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Our File: 51433 JLH

**DELIVERED BY COURIER**

September 25, 2015

Reynolds Mirth Richards & Farmer LLP  
Suite 3200 Manulife Place  
10180 - 101 Street  
Edmonton, Alberta T5J 3W8

**Attention: Marco Poretti**

Bryan & Company  
2600 Manulife Place  
10180 - 101 Street  
Edmonton, Alberta T5J 3Y2

**Attention: Nancy Cumming, Q.C.**

Parlee McLaws  
Suite 1500 Manulife Place  
10180 - 101 Street  
Edmonton, Alberta T5J 3W8

**Attention: Edward Molstad, Q.C.**

Dentons LLP  
Suite 2900 Manulife Place  
10180 - 101 Street  
Edmonton, Alberta T5J 3W8

**Attention: Doris Bonora**

McLennan Ross LLP  
600 McLennan Ross Building  
12220 Stony Plain Road  
Edmonton, Alberta T5N 3Y4

**Attention: Karen Platten, Q.C.**

DLA Piper  
1201 Scotia Tower 2  
10060 Jasper Avenue  
Edmonton, Alberta T5J 4E5

**Attention: Priscilla Kennedy**

Dear Sirs and Mesdames:

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

Please find enclosed for service upon you the Public Trustee's letter to the Court on Costs filed in response to the September 18, 2015 submission filed by the Sawridge Trustees.

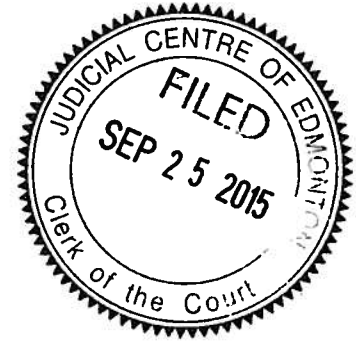
**September 25, 2015**

Court of Queen's Bench of Alberta  
6<sup>th</sup> Floor Law Courts Building  
1A Sir Winston Churchill Square  
Edmonton, Alberta T5J 0R2

Attention: The Honourable Mr. Justice D.R.G. Thomas

Your Honour:

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



**1. List of what has been sent/handed to Your Lordship re Costs:**

- Letter to *Dentons* from Public Trustee, August 29, 2015 (attached to letter to Your Lordship, September 2, 2015, Tab F)
- Letter to Public Trustee from *Dentons*, September 1, 2015 (signed by and on behalf of *Dentons*, and also additionally signed on behalf of *Reynolds Mirth*)
- Letter to Your Lordship from the Public Trustee, September 2, 2015.
- An unredacted copy of the Hutchison Law July 30, 2015 account (attaching unredacted copies of the *Supreme Advocacy* invoices included in the July 30, 2015 account).
- Letter to Your Lordship from *Dentons*, September 18, 2015 (signed by and on behalf of *Dentons*, and also additionally signed on behalf of *Reynolds Mirth*)

**2. No Repetition Herein**

The Public Trustee handed up a letter to Your Lordship on September 3, 2015 (letter dated September 2, 2015).

This Reply will not repeat anything therein; only reply to the 104-page Response filed by *Dentons* and *Reynolds Mirth* on behalf of the Trustees.

### 3. Deciding Both Issues Now

The Trustees requested further information regarding the Public Trustee's accounts. The Public Trustee complied with the Trustees' request to the extent privilege would allow them.

The Public Trustee's letter of September 2, 2015 sought payment of the July 30, 2015 account. The Trustees appear to be seeking a determination solely on the release of the additional [privileged] information they say is required to evaluate the accounts. The Trustees appear to suggest that reasonableness of the July 30, 2015 account (and thus payment) should be dealt with at a later date.

At issue is

- (1) the amount of detail the Public Trustee is required to disclose regarding its legal accounts; and
- (2) whether those accounts are reasonable.

With the unredacted accounts handed up to the Court, Your Lordship now has sufficient information to decide both issues. It is not an efficient use of this Court's, or the parties', time and resources to further bifurcate this process. Deciding both issues at this stage will avoid further delay – the account in question has been outstanding for approximately 2 months and bills for work done up to 4 months ago.

Undue delay in payment of the Public Trustee's accounts is inconsistent with the Court order for "full and advance" indemnification.<sup>1</sup> As discussed further, below, it is also inconsistent with the Court of Appeal's findings that in order to protect the interests of the affected minors it was "necessary to secure the costs in such a fashion to secure the requisite independent representation of the Public Trustee."<sup>2</sup>

### 4. Issue 1: Accounts are Privileged

The Trustees requested further information regarding the Public Trustee's accounts. The Public Trustee complied with Trustees request to the extent privilege would allow them by providing redacted accounts and a detailed description of work done in the account cover letter. At issue is the amount of detail the Public Trustee is required to disclose regarding its legal accounts.

The Trustees begin with the proposition that a lawyer's bills are presumptively subject to solicitor-client privilege, but then argue they have rebutted this presumption citing part of the test in *Kaiser (Re)*, 2012 ONCA 838. The full test at para. 30 reads as follows:

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<sup>1</sup> Court of Queen's Bench, Reasons for Decision, June 12, 2012, para.42. [Tab 4, Public Trustee's Brief date June 12, 2015]

<sup>2</sup> Court of Appeal, June 19, 2013, Memorandum of Judgment para. 28. [Tab 5, Public Trustee's Brief date June 12, 2015]

...The presumption may be rebutted by evidence showing (a) that there is no reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications...; or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client....

The Court in *Kaiser (Re)* went on to find that motion judge erred in finding that the presumption had been rebutted in that case:

- “he took too narrow a view both of the potential prejudice and the impact of disclosure on Mr. Kaiser’s right to confidentiality”; (para. 33)
- he failed “to take into account the overall context of the dispute between the trustee and Mr. Kaiser”; and (para. 35)
- “the information sought to be disclosed impacts directly on the merits of the overall dispute and its revelation might well be prejudicial to Mr. Kaiser in that overall context.” (para. 37)

Similarly, in the present case, the presumption cannot be rebutted based on the *Maranda* criteria because its disclosure would reveal confidential communications between the Public Trustee and its counsel. There are ongoing disputes in this matter which has numerous parties and issues at play. To order disclosure of accounts regarding those issues would be to take too narrow a view of the potential prejudice and the impact of disclosure on the Public Trustee’s right to confidentiality and privilege.

The Trustees also referred to *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 CanLII 6045 (ON CA) at para. 12. The Court in that case adopted the test set out in *Legal Services Society v. Information and Privacy Commissioner of British Columbia (2003)*, 2003 BCCA 278:

If there is a reasonable possibility that the assiduous inquirer . . . could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfied the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. . .

Given the status of the present proceedings and the issues that remain to be resolved, an assiduous inquirer could certainly infer from the accounts something of the confidential communications that are essential during litigation. Such disclosure could put in jeopardy, or at minimum detract from the effectiveness of, the independent representation by the Public Trustee which the advance costs award was intended to secure.<sup>3</sup>

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<sup>3</sup> Court of Appeal, Memorandum of Judgment, June 19, 2013, para. 27-28. [Tab 5, Public Trustee’s Brief date June 12, 2015]

## 5. Issue 2: Reasonable Accounts

The Public Trustee's accounts are reasonable. The amounts being challenged relate to a period when both firms were engaged in extensive work preparing affidavits, written submissions and preparing for complex special chambers appearances.

The Trustees' references to only two applications being filed does not fairly recognize the scope of the two applications in question. The relief sought within each application was diverse with multiple orders. The Production applications and the Settlement application (which at the time the July account was issued were all proceeding on a contested basis) were particularly involved and complex.

The accounts are reasonable in light of:

- the skill, work and responsibility involved;
- the complexity and difficulty of the matter;
- the nature, importance and urgency of the matter;
- the monetary value at stake;
- the time and effort required and spent; and
- a holistic balancing.

A few comments on some of these factors.

### a. **Skill & Complexity**

This is a complex multi-party, multi-lawyer, multi-law firm piece of litigation. In approximately April 2015, a dramatic spike in activity began on the file (as compared to the previous year and a half). At that time, the Trustees were intent on reaching a final hearing by January 2016 and time pressures became significant. The issues being raised by the Trustees, and indeed the Public Trustee, became more involved and complex as the parties turned their sights towards a final order (in the Settlement Application). Some of the complexity was evidenced by the volume of material filed for the September 2 and 3 hearings.

The September 2 and 3 hearing took almost two days to deal with only one of the applications. Had the Settlement Application proceeded the hearing likely would have taken even longer.

Many *trials* have less materials, less filings, less lawyers, less law firms, less disputes.

Complexity necessitates appropriate lawyer resources be brought to bear. The Trustees' decision to involve 3 (or perhaps more) major national law firms to represent them in this proceeding is an indicator of the resources required for a matter of this complexity. The Public Trustee participated in this matter until spring of 2015 with significantly less manpower than the Trustees. As this matter became dramatically more time consuming and the more complex

issues in the proceeding came to the fore, the addition of resources was not only reasonable, but necessary to ensure the Public Trustee's independent representation of minors was preserved.<sup>4</sup>

The Public Trustee's July 30, 2015 account does represent a change. The costs to have essentially a single lawyer responding to 3-4 separate legal teams in large national firms were extraordinarily reasonable from 2012 to spring 2015. The legal team now being brought to bear to represent the minors' interests remains modest in comparison to the resources and manpower being accessed by the Trustees. The Public Trustee has chosen to utilize counsel with particular knowledge, background and skill in the matter of First Nations membership, Bill C-31, administrative law, trust law and past Sawridge membership issues. Those skill sets are not only essential to the effective representation of the minors, they have (and will) result in more efficient representation in this matter.

*Supreme Advocacy* was able to come up to date on this matter quickly and under significant time pressures. That was possible solely due to Mr. Meehan, Q.C. and Ms. Hutchison's joint knowledge of other Bill C-31/Sawridge matters and due to the combined expertise and experience in the two firms on the issues raised by this proceeding. Bringing in another firm without that background would have resulted in costly adjournments, months of additional document review and preparation, and significantly increased fees.

**b. Nature of Matter & Effort Required: Appropriate Balance/Level Playing Field in Litigation**

The future of minor beneficiaries and candidate children are at risk. As Your Lordship has written:

“...seems to be accepted by all...that certain children who are presently entitled...would be excluded if the proposed changes are approved... certain dependent children...would become beneficiaries...while other dependent children would be excluded. [There is] a *logical basis for a concern* by the Public Trustee and this Court of a *potential for unfair distribution...*” (paras. 2 and 25, June 12, 2012, emphasis added).

While the Public Trustee was represented by knowledgeable and experienced counsel, the proceeding reached a point where the sheer volume of work required additional resources. The Public Trustee still chose additional resources carefully and with a view to locating counsel that could work on the matter within existing timelines. That required a unique skill set that only Mr. Meehan, Q.C. and his team could provide, and fortunately was able to provide on extremely short notice.

