decided to establish a formal trust in respect of the property then held in trust by individuals on behalf of the present and future members of the Nation. The establishment of the formal trust would enable the Nation to provide long-term benefits to the members and their descendents. On April 15, 1982, a declaration of trust establishing the Sawridge Band Trust (hereinafter referred to as the "1982 Trust") was executed. Attached as **Exhibit "A"** to my Affidavit is a copy of the 1982 Trust.

10. In June, 1982, at a meeting of the trustees and the settlor of the 1982 Trust, it was resolved that the necessary documentation be prepared to transfer all property held by Chief Walter Twinn, George Vital Twin and Walter Felix Twin, in trust for the present

and future members of the Nation, to the 1982 Trust. Attached as **Exhibit "B"** to my Affidavit is a copy of the resolution passed at the said meeting dated June, 1982.

11. The 1982 Trust was varied by a Court Order entered on June 17, 2003, whereby paragraph 5 of the 1982 Trust was amended to provide for staggered terms for the trustees. Attached as **Exhibit "C"** to my Affidavit is a copy of the Court Order entered on June 17, 2003 varying the 1982 Trust.

12. On December 19, 1983, a number of properties and shares in various companies which had been held by Chief Walter Twinn, Walter Felix Twin, Samuel Gilbert Twin and David Fennell in trust for the present and future members of the Nation were transferred into the 1982 Trust. Attached as **Exhibit "D"** to my Affidavit is an agreement dated December 19, 1983, transferring certain assets into the 1982 Trust. Attached as **Exhibit "E"** to my Affidavit is a transfer agreement dated December 19, 1983 transferring certain assets from the 1982 Trust to Sawridge Holdings Ltd.

Changes in Legislation – The *Charter of Rights and Freedoms* and *Bill C-31*

13. On April 17, 1982, the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*"), came into force. Section 15 of the *Charter* did not have effect, however, until April 17, 1985, to enable provincial and federal legislation to be brought into compliance with it.

14. After the *Charter* came into force, the federal government began the process of amending the *Indian Act*, R.S.C. 1970, c. I-6 (hereinafter referred to as the "1970 *Indian Act*"). Following the federal election in 1984, the government introduced *Bill C-31*, a copy of which is attached as **Exhibit "F"** to my Affidavit. *Bill C-31* was introduced to address concerns that certain provisions of the 1970 *Indian Act* relating to membership were discriminatory.

15. It was expected that *Bill C-31* would result in an increase in the number of individuals included on the membership list of the Sawridge First Nation. This led the Nation to settle a new trust, the 1985 Trust, within which assets would be preserved for the Band members as defined by the legislation prior to *Bill C-31*.

Creation of the 1985 Trust

16. Attached as **Exhibit "G"** to my Affidavit is a copy of the 1985 Trust dated April 15, 1985.

17. The 1985 Trust provides that the "Beneficiaries" are:

> "Beneficiaries at any particular time shall mean 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 the 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 purposes of this Settlement."

18. The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*.

19. Attached as **Exhibit "H"** to my Affidavit is a copy of a Resolution of Trustees dated April 15, 1985, whereby the trustees of the 1982 Trust resolved to transfer all of the assets of the 1982 Trust to the 1985 Trust.

20. On April 15, 1985, the Sawridge First Nation approved and ratified the transfer of the assets from the 1982 Trust to the 1985 Trust. Attached as **Exhibit "I"** to my Affidavit is a Sawridge Band Resolution dated April 15, 1985 to this effect.

21. On April 16, 1985 the trustees of the 1982 Trust and the trustees of the 1985 Trust declared:

    a. that the trustees of the 1985 Trust would hold and continue to hold legal title to the assets described in Schedule "A" of that Declaration; and

    b. that the trustees of the 1985 Trust had assigned and released to them any and all interest in the Promissory Notes attached as Schedule "B" of that Declaration.

    Attached as **Exhibit "J"** to this my Affidavit is the Declaration of Trust made April 16, 1985.

22. Based upon my review of the exhibits attached to this my affidavit and upon the knowledge I have acquired as Chief Executive Officer of the Sawridge Trusts, I believe that all of the property from the 1982 Trust was transferred to the 1985 Trust. Further, there was additional property transferred into the 1985 Trust by the Sawridge First Nation or individuals holding property in trust for the Nation and its members.

23. The transfers were carried out by the trustees of the 1982 Trust under the guidance of accountants and lawyers. The Trustees have been unable to locate all of the necessary documentation in relation to the transfer of the assets from the 1982 Trust to the 1985 Trust or in relation to the transfer of assets from individuals or the Nation to the 1985 Trust.

