

COURT OF APPEAL OF ALBERTA

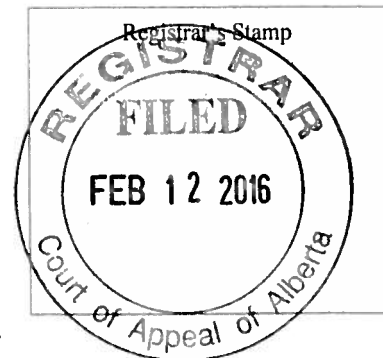
COURT OF APPEAL FILE NUMBER: 1603-0029AC

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

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

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



APPLICANT: PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Appellant

STATUS ON APPLICATION: Applicant

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

STATUS ON APPEAL: Respondents

STATUS ON APPLICATION: Respondents

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

STATUS ON APPEAL: Respondent

STATUS ON APPLICATION: Respondent

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

STATUS ON APPEAL: Respondent

STATUS ON APPLICATION: Respondent

DOCUMENT

MEMORANDUM OF ARGUMENT OF CATHERINE TWINN, TRUSTEE
OF THE 1985 TRUST

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

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and

CONTACT INFORMATION OF ALL OTHER PARTIES:

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Bryan & Company Suite 2600 Manulife Place 10180-101 Street Edmonton, Alberta T5J 3Y2 Attention: Nancy Cumming, Q.C. Solicitor for the Sawridge Trustees Phone: 780-420-4733 Fax: 780-428-6324 Email: necumming@bryanco.com	Hutchinson Law #190 Broadway Business Square 130 Broadway Boulevard Sherwood Park, Alberta T8H 2A3 Attention: Janet L. Hutchison Counsel for the Public Trustee of Alberta Phone: 780-417-7871 Fax: 780-417-7872 Email: jhutchison@jlhlaw.ca
Parlee McLaws Suite 1500 Manulife Place 10180-101 Street Edmonton, Alberta T5J 3W8 Attention: Edward Molstad, Q.C. Solicitor for the Sawridge First Nation Phone: 780-423-8500 Fax: 780-423-2870 Email: emolstad@parlee.com	DLA Piper 1201 Scotia Tower 2 10060 Jasper Avenue Edmonton, Alberta T5J 4E5 Attention: Priscilla Kennedy Solicitor for June Kolosky and Aline Huzar Phone: 780-426-5330 Fax: 780-428-1066 Email: Priscilla.kennedy@dlapiper.ca

PART 1 INTRODUCTION

1. McLennan Ross LLP acts on behalf of Catherine Twinn in her capacity as a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the “1985 Trust”).
2. While Dentons LLP and Reynolds Mirth Richards & Farmer LLP, represent the collective group of the trustees of the Trusts, our client has found it necessary to retain independent representation as her instructions and concerns as a trustee of the Trusts were not and are not being represented by these firms due to her views representing the minority position amongst the trustees.
3. Ms. Twinn has also filed an appeal of the December 17, 2015 Judgment of Justice D.R. Thomas (the “Judgment Under Appeal”) issued in Court of Queen’s Bench Action No. 1103 14112 (the “Action”) in Court of Appeal File Number 1603-0026AC. Ms. Twinn’s appeal has been informally consolidated with the appeal of the Office of the Public Trustee of Alberta (“OPGT”) in Court of Appeal File Number 1603-0029AC.

Appeal of Catherine Twinn, in her capacity
as a Trustee of the 1985 Sawridge Trust,
filed January 15, 2016 [TAB 1].

PART 2 SUBMISSIONS

4. Ms. Twinn supports the position taken by the OPGT in regards to the need for a stay of the Judgment Under Appeal pending the outcome of the appeal.
5. The Judgment Under Appeal orders the distribution of the assets of the 1985 Trust, subject to a scheme of distribution to be approved at a later date, and defines who the recipients will be (i.e. beneficiaries) of that distribution. These issues were not before the Court on the subject application by the OPGT.

1985 Sawridge Trust v. Alberta (Public Trustee), 2015 ABQB 799 at paras. 40, 56 and 62-65 [TAB 5 of the Memorandum of

Argument of the Public Trustee of Alberta
filed February 8, 2016].

6. Ms. Twinn submits, in addition to affected minors, the outcome of the Judgment Under Appeal has potentially life changing consequences for any individuals who have lost their beneficiary status under the 1985 Trust as a result of the change in definition of “beneficiary” that was directed in the Judgment Under Appeal without notice that this issue was under consideration on the application.
7. Ms. Twinn submits that this lack of procedural fairness and breach of natural justice constitutes irreparable harm.