The Public Trustee has been tasked to provide independent representation to the affected minors in this matter. The Court of Appeal has confirmed that the Public Trustee was to have advance costs to secure that independent representation. It is simply not reasonable for the Trustees to

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<sup>4</sup> Court of Appeal, Memorandum of Judgment, June 19, 2013, para. 27-28. [Tab 5, Public Trustee's Brief date June 12, 2015]

expect that said independent representation can be effectively provided not only by a smaller legal team than is available to the Trustees but also at reduced rates. The Public Trustee's July 30, 2015 account represents the cost of having two busy, experienced litigators, with a unique skill set (that is also necessary for this particular matter) devote the majority of their practices to one file for almost 3 months. The support of Ms. Major and Mr. Slade at *Supreme Advocacy* represents a maximum of 4 lawyers available to work on this file for the Public Trustee at any one time. The Trustees have resources within 3-4 large national firms.

As such, the Public Trustee's addition of agent counsel to add resources does not, in fact, level the playing field in terms of legal resources. It does restore some balance to preserve the original intent of the advance costs order – preserving the independent representation of the affected minors.

Ms. Bonora and Mr. Poretti have continually expressed concern for their clients' fiduciary responsibilities as the basis to object to Public Trustee costs:

- Submissions of Trustees dated September 18, 2015
- Letter from Ms. Bonora and Mr. Poretti dated September 1, 2015.

As discussed further, below, these positions are taken without actual disclosure of the total costs being incurred by the Trustees for their legal representation. These positions must also be considered in the context of the value the Trustees assign to other work related to the Trusts.

Despite suggestions that the Trustees must monitor and manage the costs of this proceeding, the Trustees have not explained why four separate law firms are retained by what Mr. Molstad Q.C. described in the September 2-3 hearing as, "a nation of 44 individuals at this time. They are a small nation of family..." The "small nation of family" is currently represented by:

- Ms. Bonora, *Dentons* – Counsel for the Sawridge Trustees (the four total they represent out of five);
- Mr. Poretti, *Reynolds Mirth* – also Counsel for the same four Trustees (so far, not described as co-counsel, but acting as additional counsel for the four Sawridge Trustees);
- Ms. Cumming, Q.C. and Mr. Kueber, *Bryan & Co.* – also Counsel for the four Trustees as individuals;
- Mr. Molstad, Q.C. and Mr. Rolf, Q.C., *Parlee McLaws* – counsel for the First Nation; and
- most recently, Ms. Stratton, *Bennett Jones* for Brian Heidecker in his role as CEO.

### c. 'Holistic' Balancing

The Court may also request detailed accounts of all counsel, so that the court has a 'global' perspective rather than an interstitial one. Should counsel decline to volunteer same, or decline to accede to the Court's request – for the court to read for information purposes only, not review/approval purposes – the Court may make whatever inference it may deem appropriate.

The Court can view – for informational purposes – fee accounts paid by the Trustees/First Nations herein, back to when each lawyer/law firm was retained. That way the Court will be able to more holistically, and more realistically, balance whatever all other lawyers/law firms have invoiced herein, versus the Public Trustee.

The accounts at issue are in line with other items the Trustees have considered reasonable. For example, Trustees are paid \$15,000 per Trustee per meeting (or \$75,000 for a day's Trustee meeting, or portion thereof).<sup>5</sup> The Trustees have paid not only their own legal fees, but those of the Sawridge Indian Band.<sup>6</sup> Lastly, the accounts of Ms. Hutchison, previously paid for by the Trustees and deemed reasonable, dealt with time periods with fairly modest activity.

The Public Trustee's costs to participate in the matter are reasonable and appropriately reflect the cost to be expected in a proceeding when:

- 1.) A party is attempting to expedite a complex matter and move rapidly towards a final order;
- 2.) The amount of activity, and number of court applications, spikes dramatically;
- 3.) One party is represented by a dramatically larger legal team, generating significant volumes of correspondence and communications;
- 4.) Counsel effectively devotes almost 3 months to one matter due to such demands and increased activity;
- 5.) Additional counsel must be brought in to meet the above demands, and comes up to speed on a file in a short time frame, without seeking any adjournments or filing accommodations;
- 6.) All counsel involved are skilled, experienced, knowledgeable and bring to bear a unique set of skills or background in the matter.

Above all, when this Court reviews either the request for unredacted accounts or the reasonableness of the July 30, 2015 account, the Court must remain consistent with the 2012 Order and this Court's and the Court of Appeal's reasons to the effect that:

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<sup>5</sup> Affidavit of Catherine Twinn, filed September 3, 2015, Exhibit D, attached

<sup>6</sup> i.e. Catherine Twinn's Dec. 8, 2014 affidavit (para. 22) indicates that the Trustees have paid the First Nation's legal fees. [Affidavit of Roman Bombak dated June 12, 2015, Tab 16] Why would this be when:

- the First Nation is not a beneficiary of the Trust
- the First Nation is a separate person in law
- the First Nation is separately represented
- the Trustees and the First Nation both insisted they are to be treated separately (and filed separate briefs) for anything related to production?



- 1.) The Public Trustee is to receive “full and advance” indemnification for costs;
- 2.) The advance costs are to be secured in such a fashion as to secure the independent representation of the minors by the Public Trustee.

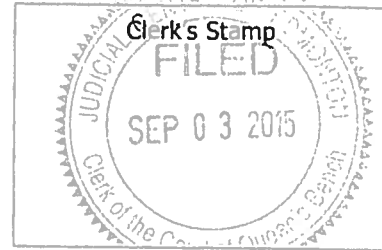
Yours truly,

**Supreme Advocacy LLP**

*Eugene Meehan Q.C.*

Per: Eugene Meehan, Q.C.

COURT FILE NO. 1403 04885  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE EDMONTON



IN THE MATTER OF THE SAWRIDGE BAND INTER  
VIVOS SETTLEMENT, APRIL 15, 1985 (the "1985  
Trust") and THE SAWRIDGE TRUST, AUGUST 15,  
1986 (the "1986 Trust")

APPLICANT CATHERINE TWINN, as Trustee for the 1985 Trust and the 1986 Trust  
RESPONDENTS ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN and MARGARET  
WARD as Trustees for the 1985 Trust and the 1986 Trust

DOCUMENT **AFFIDAVIT**

ADDRESS FOR SERVICE AND CONTACT	McLENNAN ROSS LLP #600 West Chambers 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Karen A. Platten, Q.C. Telephone: (780) 482-9200 Fax: (780) 482-9102 Email: kplatten@mross.com File No.: 281946
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**AFFIDAVIT OF CATHERINE TWINN**

**SWORN ON THE 23<sup>rd</sup> DAY OF SEPTEMBER, 2014**

I, Catherine Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, in the Province of Alberta, SWEAR AND SAY THAT:

1. I am a trustee of the Sawridge Band Inter Vivos Settlement, April 15, 1985 (the "1985 Trust") and the Sawridge Trust, August 15, 1986 (the "1986 Trust") (collectively referred to as the "Trusts"), and, as such, have a personal knowledge of the matters hereinafter deposed to, save where stated to be based upon information and belief.
2. I was appointed as trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. I have continuously maintained my position as a trustee since these appointments.
3. It is my understanding that the Trusts will have a collective asset value of approximately \$213 million dollars by 2015.

## **BACKGROUND**

4. My late husband was Walter Patrick Twinn. He passed away on October 30, 1997. My husband was the Chief of the Sawridge Indian Band (the "Band") from 1966 until his death.
5. The Band is comprised of three family groups, the Twin(n)s, the Potskins and the Wards. The majority of the Band membership of approximately 44 members is comprised of the Twin(n) family. Only 3 of the 44 Band members are minor children.
6. The trustees of the Trusts have taken the position that membership in the Band, as determined by Band Council, is definitive of beneficiary status under the 1986 Trust. There has not been an independent legal determination of the beneficiaries of the 1985 Trust or a process put into place to make this determination.
7. Paul Bujold has been the Administrator of the Trusts since September 9, 2009. This is a salaried position that is contracted for by the Trusts. Mr. Bujold is not a trustee of the Trusts and has no voting power. His position is at the discretion of the trustees.
8. Brian Heidecker has been the Chair of the Trusts since May 10, 2010 (the "Chair"). This is also a position that receives financial compensation. Mr. Heidecker is not a trustee of the Trusts and has no voting power. His position is at the discretion of the trustees.
9. The current trustees of the Trusts are:
  - (a) Myself;
  - (b) Bertha L'Hirondelle (also a paid elected elder of the Band);
  - (c) Roland C. Twinn (also the elected Chief of the Band);
  - (d) E. Justin Twin (also an elected Band Councillor), appointed January 21, 2014; and
  - (e) Peggy Ward, appointed August 12, 2014.
10. As 3 out of the 5 trustees are also elected officials of the Band, these individuals are duly responsible for administering and managing the Trusts, but also have the ability to determine or influence Band membership and thus who is a beneficiary under the 1986 Trust.

## **HISTORY OF TRUSTS**

11. Prior to the subject Trusts, various assets of the Band were held under prior trust deeds starting in 1982. Prior to 1982, the assets of the Band were held in a bare trust by the Band Council for the benefit of the Band.
12. As my late husband was the Chief of the Band in the 1980s, he was the settlor of the Trusts.
13. It is my understanding that under prior trust deeds, elected officials of the Band were automatically designated as Trustees. The terms of the subject Trusts were a marked departure from this practice, as they do not provide for the automatic appointment of elected officials as trustees of the Trusts. The deeds of settlement for each of the subject Trusts provide that a maximum of two of the trustees may be non-beneficiaries of the Trusts and a minimum of three trustees must qualify as beneficiaries under each Trust.

14. My late husband and I had many conversations regarding this change in practice. My late husband expressed concerns about having trustees of the Trusts who were also elected officials of the Band and was attempting to move away from such a practice.

#### Recent Appointments to Trusts

##### Justin Everret Twin-McCoy ("Justin")

15. In or around January 8, 2014, I was notified by Mr. Bujold that Walter Felix Twin intended to resign as a trustee of the Trusts.
16. At the next trustee meeting on January 21, 2014, six motions were presented, without prior notice to me, that accepted Walter Felix Twin's resignation and appointed Justin Everret Twin-McCoy in his place and sought to make a transfer of the Trusts' assets to the new trustees. These motions were approved by Bertha Twin-L'Hirondelle, Clara Twin-Midbo and Roland Twinn. I did not consent to this appointment and instead raised questions, including the need for a proper succession planning process and whether Justin was a beneficiary under the 1985 Trust, which was a requirement as Walter Felix Twin was a beneficiary trustee.
17. Bertha Twin-L'Hirondelle and Clara Twin-Midbo were Roland Twinn and Justin's aunts. I am Chief Roland Twinn's step mother and Justin's aunt. Bertha and Clara do not qualify as beneficiaries under the 1985 Trust. Under the 1985 Trust, Band membership is not synonymous with beneficiary status as it is under the 1986 Trust.
18. While the deeds of the Trusts do not require unanimous approval, to my knowledge, in all past trustee votes to appoint a successor trustee, it was a practice and policy that the decision be unanimous. Attached as **Exhibit "A"** to my Affidavit is a draft document tendered by the Chair at the September 17, 2013 trustee meeting that speaks to this issue at paragraph 7(b)(ii)(2) wherein it states "Gives each Trustee a veto regarding Trustee succession" (the "September Chair Agenda").
19. At the time of and following Justin's appointment, I raised concerns with the other trustees, the Chair and Mr. Bujold regarding whether Justin was an eligible beneficiary under the 1985 Trust. Approximately two months after Justin's appointment, I received a letter from Mike McKinney dated March 5, 2014 that stated that Justin qualified as a beneficiary under the 1985 Trust. Mike McKinney is a lawyer employed in house by the Sawridge First Nation. His employment is determined by the Chief and Council of which, Roland Twinn is the Chief and Justin is a Council member. Roland Twinn and Justin constitute a majority of the three person Band Council.
20. I relayed my concerns to the Chair that it was essential that an independent legal opinion was obtained. I proceeded to obtain the opinion of Larry Gilbert, who is a lawyer and was the former Registrar of Indian Status and Band membership for Indian and Northern Affairs Canada. The opinion of Mr. Gilbert dated July 2, 2014 concluded that Justin did not qualify as a beneficiary under the 1985 Trust, despite Justin being a Band member. Attached as **Exhibit "B"** to my Affidavit is a copy of Mr. Gilbert's opinion.
21. To date, from my perspective, the issue of whether Justin is a beneficiary under the 1985 Trust has not been resolved and his appointment to replace Walter Felix Twin is a violation of the terms of the 1985 Trust deed.