24. It is clear that the transfers were done but the documentation is not currently available. The Trustees have been operating on the assumption that they were properly guided by their advisors and the asset transfer to the 1985 Trust was done properly.

25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.

26. The 1985 Trust is the sole shareholder of Sawridge Holdings Ltd. I am advised by Ralph Peterson, Chairman of the Board of Directors of the Sawridge Group of Companies, and do verily believe that an approximate value of the 1985 Trust investment in Sawridge Holdings Ltd. as at December 31, 2010 is $68,506,815. This represents an approximate value of the net assets of Sawridge Holdings Ltd., assuming all assets could be disposed of at their recorded net book value and all liabilities are settled at the recorded values as at that date, with no consideration for the income tax effect of any disposal transactions.

27. Taking into account the other assets and liabilities of the 1985 Trust, the approximate value of the net assets of the 1985 Trust as at December 31, 2010 is $70,263,960.

28. To unravel the assets of the 1985 Trust after 26 years would create enormous costs and would likely destroy the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with a reversal of the transfer of assets.

Creation of the 1986 Trust

29. Attached to my affidavit as **Exhibit "K"** is a copy of the 1986 Trust dated August 15, 1986. The beneficiaries of the 1986 Trust included all members of the Sawridge First Nation in the post-*Bill C-31* era.

Tab C4

March 10, 2016

GABRIEL JOSHEE-ARNAL
DIRECT DIAL: 780 423 8573
DIRECT FAX: 780 423 2870
EMAIL: gjoshee-arnal@parlee.com
OUR FILE #: 64203-7/EDM

Via email

Hutchison Law
190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3

Attention: Janet Hutchison

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112

I am assisting Mr. Molstad with the above matter. Further to the Notices of Application that were provided on January 29, 2016, please find below the Sawridge's First Nation's ("Sawridge") position regarding the substance of those Applications.

A. Records Related to the Identification of Minors

In Justice Thomas' reasons in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799, he affirmed that Sawridge was required to provide you with the following information by January 29, 2016:

1. The names of individuals who have:
    a. made applications to join the SFN which are pending; and
    b. had applications to join the SFN rejected and are subject to challenge; and
2. The contact information for those individuals where available. (*Paragraph 57*)

The above information was provided to you via letter dated January 18, 2016. As part of that letter, Sawridge provided a table containing a list of all of the adult individuals who had applied to join Sawridge, but whose applications were still pending. Sawridge also provided a list of all of the adult parents who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge in accordance with the relevant limitations period under the Sawridge Constitution and its laws.

Justice Thomas indicated in his reasons that the information provided by Sawridge should allow for the following:

1. permit the Public Trustee to know the number and identity of the minors whom it represents and additional minors who may in the future enter into category 2 [i.e., children of Sawridge members] and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

    a. the maximum potential number of recipients of the 1985 Sawridge Trust distribution;

    b. the number of adults and minors whose potential participation in the distribution has "crystalized"; and

    c. the number of adults and minors who are potential members of categories 1 [i.e., adult members of Sawridge] and 2 at some time in the future. (*Paragraph 59*)

In your Notice of Application, you have requested, "all documents in the possession of [Sawridge] that may assist in identifying current and possible minors who are children of members of [Sawridge]."

It is Sawridge's position that it has provided the Public Trustee with all of the information that it is required to pursuant to Justice Thomas' decision, and that it is not required to provide any additional records to the Public Trustee. The information provided by Sawridge clearly allows the Public Trustee to determine the number and identity of all of the minors who it represents and who it may represent. Furthermore, the information provided on January 18, 2016, as well as the other information previously provided by the 1985 Sawridge Trust Trustees, would allow for the timely identification of the above-listed adults and minors.

Additionally, Sawridge takes issue with the manner in which you have framed your request for records. Specifically, your request fails to delineate what records you are seeking. Case law interpreting Rule 5.13 is clear that as an applicant, the Public Trustee is required to clearly identify the records it is seeking from Sawridge, and must establish that Sawridge has said records in its possession. Those records must accordingly be described with some level of precision (see e.g., *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB)). In light of the fact that your request for documents from Sawridge fails to clearly identify what is being sought, it is Sawridge's position that it is under no obligation to disclose any further records pursuant to Rule 5.13.