Waldner v. Ponderosa Hutterian Brethren,
[2003] A.J. No. 1503 (C.A.) [TAB 13 of the
Memorandum of Argument of the Public
Trustee of Alberta filed February 8, 2016].

8. In addition to the effect on adult beneficiaries’ entitlement to share in the distribution of the 1985 Trust assets, the Judgment Under Appeal also affects the trustees’ ability to meet their fiduciary obligations.
9. While the Judgment Under Appeal had the effect of modifying the role of the OPGT in the Action without notice to the OPGT that this was under consideration, the Judgment Under Appeal also had the effect of modifying the role of the trustees of the 1985 Trust without notice.
10. The Judgement Under Appeal provides that the trustees of the 1985 Trust are prohibited from engaging in collateral attacks on the SFN membership processes.

*1985 Sawridge Trust v. Alberta (Public
Trustee)*, 2015 ABQB 799 at para. 69 [TAB
5 of the Memorandum of Argument of the
Public Trustee of Alberta filed February 8,
2016].

11. A fundamental duty of a trustee is to ascertain the beneficiaries of the trust. Failing in this duty would cause the trustees to be unable to distribute the trust property or alternatively cause the trustees to distribute the trust property incorrectly.
12. If the trustees are prohibited from reviewing the Sawridge First Nation ("Sawridge First Nation") membership process, this will impact their ability to ensure that the beneficiaries of the 1985 have been properly ascertained.
13. This may result in the trustees not being able to fulfill their fiduciary obligations to the beneficiaries of the 1985 Trust and thus create irreparable harm.
14. This is especially concerning given certain trustees hold both the role of trustee and elected SFN official, such as Chief of the SFN.

1985 Sawridge Trust v. Alberta (Public Trustee), 2015 ABQB 799 at para. 8 [TAB 5 of the Memorandum of Argument of the Public Trustee of Alberta filed February 8, 2016].

PART 3 CONCLUSION

15. Ms. Twinn requests that the OPGT's application for a stay of the Judgment Under Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 12th day of February, 2016.

MCLENNAN ROSS LLP

Per:



Karen Platten, Q.C.

Solicitor for Catherine Twinn
1985 Trust

Estimation of time for Oral Argument: 5 minutes

COURT OF APPEAL OF ALBERTA

Form AP-1
[Rules 14.8 and 14.12]

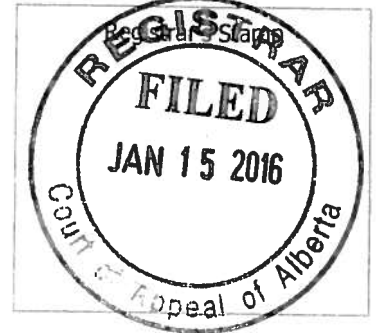
COURT OF APPEAL FILE NUMBER: 1603-0026AC

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



APPLICANT: PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Respondent

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

STATUS ON APPEAL Respondents

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

STATUS ON APPEAL Respondent

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

STATUS ON APPEAL: Appellant

DOCUMENT **CIVIL NOTICE OF
APPEAL**

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File No.: 144194

WARNING

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

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

Date pronounced: December 17, 2015

Date entered: December 17, 2015

Date served: December 17, 2015

Official neutral citation of reasons for decision, if any: 2015 ABQB 799

2. Indicate where the matter originated:

☒ **Court of Queen's Bench**

Judicial Centre: Edmonton

Justice: D.R.G. Thomas

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

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

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

☐ **Board, Tribunal or Professional Discipline Body**

Specify Body: _____

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

☒ Permission not required, or ☐ Granted:

Date: _____

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

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

☒ Whole, or

☐ Only specific parts (if specific part, indicate which part):

(Where parts only of a family law order are appealed, describe the issues being appealed, e.g. property, child support, parenting, etc.).

5. Provide a brief description of the issues:

Case Management Order resulting from an application by the Office of the Public Trustee for document production. In addition to direction on production issues, the Order provides direction on the variation of a private trust, identification of beneficiaries under the directed variation and direction for the distribution of the trust assets.

The Case Management Judge made errors in law, palpable and overriding errors in fact and/or unreasonably exercised their discretion in regards to the following matters:

1. Overreaching their jurisdiction by directly or indirectly granting final relief on matters which were not before the Court, particulars of which include;
 - a. Variation of the beneficiary definition in the 1985 Trust;
 - b. Directing a distribution of the 1985 Trust;
 - c. Such further and other particulars as shall be submitted.
2. Failing to provide procedural fairness, particulars of which include;
 - a. Ensuring proper service on beneficiaries affected by the variation in beneficiary designation;
 - b. Failing to provide notice to the parties of the matters to be adjudicated;
 - c. Failure to provide the opportunity for the parties to make submissions on the matters to be adjudicated;
 - d. Failure to provide reasons for the variation in beneficiary designation;
 - e. Such further and other particulars as shall be submitted.
3. Failing to consider and properly apply the legal requirements for variation of trust, including requirements of Section 42 of the *Trustee Act*, RSA 2000, c. T-8.
4. Failing to appropriately consider the evidence and apply the case law before the Court in regards to the Sawridge First Nation membership process.
5. Such further and other matters as shall be raised at the hearing of this appeal.