### Clara Midbo ("Clara")

22. On July 13, 2014, Clara Midbo passed away from cancer. I was not aware that she was terminally ill and no prior disclosure or discussion on this matter had occurred at any trustee meetings I was present at, including the June 10, 2014 meeting where trustee succession was an agenda item.
23. As a result of her death, Mr. Bujold called an emergency trustee meeting for August 12, 2014 for the stated purpose of appointing a replacement trustee for Clara.
24. On August 6, 2014, I emailed Mr. Bujold, the Chair and the three other trustees, asking who was being proposed as a replacement trustee. I did not receive a response.
25. On August 12, 2014, I proposed that an independent outside professional trustee be appointed to fill the vacancy. This proposal was met with criticism by Justin and Roland Twinn. Roland Twinn stated that the Trusts' beneficiaries were unhappy with having outside directors for the corporations held by the Trusts and the sale of the Slave Lake hotel and further, the beneficiaries would not be supportive of having independent professional individuals appointed as trustees for the Trusts. This concerns me because a trustee ought not to fetter their discretion.
26. By way of background, in 2003 the control of the Sawridge Group of Companies was transferred to outside management from Band Council management because the Sawridge Group of Companies were in financial distress. Since the Sawridge Group of Companies were transferred to the control of outside management (2003) and directors (2006), they have financially recovered and avoided bankruptcy.
27. Despite my objections and proposal that an independent professional trustee be appointed who met a skills matrix I tabled, Peggy Ward, a Band member and a beneficiary of the 1985 Trust, was appointed by the other trustees as Clara's successor.
28. At the time of Peggy Ward's appointment, I was not aware of her past business, board, investment, financial and trust experience and what skill set and qualities she would bring as a trustee of the Trusts. I am deeply troubled with how and the circumstances in which this appointment was conducted, that an individual would be elected as a trustee of the Trusts without a resume being presented in support of her nomination, without regard to the need for independent, professional, expertise to modernize the Trusts and without due regard to other highly qualified and independent candidates whose resumes were tabled.

### Interaction between Political Interests and Trust Management

29. For some time, I have been very concerned that the elected Band Council members and elders, who are also trustees of the Trusts, are allowing their political and/or personal agenda to influence their decision making as trustees. My concern is that elected Band Council members, with elected elder support, are approving Band members who are then beneficiaries of the 1986 Trust. This process does not appear to be fair, timely, unbiased or transparent, in addition, I am concerned that it is not Charter compliant. When my concerns are expressed to the other trustees, the Chair and Mr. Bujold, I am either ignored or met with varying degrees of ridicule, denial, reprisal and/or contempt. The following are various examples of why I am concerned:
  - (a) Ascertaining the Trusts beneficiaries in a fair, timely and unbiased process has been an ongoing issue and subject to an interlocutory decision by Justice D. Thomas on June 12, 2012. Attached as **Exhibit "C"** to my Affidavit is a copy of Justice Thomas' decision. I have observed examples of where family members of the elected Band Council, including

Chief Roland Twinn, were quickly added to the Band membership list, while membership applications of non-Twin(n) family members have remained unprocessed or denied.

- (b) It concerns me that individuals who are responsible for managing, growing and distributing the Trusts' wealth, are demonstrating bias in their capacity as members of Council in determining who is entitled to the Trusts' wealth. One particularly disturbing example of this behavior was when Chief Roland Twinn and Bertha Twin-L'Hirondelle voted against Alfred Potskin's membership application at a membership committee meeting after Chief Roland Twinn's sister, Arlene Twinn, told a story wherein a Potskin woman had allegedly been rude to their mother many years ago. Arlene Twinn finished the story with the statement "this is payback time". Immediately thereafter, Chief Roland Twinn and Bertha Twin-L'Hirondelle voted to not recommend Alfred Potskin's membership application. This recommendation and the application, then goes to Chief and Council who make the decision. As of August 10, 2014, Albert Potskin's name is not on the Band list. I note that Chief Roland Twinn is placed in the dual role of recommending and deciding upon membership applications. I was present during this event. I also note that with the exception of only a few individuals, only the children of former and currently elected Band officials have been granted Band membership by Chief and Council, while other children have been discounted and/or discouraged from applying.
- (c) There have been instances where a ruling on Band membership has not been made in a timely manner, including one applicant who waited 28 years for a decision.
- (d) I have concluded that, based on information received from persons who may be entitled to beneficiary status under 1985 Trust rules, they will not be granted that beneficiary status as the trustees have never gone through a process of independently determining who qualifies as beneficiaries. Thus the eligible pool of candidates to be trustees who qualify as beneficiaries of both Trusts is greatly limited as a direct result of the decisions made by those trustees who are also elected officials of the Band and decide and restrict Band membership.
- (e) At the August 12, 2014 and September 14, 2014 trustee meetings, Chief Roland Twinn stated "we don't know who they are". This statement referred to the beneficiaries of the 1985 Trust. I advised him that those who qualify under the 1985 Trust rules can be ascertained, but the trustees have repeatedly failed to provide an independent process for such. The separate issue of whether those rules are valid is before Justice Thomas. This is just one example of the trustees refusal to make meaningful attempts to even discuss how to determine the proper beneficiaries of the 1985 Trust. At present, despite my insistence, the beneficiaries of the 1985 Trust have not been properly ascertained. The September Chair Agenda is a further example of how these issues have been tabled at trustee meetings for years however, despite the passage of time, no resolution to these issues has been reached. A further example of the trustees unwillingness to address these issues is shown in a January 19, 2009 letter to David Ward, Q.C. of Davies Ward Phillips & Vineberg LLP which is attached as **Exhibit "D"** to my Affidavit and was copied to the other trustees. In this correspondence, I raise the issue of trustee composition. Robert Roth from Fraser Milner Casgrain (as it was then known) had been retained to develop and deliver a process however Chief Roland Twinn failed to engage and the process terminated.

- (f) It has been made clear to me by the Chair, Mr. Bujold and the trustees who are also elected Band officials, that how membership is determined is not the concern of the trustees. I see two very separate issues that this statement raises, authority to determine membership and the trustee's confidence in the determination of the beneficiaries of the 1986 Trust.
- (g) As a trustee I have expressed concern about the Band membership lists, as this list determines the 1986 Trust beneficiaries, to date, this difficult issue has not been properly discussed and resolved by the trustees.
- (h) Benefits from the Trusts have only been extended to the 1986 Trust beneficiaries, which group, at present, only amounts to 44 individuals. This has been to the detriment of the 1985 Trust beneficiaries who can be ascertained under the 1985 Trust rules and who the settlor expressly intended to include and benefit. I believe that the 1985 Trust beneficiaries is much larger than the Band membership group who comprise the 1986 Trust beneficiaries.
- (i) Chief Roland Twinn and Band Council are the directors of Sawridge Resource Development. The Band is the shareholder and presumably, it is the Chief and Council who appoint directors. Chief Roland Twinn is also the CEO. As a result, Chief Roland Twinn directly controls the employment and monetary income of Band members employed by Sawridge Resource Development because he has the power to terminate or otherwise control their employment. As a result, he influences Band membership, employment and beneficiary status, amongst other things.
- (j) I am afraid that if I speak out at trustee meetings, that I will be faced with reprisal from or because of Chief Roland Twinn. I base this concern on the fact that Chief Roland Twinn has threatened to take my home on the Band reserve from me, without compensation, which could further result in my Band membership being revoked by the Chief and Council as a non-resident member. This is only one example of the many reprisals I have experienced from Chief Roland Twinn.
- (k) Despite my objections, a majority of the trustees authorized payment of the Band's legal fees in relation to the Band's participation in the matter before Justice Thomas regarding Band membership, despite the fact that such a payment is not allowed pursuant to the deeds of settlement.
- (l) I am concerned that the former counsel for the Band, Marco Poretti, is now acting as counsel for the Trusts at his new law firm, Reynolds Mirth Richards & Farmer.
- (m) It took years from 2003 when the Band Council's management contract was terminated to transfer and gather records relating to the Trusts' assets from Band Council (which was previously responsible for the management of the Trusts' assets). While efforts were still being made to obtain these records, Chief Roland Twinn and Bertha L'Hirondelle advised at a trustee meeting that some records had been burned.
- (n) Many of the trustees who were or are elected officials of the Band supported adding the Band as a beneficiary of the Trusts and developing "an innovative approach that will enable the construction of a new office and community center complex on the Sawridge First Nation". The September Chair Agenda attached as **Exhibit "A"** documents this request for a community center. I did not support this initiative for a number of reasons, including, the fact that a majority of the beneficiaries of the Trusts do not live on the

Sawridge reserve and this may not be the best use of Trust funds to benefit the beneficiaries. I am concerned that the community center initiative is an example of the elected officials political agendas interfering with their decision making as a trustee.

30. On or about January 12, 2009, the trustees of the Trusts executed a Code of Conduct for Trustees ("Code"). Attached as **Exhibit "E"** is a copy of the executed Code. I am concerned that the instances of conflict and breach of duty that are described in my Affidavit, violate the Code.

#### **ROLE OF BAND COUNCIL**

31. The elected members of Band Council and the Chief have a myriad of duties, powers and responsibilities. They deal with a wide range of issues that include political, social, legal, financial, economic, governmental, and personal issues relating to band members. Resources, including their allocation, are a challenge, along with overcoming many complex challenges and historical legacies.
32. First Nations groups are unique in the sense that members of each Nation are related to each other and have long histories as clans and families. As a result of these long histories, conflict amongst members often results.
33. Given the often competing interests already facing elected members of Council and the Chief, I am concerned that it is an inherent conflict of interest for elected members of Band Council or the Chief to also hold the office of a trustee of the Trusts. As members of Council, individuals are called to act in the best interest in the community, while as trustees, individuals are called to act in the best interests of the beneficiaries of the Trusts – these two interests have the potential to conflict. In addition, given that the elected officials have the ability to seriously impact an individual's livelihood, reputation, residency, membership and security in the reserve community and beyond, it makes it difficult for non-elected official trustees to take positions that are contrary to the majority, even if the trustee believes that taking the position is in the best interests of the beneficiaries. This is especially so when one of the elected officials is the Chief of the Band.
34. The enmeshment of elected officials of the Band acting as trustees of the Trusts creates the opportunity for and causes me to be fearful of reprisal if I question how beneficiaries are being determined or why persons who appear qualified and entitled are being excluded as beneficiaries. I have found it very stressful to voice concerns about my lack of confidence in the systems ascertaining beneficiary status. The trustees who are elected officials of the Band have an undue influence at the trustee table both by the fact they are a majority of the trustees and control decision making and also because of the deference shown to them by others and the difficulty in separating political interests from trustee decision making. Undue influence and conflict of interest are compelling reasons to employ the separation rule that elected Band officials and their employees and agents cannot be trustees. I find it hard as a non-elected trustee to cast a vote against the Chief and other elected Band officials who are trustees for fear of political, legal, financial and other repercussions. While all trustees should be considered equal, the Chief remains the Chief and in most cases is the primary influencer of decisions at trustee meetings.