B. Records Related to the Settlement of Assets to the Trust

In his decision, Justice Thomas affirmed that the Public Trustee was entitled to serve Sawridge with an application for documents, "which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust." (*Paragraph 46*)

In order to understand what is "relevant and material" to this request, it is important to look back at the Order obtained by the 1985 Sawridge Trust Trustees on August 31, 2011, which defines the scope of the advice and direction being sought from the Court. That Order notes at Paragraph

1(b) that one of the purposes of this Action is to seek direction, "with respect to the transfer of assets to the 1985 Sawridge Trust." The Order does not indicate that the 1985 Sawridge Trust Trustees are seeking any kind of accounting of the assets in the 1985 Sawridge Trust, or that any tracing-related remedy is being sought. Rather, the focus of this request for direction was the transfer of the assets, and not the assets themselves. Additionally, at Paragraph 25 of the Affidavit of Paul Bujold, sworn on September 12, 2011, he notes the following:

> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.

In light of the above, it is Sawridge's position that the only records that are relevant and material to the issue of the settlement of the assets in the 1985 Sawridge Trust are records concerning the transfer of the assets from the 1982 Sawridge Trust to the 1985 Sawridge Trust in April of 1985.

With regards to the specific requests for records outlined in Paragraph 1 of your Notice of Application, Sawridge's position is as follows:

> Paragraph 1(a): The records that you have requested are irrelevant. The requests for records regarding the ownership of property dating back to the 1970s (i.e., prior to the inception of the 1985 Sawridge Trust) are not relevant to the issue of the transfer of the assets to that trust in April of 1985.
>
> Paragraph 1(b): The records that you have requested concerning the assets settled in the 1982 Sawridge Trust are irrelevant to the issue of seeking direction regarding the transfer that occurred to the 1985 Sawridge Trust. As noted above, the focus of this Action is not to provide an accounting of all of the assets in the 1985 Sawridge Trust, but rather to seek direction regarding the transfer of the assets to that trust.
>
> Paragraph 1(c): Sawridge has reviewed its records, and has advised that it has not located any other records in its possession concerning the April 15, 1985 meeting.
>
> Paragraph 1(d): Much like the first two requests for records, this request concerns records that are unrelated to the transfer of assets into the 1985 Sawridge Trust in April of 1985. As such, it is Sawridge's position that any documents concerning assets added to the 1985 Sawridge Trust after April of 1985 would be irrelevant.
>
> Paragraph 1(e): The records that you have requested concerning the note in the 1984 financial statements are irrelevant to the issue of the transfer of the assets into the 1985 Sawridge Trust. That note concerns a transfer that took place in 1983, and is thus irrelevant to the transfer into the 1985 Sawridge Trust.
>
> Paragraph 1(f): Sawridge takes the position that the records concerning the transfer that occurred on December 17, 1983 are irrelevant to the issue of the transfer to the 1985 Sawridge Trust.

Paragraph 1(g): Sawridge takes the position that the records that you have requested concerning note 7 in the Sawridge Trust's financial statement from December 31, 1986 are irrelevant to the issue of the transfer that occurred in April of 1985.

Paragraph 1(h): Sawridge takes the position that the records that you have requested concerning the promissory notes or the 1985 Demand Debentures are irrelevant to the issue of the transfer that occurred in April of 1985.

Paragraph 1(i): In light of the fact that you have not provided any evidence in support of this request, Sawridge takes the position that it is not required to provide any such records pursuant to Rule 5.13. Sawridge is prepared to reconsider its position should you provide some evidentiary basis for your request.

Paragraph 1(j): It is Sawridge's position that any records regarding the "intention" to transfer assets to the 1985 Sawridge Trust are irrelevant to the issue of the transfer itself.

C. Conclusion

In light of the above, could you please advise in writing if you will be withdrawing your Applications against Sawridge? If you do not withdraw your Applications, we will be following the direction of Justice Thomas and will be submitting written submissions.

I look forward to your reply.

Yours truly,

PARLEE McLAWS LLP

GABRIEL JOSHEE-ARNAL

GJA/

Cc: Edward H. Molstad, Q.C.
Cc: Reynolds Mirth Richards & Farmer LLP – Attn: Mr. Marco Poretti
Cc: Dentons LLP – Attn: Ms Doris Bonora
Cc: Bryan & Company – Attn: Ms Nancy Cumming, Q.C.
Cc: McLenna Ross LLP – Attn: Ms Karen Platten, Q.C.
Cc: Supreme Advocacy LLP - Mr. Eugene Meehan, Q.C.