6. Provide a brief description of the relief claimed:

Set aside Case Management Order with full solicitor/client costs to be awarded to the Appellant from the 1985 Trust assets on a solicitor/client basis.

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

☐ Yes ☒ No

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

☐ Yes ☒ No

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

☐ Yes ☒ No

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

☐ Yes ☒ No

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

☐ Yes ☒ No

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

☐ Yes ☒ No

If yes, provide details: _____
(Attach a copy of any order.)

13. List Respondent or counsel for the Respondent, with contact information:

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14. Attachments (check as applicable)

☒ Order or judgment under appeal if available (not reasons for decision) (Rule 14.12(3))
Not yet available, will provide when available

☐ Earlier order of Master, etc. (Rule 14.18(1)(c))

☐ Order granting permission to appeal (Rule 14.12(3)(a))

☐ Copy of any restricted access order (Rule 14.12(2)(e))

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

THE HONOURABLE MR. JUSTICE
DENNIS R. THOMAS



THE LAW COURTS
EDMONTON, ALBERTA
T5J 0R2
TEL: (780) 422-2200
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COURT OF QUEEN'S BENCH OF ALBERTA

December 17, 2015

SENT VIA E-MAIL

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Dear Counsel:

Re: 1985 Sawridge Trust v Alberta (Public Trustee)
Action No. 1103 14112

Enclosed please find a copy of a decision on the Public Trustee's production application which was filed today.

Yours truly,

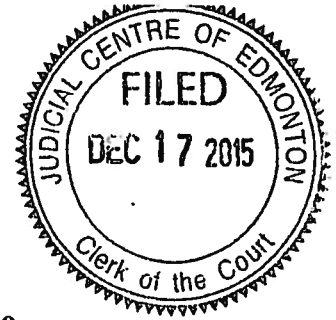
A handwritten signature in black ink, appearing to read 'D.R.G. Thomas'.

D.R.G. Thomas

/ds

Attach. Reasons for Judgment, 2015 ABQB 799

cc J. Kueber, QC, Bryan and Co. (via e-mail)
Karen Platten, QC, McLennan Ross LLP (via e-mail)



Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees Act*, RSA 2000, c T-8, as amended; and

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

Between:

**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

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

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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 v Alberta (Public Trustee)*, 2012 ABQB 365 [“*Sawridge #1*”], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 [“*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 AR 371; *Wasylyshen v Canadian Broadcasting Corp.*, [2006] AJ No 1169 (Alta QB).

[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 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (*Gainers Inc. v Pocklington Holdings Inc.* (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v Stearns Catalytic Ltd.* (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[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 AR 180.

[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 at paras 97, 123 OR (3d) 401; *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: *Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems*, 2008 SCC 8, [2008] 1 SCR 157. 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 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v Canada*, [2000] FCJ No 873 at para 5, 258 NR 246. 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 AR 172; *H.Z. v Unger*, 2013 ABQB 639, 573 AR 391. 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: *Royal Bank of Canada v Kaddoura*, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[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 DLR (4th) 56, 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, 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 Twinn*, 2013 FC 910, 438 FTR 264, "[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 and 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

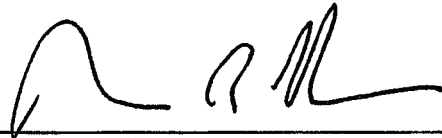
[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership 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.

Heard on the 2nd and 3rd days of September, 2015.

Dated at the City of Edmonton, Alberta this 17th day of December, 2015.



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

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February 12, 2016

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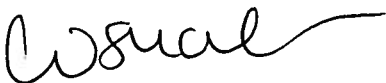
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**Re: Memorandum of Argument of Catherine Twinn, Trustee of the 1985 Trust
Filed February 12, 2016
Court of Appeal File Number: 1603-0029AC
Trial Court File Number: 1103 14112**

Please find enclosed for service upon you our client's filed Memorandum of Argument.

Should you have any questions, please contact the writer.

Yours truly,

A handwritten signature in black ink, appearing to read "Crista Osualdini", with a long, sweeping horizontal line extending to the right.

CRISTA OSUALDINI

CCO/pmd

Encl.

cc. client

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