35. It is my understanding and I do verily believe that many other First Nations in Alberta and Canada structure their trusts, or are in the process or restructuring their trusts, so that elected officials and their employees and agents, cannot sit as trustees or if so, are ex officio or a minority. Examples of this include:

- (a) Samson Cree Nation;
- (b) Ermineskin First Nation;
- (c) Onion Lake Cree Nation;
- (d) Stoney Nakoda;
- (e) Mikisew Cree Nation; and
- (f) Saddle Lake Cree Nation.

36. I swear this as evidence for the Court and for no improper purpose.

**SWORN BEFORE ME** at the  
City of Edmonton,  
in the Province of Alberta  
the 24<sup>th</sup> day of September, 2014

*Crista C. Osualdini*  
*Crista C. Osualdini*

A Commissioner for Oaths in and  
for the Province of Alberta

**Crista C. Osualdini**  
Barrister & Solicitor

Crista C. Osualdini  
a Notary Public and Commissioner for Oaths  
in and for the Province of Alberta  
My Appointment expires at the Pleasure  
of the Lieutenant Governor

*Catherine Twinn*  
*Catherine M Twinn*

This is Exhibit "A" referred to in the  
Affidavit of

Catherine Twinn

Sworn before me this 24 day

of September 20 14

Crista C. Osualdini

A Commissioner for Oaths  
In and for the Province of Alberta

Crista C. Osualdini

Crista C. Osualdini  
Barrister & Solicitor

## SAWRIDGE TRUSTS

### A VISION OF OUR FUTURE

2024 & 2038

**"Kootsapatamik"**

**'Something we hope to see in the future'**

**'Our hopes, dreams, aspirations for the future'**

**September 16, 2013**

**Draft #4**

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## **1. Introduction**

"This strategic plan has been developed by the Trustees of the Sawridge in order to..."

To demonstrate that we understand that the status quo is not an option

To consolidate and modernize our efforts

To prepare for our reporting to the beneficiaries

Etc

## **2. Our Community in 2024 and in 2038**

A clear description of what we aspire to be

Fairly lofty but inspirational

"It's for the kids and the Grandkids"

Failure is not an option

## **3. Our History**

A brief over of our history and our evolution

## **4. Our Governance and Board**

The Trusts Deeds set out the powers and responsibilities. Etc etc

## **5. Our Stakeholders**

- a. The beneficiaries
- b. The Sawridge Group of Companies
- c. The Sawridge Trusts
- d. The Sawridge Trustees
- e. The Sawridge First Nation
- f. The communities in which we live, work and do business
- g. Lesser Slave Lake Regional Council

## **6. Our organizational tenets**

### **a. Our Vision**

*(As approved by the Trustees 01-05-15)*

"A healthy and harmonious community of beneficiaries united by relationships based on mutuality, reciprocity, respect, love, kindness, common interest and common good.

A community in which individuals seek to secure the good of others, and thereby secure their own.

A community which works together and supports the unique gifts and abilities of each member of the community thereby raising the community as a whole.

A community based on respect and affection.

A community based on the recognition that we are all spiritual beings

Seven phases of life and seven gifts: Love, Honesty, Humility, Respect, Truth, Patience, Wisdom.

Make our houses strong. Everything that lives"

### **b. Our Mission**

*(As approved by the Trustees 01-05-15)*

"The Trustees recognize that wealth is a concept that encompasses much more than financial prosperity. Our mission is to preserve and increase the wealth of our community in all respects -physically, socially and spiritually - in a balanced and sustainable way that respects the human and natural world. The Trustees will manage the trust funds to achieve this end for the benefit of the existing beneficiary group and future generations of beneficiaries."

### **c. Our Ethos**

The disposition, character, or fundamental values particular to a specific person, people, culture, or movement.

- i. We firmly believe that our mandate is to avoid activities that may lead to entitlement and dependency attitudes

ii. We believe that the capital of the Trusts should be preserved for future generations

iii.

d. Our Values

Values define who we are and who we want to be, both individually and as a group.

The highlighted portions of the Preamble to the Constitution of the SFN describe the existing values and aspirations of our Beneficiary group.

## Constitution of the Sawridge First Nation

### Preamble

We the Cree People of the Sawridge First Nation, having the inherent responsibilities, rights and powers to govern ourselves and the lands to which we belong, from time immemorial granted to us by the Creator for as long as the grass grows, the wind blows and the water flows, HEREBY DECLARE THE FOLLOWING TO BE OUR TRUTHS:

1. Family is the foundation of our Community. We value Community, Relationships, Cultural Survival, the Cree Language, and our Ancestors and will strive for the protection of these values.
2. We continue to live in family-based communities in the territory which we have occupied since time immemorial.
3. We have the obligation and responsibility to preserve our culture and language and to pass on our language, our cultural practices and our history to our descendants.
4. Our Land, waters, and natural resources are sacred and essential to the survival of our community.
5. As with all peoples, we have the inalienable right to the pursuit of happiness.
6. We will govern ourselves as a community which is safe, supportive, prosperous, friendly, and caring, and which will always be here for our grandchildren and descendants.

7. Our ancestors occupied these lands and utilized our waters and resources since time immemorial, living by the Natural Law which is encompassed by the traditional values of Love, Honesty, Kindness, Humility, Respect, Truth, Patience, Contribution, Responsibility, Self-Reliance, Independence, Accountability, and Wisdom.
8. Our inherent right to govern ourselves was recognized in Treaty #8 which was entered into between our ancestors and the Crown as original signatories.
9. Since the signing of Treaty #8, this inherent right has been distorted by the imposition of forced dependency, attitudes of superiority, systems of control, which, through this Constitution we disavow, denounce, and discard.
10. To ensure the preservation and advancement of the Sawridge First Nation we herein record the traditions, customs and practices of the Sawridge First Nation, formerly called the Sawridge Indian Band, in this, the Constitution of the Sawridge First Nation.
11. The Sawridge First Nation shall, in accordance with its customs and traditions, have an effective governing body which is transparent and accountable to the members of the Sawridge First Nation, which respects and preserves the rights of those members, and manages the property, resources, programs and services of the First Nation, and which is mandated to defend and protect our lands, waters, resources, air space, rights and Treaty relationship.
12. Reflecting an integral part of our tradition, our wish is that our governance be guided by Elders who have the respect and trust of the First Nation; who are known for their wisdom and good judgment; who demonstrate a significant commitment to and knowledge of the history, customs, traditions, cultural and communal life of the First Nation, and who are known for a character and lifestyle that does not cause detriment to the future welfare or advancement of our First Nation.

## 7. Our current realities

### a. Facts and Truisms

- i. This generation must initiate and practice new approaches
- ii. intergenerational trauma must be identified and accepted/acknowledged
- iii. Granddaughter said "Why am I so sad?"
- iv. Very strong sense of duty and obligation to kids
- v. Problems must be acknowledged before they can be fixed
- vi. First Nation culture based on very long term view "7 generations"
- vii. Unique blend of European religion and First Nation's spirituality

b. Reality check

- i. Very complex web of issues and challenges
- ii. Trust deeds act as a "Poison Pill"
  - 1. Precludes a hostile takeover
  - 2. Gives each Trustee a veto regarding Trustee succession
- iii. Stuck on fundamental issues
- iv. Not a harmonious group
  - 1. We basically have a Mexican Standoff
  - 2. Nobody can "win", therefore everybody "loses"
- v. How do we get to unanimity?
- vi.

c. Outstanding Issues

- i. Settling Catherine's accounts
- ii. Trustee evaluation process
- iii. Trustee succession
- iv. Identifying our beneficiaries
- v. Reporting to our beneficiaries
- vi. Understanding the costs of benefits into the future
- vii. Societal issues
  - 1. Lateral violence
  - 2. Addictions and their consequences
  - 3. Intergenerational trauma
- viii. Honouring Walter Twinn
- ix.

d. Risks and Challenges

- i. How to assure continuation of services and support for our people?
- ii. Racism and stereotyping
- iii. Restore and maintain pride and dignity
- iv. Loss of control of trusts
- v. Dispersal of trust funds = poor legacy
- vi. Attainment of self-determination on wide scale
- vii. Dispel the bogeyman
- viii. Maintaining critical mass
- ix. What if our report to beneficiaries is not acceptable to the majority?
- x. Status-quo is not sustainable, we have to change



e. Risks

- i. Are we in compliance with trust standards?
- ii. If not, are trustees liable?
- iii. Inherent "questions" regarding conflict of interest
- iv. Unrest among beneficiaries
- v. Dissipation of trust assets
- vi. Desirability/practicality of continuing current culture
- vii. Protracted litigation
- viii. Court removal
- ix.

f.

**8. SWOT analysis**

a. Strengths

- i. Our financial capacity
- ii. Our Trust deeds
- iii. Companies are doing very well
- iv. Good benefits program
- v. Trusts office is functioning well
- vi.
- vii.

b. Weaknesses

- i. Very complex and long standing web of issues & challenges
- ii. Difficulty in coming to decisions
  - 1. Not a harmonious group
  - 2. Mexican stand-off, nobody can win, so everybody loses
- iii. Lack of clarity re beneficiaries of 1985 Trust
- iv. Unrest amongst beneficiaries
- v.
- vi.

c. Opportunities

- i. Capitalizing on a buoyant Alberta market
- ii. Capitalizing on the excellent public image of the SGC
- iii. Capitalizing on the positive public perception of the SFN/Sawridge Trusts business structure and strategies
- iv. Providing indirect benefits to the beneficiaries at the community level
- v. Court application to clarify beneficiaries
- vi. Developing and providing a report to our beneficiaries
- vii.
- viii.

d. Threats

- i. Maintaining critical mass

- ii. Racism and profiling
- iii. Intergenerational trauma
- iv.
- v.

## 9. Our Desired Outcomes

- a. Clearly defined beneficiaries of the 1985 and 1986 trusts
- b. Membership process based on principles of administrative law
- c. Profitable, well managed companies able to pay sustainable dividends
- d. Understand and mitigate the Impact of an influx of beneficiaries
- e. Maintain separation of economic and political activities
- f. Provide a thoughtful suite of benefits that mitigate against entitlement or dependency attitudes
- g. Being respectful of 114 years of Sawridge tradition
- h. Maintaining our long-term endowment mindset
- i. Strip of gray
- j. Families raised in a community with positive relational abundance
  - i. Community and family matter!!
  - ii. "communal system"
- k. Must be aware of the 4 pillars of our environment
  - i. Physical
  - ii. Mental
  - iii. Emotional
  - iv. Spiritual

l.

## 10. Our Strategic objectives

- a. Critical Long Term Investment-Capacity Building
  - i. Education
  - ii. Training
  - iii. Skills upgrading
  - iv. Leadership development
  - v. Mentors
  - vi. Heroes
  - vii. Role models
  - viii.
- b. Risk Mitigation to protect our investments and ensure our legacy
  - i. Addictions treatment programs
  - ii. Address intergenerational issues
    - 1. Identification
    - 2. Acknowledgement

- 3. Remedial action
- iii. Maintain critical mass
  - 1. A fair and effective membership application process
  - 2. Clarification of definition of beneficiary
  - 3.
- iv.
- c. Acknowledging our success – saying "Congratulations"
  - i. Why? To acknowledge the wisdom and perseverance of forgoing immediate cash payments in favour of developing a long term Trust Fund that will pay benefits for generations to come
  - ii. To whom?
    - 1. Our seniors
    - 2. Our elders
    - 3. Our champions
    - 4. Our heroes
    - 5. Our "average" members
    - 6. Our neighbours
    - 7. Our friends
    - 8. Our families
  - iii. Acknowledging and celebrating our history
  - iv.

## **11. Our Goals and Actions**

- a. Critical Long Term Investment-Capacity Building
  - i. Continue our investment into education and skills upgrading
  - ii. Develop plans for leadership development
  - iii. Identify individuals who can act as mentors, heroes and role models
  - iv.
- b. Risk Mitigation to protect our investments and ensure our legacy
  - i. Continue funding our addiction programs
  - ii. Develop long range avoidance strategies
  - iii. Obtain clarification of who are beneficiaries are
  - iv. Critical to have a quality membership approval process
  - v. Maintaining the separation of political and economic functions
  - vi. Report to our beneficiaries
  - vii. Develop and implement a Trustee succession plan
  - viii. Resolve our outstanding issues
  - ix.
- c. Acknowledging our success – saying "Congratulations"
  - i. Fund some generic projects that appeal to "average" members

1. Develop an innovative approach that will enable the construction of a new office and community centre complex on the SFN
  2. A key collaboration of the SGC, SFN and the Sawridge Trusts
  - 3.
  - 4.
- ii. Identify locations to display and highlight SFN history and successes
    1. The new Sawridge Community Centre
    2. Work with the designer to maximize and optimize the spaces that could be used to describe Sawridge history and its achievements
    3. Identify honorific naming opportunities
      - a. The Building
      - b. Rooms and internal areas
      - c. Chairs
      - d. Wall spaces
    4. Develop modules/displays of Sawridge history
    5. Develop modules/displays of Sawridge achievements
    - 6.
    - 7.
  - iii. Identify key messages for each target audience
  - iv.
- d.

## **12. Evaluation –how will we measure success?**

- a. Key success indicators
- b. How have our FN peers fared?
- c. How does SFN compare to Albertans?
- d.

## **13. Appendix**

**LARRY GILBERT  
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(250) 478-8881

Catherine M. Twinn  
Barrister & Solicitor  
Box 1460  
Slave Lake, Alberta  
T0G 2A0

This is Exhibit "B" referred to in the  
Affidavit of

Catherine Twinn  
Sworn before me this 23 day  
of September 2014

Dear Ms. Twinn:

Crista C. Osualdini  
A Commissioner for Oaths  
In and for the Province of Alberta  
*Crista C. Osualdini*

**RE: OPINION REGARDING JUSTIN TWIN-McCOY AS A BENEFICIARY AND AS A TRUSTEE FOR THE APRIL 15, 1985 SAWRIDGE INDIAN BAND TRUST FUND**

You have asked me to answer a number of questions:

**Crista C. Osualdini**  
Barrister & Solicitor

1. Under sections 11 and 12 of the Indian Act, R.S.C. 1970, c. I-6 ("the rules") as these rules existed prior to April 17, 1982, does Justin McCoy-Twin qualify to be registered as an Indian and listed on the Sawridge Band List maintained by the Department?
  - a) In particular, based on the facts and "the rules", is Justin McCoy-Twin, the son of Vera Twin and Jody McCoy, entitled to be registered as an Indian under those rules, firstly because at birth he was the illegitimate child of an Indian woman and non-Indian man?
  - b) Secondly, what is the effect of the marriage of his parents, Vera Twin and Jody McCoy, as the marriage deems Justin McCoy-Twin the legitimate child of the marriage effective from the date of his date of birth.
  - c) What effect does the language of the April 15, 1982 Sawridge Band Trust, antecedent to the 1985 Trust, have on Justin McCoy-Twin's eligibility? Does the Settlor's clear 1982 intention to exclude the illegitimate children of Indian women carry forward to the 1985 Trust vis a vis Justin Twin McCoy's eligibility as a beneficiary of the 1985 Trust?
2. What effect does the Chapman v. Martin, [1983] 1 SCR 356 case have to these facts? As I understand the case, the illegitimate children – male or female – of a male Indian are entitled to registration.
3. Do the actions or inactions of the Sawridge Band impact the eligibility of Justin McCoy-Twin under those rules? If so, how?

I have been asked to render this legal opinion based on a number of assumptions regarding Justin McCoy-Twin's birth and his family without access to the records that

may or may not confirm those assumptions. I am prepared to revisit this legal opinion if any of those assumptions are proven to be incorrect.

Sections 11 and 12 of the Indian Act, R.S.C. 1970, c. I-6 provide the following:

11. (1) Subject to section 12, a person is entitled to be registered if that person

- (a) on the 26<sup>th</sup> day of May, 1874 was, for the purposes of an Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;
- (b) is a member of a band
  - (i) for whose use and benefit, in common, lands have been set apart or since the 26<sup>th</sup> day of May 1874, have been agreed by treaty to be set apart, or
  - (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;
- (c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b);
- (d) is the legitimate child of
  - (i) a male person described in paragraph (a) or (b),
  - or
  - (ii) a person described in paragraph (c);
- (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or
- (f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).

(2) Paragraph (1) (e) applies only to persons born after the 13<sup>th</sup> day of August 1956.

12. (1) The following persons are not entitled to be registered, namely,

- (a) a person who
  - (i) has received or has been allotted half-breed lands or money scrip,
  - (ii) is a descendent of a person described in sub-paragraph (i),
  - (iii) is enfranchised, or
  - (iv) is a person born of a marriage entered into after the 4<sup>th</sup> day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

(4) Subparagraphs 1 (a)(i) and (ii) do not apply to a person who  
(a) pursuant to this Act is registered as an Indian on the 13<sup>th</sup> day of August 1958, or  
(b) is a descendent of a person described in paragraph (a) of this subsection.

(5) Subsection (2) applies only to persons born after the 13<sup>th</sup> day of August 1956.

Justin McCoy-Twin was born on September 23, 1982. His mother is Vera Irene Twin, born on December 15, 1956 who has been on the Sawridge Paylist since birth. His father is Jody McCoy, a non-Indian. On September 23, 1982, Justin McCoy-Twin's parents were not married. Justin McCoy-Twin was registered as an Indian as the illegitimate child of an Indian woman. I am informed that his paternity must not have been disclosed to the Department. This is important because the Indian Act, 1970 determined Indian status and Band Membership strictly and in accordance with the paternal line. As noted above, section 11(1)(c) refers to the male line:

11(1) Subject to section 12, a person is entitled to be registered if that person

(c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b).

Contrast that provision with paragraphs 11(1)(e) and 12(2), both dealing with the illegitimate child of an Indian woman:

- 11(1) Subject to section 12, a person is entitled to be registered if that person
- (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d).
- 12.(1) The following persons are not entitled to be registered, namely,
- (2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

Accordingly, the policy of the Department at the time was to deny registration for an illegitimate child because the father was presumed to be a non-Indian. However, the Band or the person submitting the birth record to the Department can and often did overcome that presumption by providing evidence that the father was an Indian such as in a sworn statement from the Indian father. Indeed, even today, the policy is to presume that the father of an illegitimate child is a non-Indian unless the mother and/or the Band proves otherwise.

Although Justin McCoy-Twin was registered as an Indian, he was not entitled to be registered because his father was a non-Indian.

I conclude therefore that Justin McCoy-Twin was not entitled to be registered as an Indian under the Indian Act, 1970. In addition, he was not entitled under that Act to be added to the Band List of the Sawridge Indian Band as that List was maintained by the Department.

Turning now to the Sawridge Band Inter Vivos Settlement and Declaration of Trust dated April 15, 1985. The question asked is whether Justin McCoy-Twin is eligible to be a Beneficiary of that Trust and whether Justin McCoy-Twin is eligible to be a Trustee of that Trust. These questions arise because recently Justin McCoy-Twin was made a Beneficiary and appointed as a Trustee of that Trust by Chief and Council of the Sawridge Indian Band.

Paragraph 2(a) of the Trust describes who may be a Beneficiary:

- (a) "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 15<sup>th</sup> 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 15<sup>th</sup> 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 15<sup>th</sup> 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.

Based on the above-quoted statement about "Beneficiaries", I conclude that it is the Settlor's intention that

- (i) those persons whose names appeared on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 shall be considered to be Beneficiaries of this Trust and that
- (ii) no person who would not qualify to have his or her name on the Band List maintained by the Department under the authority of the Indian Act, on April 15, 1982 shall be considered to be a Beneficiary of this Trust and that
- (iii) no person whose entitlement to membership in the Sawridge Indian Band that flows only from an amended Indian Act shall be considered to be a Beneficiary of this Trust.

As noted above, Justin McCoy-Twin was born on September 23, 1982. Accordingly, he could not have his name entered on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 because he was not yet born. On that basis alone Justin McCoy-Twin is not qualified to be a Beneficiary of the Trust. Furthermore, as noted above, Justin McCoy-Twin is not qualified to be a Beneficiary because he was never entitled to be registered as an Indian in accordance with the Indian Act, 1970, and he was never entitled to have his name entered on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 or even on the date of his birth, September 23, 1982 because of his status as an illegitimate child.

In the Declaration of Trust, Sawridge Band Trust dated April 15, 1982, the Settlor wrote at paragraph 6:

The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21)

years after the death of the last descendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act.)

By virtue of paragraph 6 of the Declaration of Trust, Sawridge Band Trust dated April 15, 1982, I believe it was the intention of the Settlor of the 1985 Trust Fund to exclude illegitimate children from being Beneficiaries of the Trust. As Justin McCoy-Twin was born the illegitimate child of his Indian mother and although his name was added to the Indian Register and the addition of his name to the Registry was not protested, paragraph 6 provides that Justin McCoy-Twin is nevertheless not entitled to be a Beneficiary of the Trust.

I am informed that sometime after the Indian Act, 1970 was amended in 1985, Justin McCoy-Twin became the legitimate child of his parents when they were legally married. With that legal marriage occurring after the Indian Act was amended, the illegitimacy of the child was no longer used as a basis to add or delete a name to or from the Indian Registry. Accordingly, Justin McCoy-Twin's status under the Indian Act, 1970, was unchanged by his parent's legal marriage. Justin-McCoy Twin would however be entitled to be registered under the amended Indian Act, R.S.C. 1985, c. I-5 as a person with one Indian parent, namely, his mother.

According to the instructions I received in preparation for this legal opinion, immediately prior to his appointment as a Trustee, there were already two (2) Trustees of this Settlement who are not Beneficiaries. Guidance on this issue is found in paragraph 5 of the Sawridge Band Inter Vivos Settlement and Declaration of Trust dated April 15, 1985. Paragraph 5 deals with who may be appointed as a Trustee:

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such power shall be exercised so that at all times (except for the period pending

any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

As there are already two (2) Trustees of this Settlement who are not Beneficiaries and as Justin McCoy-Twin is not a Beneficiary, it follows therefore that Justin McCoy-Twin cannot and should not have been appointed as a Trustee of this Settlement.

I was asked to comment on whether the Supreme Court of Canada decision in Martin v. Chapman, [1983] 1 SCR 356 has any impact on the facts of this case. This is the case of an illegitimate child of an Indian man being denied registration as an Indian because according to the Registrar in the Department, the Federal Court of Canada and the Federal Court of Appeal all decided that paragraph 11(1) (c):

11(1) Subject to section 12, a person is entitled to be registered if that person  
(c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

means that only legitimate descendants in the male line are entitled to be registered. The Supreme Court of Canada said no; paragraph 11(1)(c) applies equally to an illegitimate or legitimate male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b). As Justin McCoy-Twin was the illegitimate child of an Indian woman, paragraph 11(1)(c) has no application to his case and the decision of Martin v. Chapman has no relevance to these facts.

Finally, the question is whether the actions or inactions of the Sawridge Band impacts the eligibility of Justin McCoy-Twin under those rules? If so, how? I conclude that the Sawridge Band and the mother of Justin McCoy-Twin were responsible for Justin McCoy-Twin being registered as an Indian when he was born on September 23, 1982 notwithstanding the fact that he was never entitled to be registered as an Indian in accordance with the Indian Act, 1970.

I also conclude that it was the Chief and Council of the Sawridge Indian Band who decided Justin McCoy-Twin is entitled to be a Beneficiary of this Trust and declared him a Beneficiary and then appointed him as a Trustee of this Trust. As noted above, Justin McCoy-Twin is not entitled to be a Beneficiary and should never have been granted that status. Furthermore, Justin McCoy-Twin is not qualified but is specifically disqualified from being appointed as a Trustee of this Trust.

September 22, 2014

Please do not hesitate to call or write if you have any questions or concerns regarding this legal opinion.

Yours truly,

A handwritten signature in cursive script, appearing to read "Larry Gilbert", enclosed within a faint, hand-drawn oval.

**Larry Gilbert**  
Barrister & Solicitor

### Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365



This is Exhibit "3C" referred to in the Affidavit of

Catherine Twinn

Sworn before me this 24 day

of September 20 14

Crista C. Osualdin Crista Osualdin

A Commissioner of the Matter of the Trustee Act, R.S.A. 2000, c. T-8, as amended; and in and for the Province of Alberta

Date: Docket: 1103 14112 Registry: Edmonton

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

Between:

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

Respondent

- and -

**Public Trustee of Alberta**

Applicant

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

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VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes  
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A. In this proceeding are the Band membership rules and application processes  
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**I. Introduction**

[1] On April 15, 1985 the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [the "Band" or "Sawridge Band"] set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band property on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had 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*, R.S.C. 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"].

[2] The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. 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 certain children who are 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 entitled to shares in the Trust, while other dependent children would be excluded.

[3] 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 variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] 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.

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[4] On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

[5] On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

[6] Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

## II. The History of the 1985 Sawridge Trust

[7] An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

[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. At the present time 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] 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.

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[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.

### **III. Application by the Public Trustee**

[14] In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

1. to determine which minors should be represented by it;
2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and
3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.



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[15] The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

#### **IV. Should the Public Trustee be Appointed as a Litigation Representative?**

[16] Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "Rules", or individually a "Rule"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (*E. v. Eve (Guardian Ad Litem)*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: *R.W. v. Alberta (Child, Youth and Family Enhancement Act Director)*, 2010 ABCA 412 at para. 15, 44 Alta. L.R. (5th) 313. In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

[17] The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

[18] In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

##### **A. Is a litigation representative necessary?**

[19] Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to

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those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

[20] In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 317-318, 122 D.L.R. (4th) 1. Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: *V.B. v. Alberta (Minister of Children's Services)*, 2004 ABQB 788 at para. 19, 365 A.R. 179; *C.H.S. v. Alberta (Director of Child Welfare)*, 2008 ABQB 620, 452 A.R. 98.

[21] The Sawridge Trustees take the position at para. 48 of its written brief that:

[i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

[22] The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

[23] In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 148, [2011] 2 S.C.R. 175. It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3<sup>rd</sup> ed. (Toronto: Thomson Carswell, 2005), at p. 914 [*"Waters' Law of Trusts"*]). Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23

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minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately \$1.1 million in assets of the Sawridge Trust.

[24] In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and

secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximately \$1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately \$1.1 million each.

[25] It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

[26] I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

[27] The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in

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the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

[28] I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[29] This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

**B. Which minors should the Public Trustee represent?**

[30] The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

[31] There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

[32] The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

[33] The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative

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not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

**V. The Costs of the Public Trustee**

[34] The Public Trustee is clear that it will only represent the minors involved here if:

1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and
2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

[35] The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust. *Deans v. Thachuk*, 2005 ABCA 368 at paras. 42-43, 261 D.L.R. (4th) 300, leave denied [2005] S.C.C.A. No. 555.

[36] Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

[37] Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: *Horse Lake First Nation v. Horseman*, 2003 ABQB 114, 337 A.R. 22; *Blueberry Interim Trust (Re)*, 2012 BCSC 254.

[38] The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 ["*Little Sisters*"] and *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78. They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

[39] Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The *Little Sisters* criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the

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Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.* (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4<sup>th</sup>).

[40] I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

[41] The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

[42] The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

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**VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes**

[43] The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

[44] The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

- A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and
- B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

**A. In this proceeding are the Band membership rules and application processes relevant?**

[45] The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

[46] The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

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[47] The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

[48] The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

[49] I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in *Barry v. Garden River Band of Ojibways* (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 61 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

**B. Exclusive jurisdiction of the Federal Court of Canada**

[50] The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

[51] As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In *783783 Alberta Ltd. v. Canada*



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*(Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56, the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has “exclusive original jurisdiction” to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in *Canada v. Addison & Leye Ltd.*, 2007 SCC 33, 365 N.R. 62 indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

[52] The legal issue in *783783 Alberta Ltd. v. Canada (Attorney General)* was an unusual tort claim against the Government of Canada for what might be described as “negligent taxation” of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

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

1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and
2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order “relief” against the Sawridge Band Chief and Council.

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

[55] In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

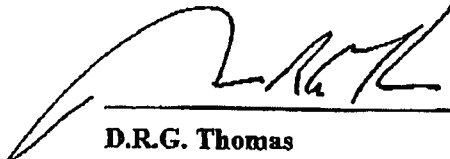
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**VII. Conclusion**

[56] The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

Heard on the 5<sup>th</sup> day of April, 2012.

Dated at the City of Edmonton, Alberta this 12<sup>th</sup> day of June, 2012.



---

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

**Appearances:**

Ms. Janet L. Hutchison  
(Chamberlain Hutchison)  
for the Public Trustee / Applicants

Ms. Doris Bonora,  
Mr. Marco S. Poretti  
(Reynolds, Mirth, Richards & Farmer LLP)  
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.  
(Parlee McLaws LLP)  
for the Sawridge Band / Respondents

# Twinn

Barristers and Solicitors

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Slave Lake, Alberta  
T0G 2A0  
Telephone: (780) 849-4319  
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Service Address: 810 Caribou Trail N E  
Sawridge Indian Reserve 150G  
Slave Lake, Alberta  
T0G 2A0

January 19, 2009

ATTENTION: DAVID WARD Q.C.

DAVIES WARD PHILLIPS & VINEBERG LLP  
44th Floor  
1 First Canadian Place  
Toronto, Ontario M5X 1B1

This is Exhibit "D" referred to in the  
Affidavit of

Catherine Twinn

Sworn before me this 24 day  
of September 20 14

Crista C. Osualdini

A Commissioner for Oaths  
in and for the Province of Alberta

Crista C. Osualdini  
Barrister & Solicitor

Dear David,

Given Ron Ewoniak's January 14, 2009 resignation as Chair of the Trustees, his reasons for resigning and his January 15, 2009 communication he would reconsider only if there were a significant change in the composition of the Board of Trustees, it is clear the Board is not functioning and its composition must be seriously examined. My main goal is to ensure the Beneficiaries are properly served. This means there must be significant change in the composition of the Trustee Group. Each of the Trustees must resolve what they intend to do after they have been given an opportunity to:

- fully understand Ron's reasons for resigning;
- Self- assess, seek counsel and determine their response.

Beneficiaries must be confident that the Trustees can individually and as a group work, think and act in an effective and fair manner.

I've requested a conference call today with the Trustees at 3:00 p.m. to:

- a. Understand and discuss Ron's reasons for resigning;
- b. Initiate a Trustee performance review;
- c. Determine what to do to have Ron reconsider or find a replacement;
- d. Retain an interim administrator.

What follows below is my summary from various discussions with you and Ron as to why Ron resigned.

1. The Trustees, as a group, are not functional.
2. In Ron's view, which I share, 3 Trustees are not performing the function of Trustee.

3. The work that must be done is not being done by the Trustees. I am doing the work which the Trustees as a body are supposed to be doing. By my performing the work of the group, other Trustees think this is improper. They refuse to pay me for my work, time and effort beyond the meeting fee. They seem to take the position that I should not be doing this work, that they have not authorized the work to be done and they do not intend that the work should be paid for. The Chair is not prepared to take on this work. No one has stepped up to do the work, but they fault me for doing so, even though I am fulfilling my duties and theirs.
3. Some trustees do not prepare for meetings of the trustees by reading the material sent to them. This wastes the time of the chair, of other trustees and the \$15,000 plus meeting fee.
4. Some of the trustees bring into the meetings a baggage of personal hostility that makes working with them intolerable.
5. The trustees, apart from me, do not prepare for their meetings and criticize me for the work I do including the work I do to support the Chair. So long as I am a Trustee, it is necessary I do this work to discharge my duties as a Trustee.
6. Some Trustees have not enabled effective communication amongst Trustees then blame me and/or the Chair for what they do not know or understand.

Ron Ewoniak would reconsider his resignation if there is a significant change in the composition of the Trustees. Ron has done an excellent job as Chair. Since he assumed the duties of Chair, much has been accomplished.

Ron believes a cooperative, functional group of Trustees could, within 6 months, resolve all issues with the Board of Directors and deliver benefits (e.g. financial distributions, programs and services) to the Beneficiaries.

With Ron gone, all the work will fall back on me. My potential liability as a Trustee increased with Ron's resignation.

My health is adversely affected by constant criticisms, attacks, stonewalling and selective recall. Financially, I cannot continue to provide hours of uncompensated work.

If I continue as a Trustee, I am legally bound to fulfill my individual duty as a Trustee. This means doing all the work for all Trustees, without compensation, working in oppressive and hostile conditions.

A Trustee can be removed:

- a. By the Court, on its own motion or on application by a Beneficiary;
- b. By 80% of the Beneficiaries.

In the call will you explain to the Trustees why you think Ron Ewoniak resigned and whether the reasons stated above accurately express Ron's reasons? I have copied Ron on this letter which is appropriate. The Trustees must be clear on what Ron's reasons are, then be responsible for their personal self assessment and what happens next. In today's call, Trustees should be asked

what they intend to do and how long they need to consider this. Perhaps they may wish to speak with you individually. I will suggest in today's call that each Trustee is free to speak with you on a confidential basis, or anyone else they feel comfortable with, as to whether they should continue as a Trustee.

While the self-reflection process is underway, today I will ask the Trustees to make decisions on two matters:

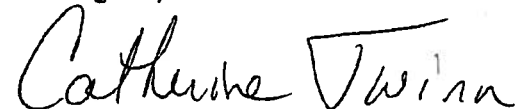
- a. A performance evaluation should be undertaken forthwith of each Trustee by a Trust lawyer in Alberta. You and Ron Ewoniak should be interviewed. This should be completed quickly.
- b. Appointment of an interim administrator to be retained immediately to ensure the orderly administration of the Trusts.

The goal is to bring about a functional and cooperative group of individuals who can work together.

As I understand, when Trustees resign, the issues of compensation can and ought to be passed through the Courts. This would include my unpaid compensation claim. Please confirm that the Trusts are responsible for all costs involved in the preparation and passing of all Accounts before the Court from the beginning and the notice requirements to Beneficiaries.

You have my authorization to release this letter to any Beneficiary as you see fit.

Best Regards,

  
Catherine Twinn

- cc. Roland Twinn
- dd. Bertha L'Hirondelle
- ee. Clara Midbo
- ff. Walter F. Twinn
- gg. Ronald Ewoniak

This is Exhibit "E" referred to in the Affidavit of 002/022

Catherine Twinn  
Sworn before me this 24 day  
of September 20 14

CODE OF CONDUCT

Trustees of The Sawridge Band Inter Vivos Settlement and of The Sawridge Trust

Crista C. Osualdini  
A Commissioner for Oaths  
in and for the Province of Alberta  
Crista C. Osualdini  
Barrister & Solicitor

WHEREAS:

- (1) The Sawridge Band *Inter Vivos* Settlement (the "1985 Trust") was established by Chief Walter P. Twinn by a Deed dated April 15, 1985.
- (2) The Sawridge Trust (the "1986 Trust") was established by Chief Walter P. Twinn by a Deed dated August 15, 1986.
- (3) The undersigned, Walter Felix Twinn, Bertha L'Hirondelle, Roland Twinn, Catherine Twinn and Clara Midbo, are currently the trustees (the "Current Trustees") of both the 1985 Trust and the 1986 Trust (collectively, the "Trusts"). The trustees of the Trusts from time to time are hereinafter referred to as the "Trustees".
- (4) The following additional documents are attached as schedules to this Code of Conduct:
  - (a) a document prepared by Davies Ward Phillips & Vineberg LLP as counsel for the Trustees which is entitled "Responsibilities of Trustees of the Sawridge Trusts" (the "Trustees' Responsibilities document"), which is attached as Schedule A; and
  - (b) Trustees' resolutions dealing with the procedure for Trustee decision-making, which are attached as Schedules B1 and B2.
- (5) In order to facilitate the effective administration of the Trusts, the Current Trustees wish to enter this Code of Conduct to which they have all agreed.

NOW THEREFORE the undersigned Current Trustees all agree to the following provisions of this Code of Conduct:

1. General

In order to carry out the Trustees' basic obligation of acting in the best interests of the beneficiaries, the Trustees must act with care, skill and diligence, integrity and impartiality; they must in general avoid conflicts of interest and duty; they must act in a way that enables decisions to be made effectively; they must respect confidentiality; and they must not act in a way which brings the office of Trustee into disrepute. This Code of Conduct will deal with each of these aspects of the Trustees' responsibilities. It will also deal with communications between Trustees and directors and management of the corporations directly or indirectly owned by the Trusts (the "Sawridge Corporations").

This Code of Conduct will also provide a procedure for resolving disputes arising from this Code of Conduct.

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## **2. Care and Diligence**

As expressed in the Trustees' Responsibilities document, the applicable general principle is that Trustees are required to exercise the care, skill and diligence of an ordinary prudent person. In particular, this requires that Trustees will:

- (a) attend all Trustee meetings except only when unable to do so;
- (b) read and consider the agendas for Trustee meetings along with accompanying materials; and
- (c) generally give careful consideration to all issues arising for decision by them as Trustees.

## **3. Communications with Directors and Management of Sawridge Corporations**

As expressed in the Trustees' Responsibilities document, the Trustees have adopted an arrangement under which none of them sit on the boards of Sawridge Corporations; instead, the Trustees have elected qualified persons to act as directors. This arrangement rests on two principles. The first is that the Trustees will not interfere in the roles, respectively, of the directors and of the management of the corporations. The second is that the Trustees will have sufficient and timely information about the conduct of the Sawridge Corporations so that, as a group, they are kept fully apprised of the business and affairs of the corporations and where considered advisable communicate any concerns through the Trustees' Chair to the Chair of the Board of Directors.

Two points dealing with the practical application of these principles apply to the conduct of Trustees. These are:

- (a) Communications between the Trustees and the directors will ordinarily be made by and to the Trustees collectively only through the Trustees' Chair. Individual communications may occur only at meetings of the shareholders at which directors attend, including at annual shareholder meetings.
- (b) Trustees will not interfere with management of the Sawridge Corporations. If any Trustee has any concern relating to management of the corporations that concern must not be communicated to the management but is to be brought to the attention of the Trustees as a group and the Trustees' concern can then be communicated through the Trustees' Chair to the Chair of the Board of Directors.

## **4. Integrity, Impartiality and Conflict of Interest**

Trustees must at all times act honestly in the best interests of beneficiaries and in making decisions as Trustees must make decisions which they honestly believe to be in the beneficiaries' best interests.

Trustees must exercise their functions as trustees free of extraneous and improper influence. This includes obvious circumstances such as receiving bribes but also extends to less obvious

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circumstances such as making a decision on the basis of personal feelings about a particular beneficiary where such feelings have no relevance to the matter under consideration or where the Trustee has not expressed to the other Trustees the fact that such feelings are affecting his or her decision.

#### Conflicts of Interest

Avoidance of conflicts of interest is an aspect of the requirements of integrity and impartiality. As stated in the Trustees' Responsibilities document, the Trustees must avoid improperly acting in a position of conflict between self-interest and duty. The following procedure will be followed to deal with such conflicts:

- (a) For the purposes of this procedure, there will be considered to be a conflict in the following circumstances:

"There will be a conflict when a Trustee may obtain some benefit, directly or indirectly, from his or her position as Trustee or when the Trustee is in a position in which his or her decision-making as Trustee may potentially be influenced, directly or indirectly, by his or her personal interests. It will be assumed that a Trustee may obtain such a benefit if the benefit is obtained, not only by the Trustee, but also by the spouse, parent, sibling or child of the Trustee. Similarly, it will be assumed that a Trustee may be influenced if, not only the Trustee, but also the spouse, parent, sibling or child of the Trustee may be affected by the decision."

- (b) All possible conflicts must be disclosed by a Trustee to the other Trustees when the possible conflict becomes apparent to him or her. If in doubt about whether there is a conflict, the possible conflict should be disclosed.
- (c) Any Trustee, or the Chair if not a Trustee, may raise with the Trustees the issue of a possible conflict affecting any other Trustee.
- (d) If a conflict does not arise from the Trustees' dual position of Trustee and beneficiary, the conflict should ordinarily be avoided by the Trustee not entering into the transaction that would give rise to the conflict. For example, a Trustee must not sell his own property to the Trust (without court approval). Such a transaction cannot properly be carried out even if the vendor Trustee does not take part in the decision-making by the Trustees.



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- (e) When the conflict is expressly dealt with by the terms of the Trust Deeds, the Trustees may, despite the conflict, take part in the applicable decision-making. In particular, the Trust Deeds expressly provide for the Trustees receiving reasonable fees for their services as Trustees. They can, therefore, properly make the decision about their own fees. However, such decisions must not be open to the criticism that the Trustees have abused their position. The fees must therefore be demonstrably reasonable, and this may involve obtaining input from qualified advisors.
- (f) When the conflict arises from the Trustees' dual position as Trustee and beneficiary – for example, when consideration is being given to a distribution of trust property to a Trustee/beneficiary, the normal procedure should be for the conflicted Trustee not to be present at the Trustees' consideration of the question and should not vote on the question. In effect, such Trustee should be treated in the same way as a beneficiary who is not a Trustee.
- (g) Where possible benefits to Trustees or their relatives from a proposal under consideration by the Trustees arise only because the proposal may benefit all beneficiaries, or a broad category of them, with no particular advantage being conferred upon any Trustee or relative of a Trustee, it would be impractical and unreasonable to disqualify Trustees from consideration of the proposal merely because of such potential benefits. In such cases the potential benefits to Trustees and their relatives will generally be obvious on the face of the proposal, so that there is no hidden advantage to a Trustee or relative which should be disclosed, nor should the Trustee be exposed to criticism or potential liability for having made such a decision on the basis that it would be in the interests of the beneficiaries as a whole, or some significant group of beneficiaries.
- (h) When the Trustees decide that there is in fact no conflict in respect of a particular question or transaction but that one or more beneficiaries might nevertheless consider that there is a conflict, it will ordinarily be appropriate for the affected Trustee not to be present at the Trustees' consideration of the matter and not to vote on it.

##### 5. Conduct Involving Decision-Making Process

In order that the decision-making process be fair and effective, it is crucial that communication among Trustees be fair and effective. Therefore, the Trustees shall act in accordance with the following principles:

- (a) **Cooperation:** Trustees shall collaborate to serve the best interests of the beneficiaries.
- (b) **Tolerance:** each Trustee should seek to fully understand the views and values of the other Trustees in the best possible light and consider whether those views and values might be usefully adopted to guide the ongoing deliberations of the Trustees.

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- (c) **Inclusion:** Trustees shall use their best efforts to include all Trustees in their deliberations so that each Trustee feels that he/she had a meaningful opportunity to contribute to the discussion and that his/her views and values were given fair and full consideration.
- (d) **Compassion:** each Trustee recognizes that the other Trustees are human beings with their own weaknesses and capable of making mistakes. The Trustees agree to show patience, and provide mentorship and caring for each other.
- (e) **Relationship:** the Trustees recognize that people live in complex and essential webs of relationship and acknowledge that decisions and actions of individuals and the community unavoidably affect each other. The Trustees shall seek to make their decisions in ways that positively strengthen their relationships and in ways that promote the best consequences for the beneficiaries.
- (f) **Honesty in Communication:** Trustees must be fair, open, truthful and sincere when dealing with each other and shall all times avoid attempts to deceive or mislead each other.
- (g) **Fair Procedures:** the Trustees agree to proceed with their decisions in accordance with known and fair procedures.
- (h) **Assertiveness:** Trustees have an obligation to state their views and concerns openly and clearly for consideration by the other Trustees.
- (i) **Consensus:** where possible, Trustees should work towards unanimous agreement; where unanimous agreement is not possible, Trustees shall try to come to a consensus; where neither of these is possible Trustees shall reach decisions by simple majority. In all cases, once a decision is made by the Trustees it should be respected and followed by all.
- (j) **Objectivity:** Trustees must base their decisions upon relevant facts and information in a way that is not biased by undisclosed personal feelings or opinions.
- (k) **Transparency:** to the extent possible, the Trustees should be able to articulate their reasons for coming to a particular decision.
- (l) **Peacefulness & Respect:** Trustees have an obligation to be polite, respectful and courteous in their dealings with other Trustees; they agree to deal with each other in a calm and open manner; and they agree to avoid expressions of anger and personal attacks which may disrupt the harmony of the group.
- (m) **Reconciliation:** the Trustees accept that they are morally accountable for their own actions. Where their actions or decisions have, intentionally or unintentionally, caused disharmony, they accept a personal obligation to work towards restoring harmony.

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## 6. Confidentiality

The Trustees shall maintain the confidentiality of the deliberations of the Trustees and of any other confidential information imparted to the Trustees including information received from the Sawridge Corporations and their businesses and affairs.

## 7. Conduct Bringing Office of Trustee Into Disrepute

It is important that the role of the Trustees be respected by the beneficiaries of the Trusts. Therefore, criminal conduct or other conduct which brings the office of trustee into disrepute is contrary to this Code of Conduct, whether or not such conduct is directly connected to the carrying on of responsibilities as Trustee.

## 8. Application of the Code of Conduct

The following are the guiding principles applicable to the application of this Code of Conduct:

- (a) It is intended that Trustees will abide by this Code of Conduct, along with the Schedules to it, in carrying out their responsibilities as Trustees.
- (b) Any Trustee who has any concern about the conduct of another Trustee will ordinarily in the first place raise the concern either privately with the other Trustee or at a meeting of the Trustees, as may be appropriate in the circumstances. It is expected that such concerns will ordinarily be resolved informally without the need for any outside intervention.
- (c) Where it is alleged by a Trustee (the "Claimant") that another Trustee has acted inconsistently with this Code of Conduct and the Claimant is not satisfied that his or her concern has been properly resolved in accordance with (b) above, the Claimant may require that an outside person be appointed to act as a mediator and arbitrator to deal with the complaint, as follows:
  - (i) Subject to (iii) below, the Claimant will by notice in writing request the Trustees' Chair to arrange the selection of a mediator/arbitrator. Such mediator/arbitrator will be such person as shall be agreed by both the Claimant and the Respondent.
  - (ii) Subject to (iii) below, if the disputing Trustees do not, within 30 days from the date of the notice referred to in (i) above, agree on a mediator/arbitrator the Trustees' Chair shall appoint a mediator/arbitrator.
  - (iii) If the Trustees' Chair is a Trustee who is a disputing Trustee, the notice referred to in (i) above will be provided to the Trustees who are not the disputing Trustees and the appointment referred to in (ii) above will be made by the majority of the Trustees who are not the disputing Trustees.

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- (d) The role and authority of the mediator/arbitrator will be as follows:
- (i) the mediator/arbitrator shall arrange for a joint meeting with the parties not later than 90 days from the date of the notice referred to in 8(c)(i) above;
  - (ii) the mediator/arbitrator will first act as a mediator in order to facilitate a resolution of the dispute without the need for any binding direction;
  - (iii) if the mediator/arbitrator determines that it will not be possible to resolve the dispute without any binding direction, he or she shall act as an arbitrator to resolve the dispute by one or more directions;
  - (iv) the mediator/arbitrator shall have all the authority, powers and discretion granted to an arbitrator under the Alberta *Arbitration Act*;
  - (v) if the mediator/arbitrator makes a finding that a Trustee has acted inconsistently with this Code of Conduct the mediator/arbitrator may make one or more directions relating to any of the following:
    - (A) that a Trustee act or abstain from acting in particular ways;
    - (B) that a Trustee not be entitled to be paid remuneration to which he or she would otherwise be entitled;
    - (C) that a Trustee resign as Trustee;
    - (D) that some or all of the costs and expenses of the dispute resolution process be paid by one or more of the Trustees personally.
  - (vi) Subject to a direction made by the mediator/arbitrator pursuant to 8(c)(iv) above, the costs and expenses incurred in respect of the dispute resolution process will be paid from the assets of the Trusts.
  - (vii) There shall be no appeal from a decision of the mediator/arbitrator.

#### **9. Application of Code of Conduct to all Trustees**

It is intended that all Trustees will be subject to this Code of Conduct. Therefore, it will be a condition of appointment of a person as Trustee that he or she will agree to become a signatory to the Code of Conduct.

#### **10. Severability**

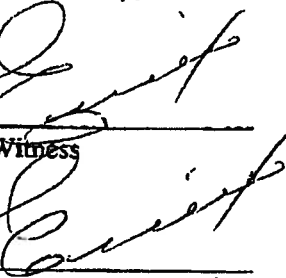
If any provision of this Code of Conduct is determined to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions of this Code of Conduct.

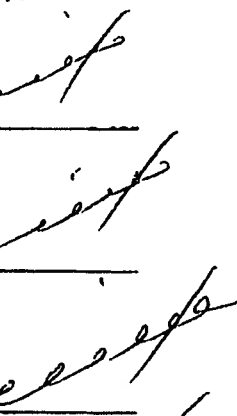
**11. Amendment of Code of Conduct**

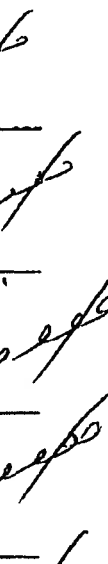
This Code of Conduct may be amended from time to time by the unanimous agreement of all of the Trustees at any such time by instrument in writing.

DATED this 12<sup>th</sup> day of January, 2009.

  
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Witness

  
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Walter Felix Twinn, WFT

  
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Bertha L'Hirondelle

  
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Catherine Twinn

  
\_\_\_\_\_  
Roland Twinn

  
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Clara Midbo

## SCHEDULE A

### Responsibilities of Trustees of the Sawridge Trust

#### **Introduction**

This document describes, in a general way, the responsibilities of the trustees (the "Trustees") of the Sawridge Band *Inter Vivos* Settlement (the "1985 Trust") and of the Sawridge Trust (the "1986 Trust") (together, the "Trusts").

Trustees are required to act in accordance with the general law of trusts as modified by the provisions of the document establishing the particular trust.

#### **Beneficiaries**

Paragraph 2(a) of the Trust Deed applying to the 1985 Trust defines beneficiaries for the purposes of that Trust as all persons who at any particular time qualify as members of the Sawridge Indian Band pursuant to the provisions of the *Indian Act* as those provisions existed on April 15, 1982.

Paragraph 2(a) of the Trust Deed applying to the 1986 Trust defines beneficiaries for the purposes of that Trust as all persons who at any particular time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including the membership rules and customary laws of the Sawridge Indian Band as they exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada.

#### **Number of Trustees**

The Trust Deed applying to the 1985 Trust provides that at all times (except for the period pending an appointment) there shall be at least five Trustees. A non-beneficiary may not be appointed if immediately before such appointment there is more than one Trustee who is not a beneficiary. There cannot, therefore, be more than two Trustees who are not beneficiaries (paragraph 5).

The Trust Deed applying to the 1986 Trust provides that at all times (except for the period pending an appointment) there is required to be a minimum of three Trustees and a maximum of seven Trustees. A non-beneficiary may not be appointed if immediately before such appointment there are more than two Trustees who are not beneficiaries (paragraph 5). It would, therefore, be possible to have three Trustees who are not beneficiaries. However, for tax reasons, it is preferable that the two Trusts have the same Trustees.

#### **Basic Obligation of Trustees**

The basic obligation of trustees is to act in the best interest of the beneficiaries.

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### **Distribution of Income or Capital of Trusts**

Both Trusts provide for the Trustees to have a wide discretion as to the distribution of income or capital of the Trusts, paragraph 6 of each Trust Deed providing (in part) that the,

"Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate."

Although the provision of the Trust Deeds refers to the discretion as "unfettered" and "uncontrolled", it is in fact "fettered" and "controlled" by the requirements of the law of trusts. The point is that since the discretion is exercisable by the Trustees as trustees they must not exercise it arbitrarily but must do so in accordance with the requirements of trust law. These requirements, which have been laid down in case law and are expressed in fairly general terms, can be summarized as follows:

- Trustees must give active consideration to the exercise of their discretionary powers.
- Trustees must act in good faith, in the sense that they must take account of relevant factors and must not take account of irrelevant factors.

The case law does not define what is relevant for these purposes. It depends on the circumstances of each particular trust. However, the basic idea is that trustees should take account of factors relevant to the purposes of the particular trust. They must not, for example, take account of their personal feelings about particular beneficiaries.

Distributions from the Trusts may be made to or for the benefit of the beneficiaries in a variety of ways. These would include providing facilities or programmes generally for the benefit of beneficiaries and by programmes involving distributions to beneficiaries. It is important that the availability of any such facilities or programmes is made known to beneficiaries so that beneficiaries have the opportunity both to take advantage of any facilities or programmes that are generally available for beneficiaries and to apply for any facility or programme that will involve selection among the beneficiaries.

The topic of conflict of interest and duty is relevant to the exercise of the Trustees' discretion to distribute trust property. This is discussed below.

### **Process of Decision Making**

Unlike the law applicable to corporations, trust law does not specify a procedure for trustees to make decisions. Also, trust documents – like the Deeds applicable to the Trusts – do not typically provide detailed guidance for such decision making.

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The following should be noted:

- Both Trust Deeds provide for decisions being made by a majority of Trustees. In the case of the 1985 Trust, paragraph 13 of the Deed states that a "majority of fifty percent" of the Trustees shall be required for any decision or action taken on behalf of the Trust. This should be interpreted to require a simple majority which is clear when there is an odd number of Trustees, and when there is an even number it should be interpreted as a simple majority. In the case of the 1986 Trust, paragraph 13 of the deed provides as follows:

"Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision."

Although, as described above, both Trust Deeds provide that the Trustees' decisions may be made by a majority, this does not mean that decisions can properly be made with the involvement of only a majority. In general, all Trustees must take part in the decision-making process, even though ultimately the decision may be made by a majority.

- Although trustees are not required to make decisions by any particular procedure, it is important that they do have a procedure that enables decisions to be made effectively.

#### **Delegation**

In general, trustees cannot delegate to others the exercise of their discretionary powers. They can, however, seek professional advice and they can appoint agents to implement their decisions. In fact, when trustees do not have the expertise needed for the making of a particular decision, they should obtain such advice.

Paragraph 8(c) of both Trust Deeds provides for the employment of professional advisors and agents as follows by confirming power,

"to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payments of professional fees to any Trustee who renders professional services to the Trustees)."

The Trustees must exercise care in the appointment of professional advisors and agents and in monitoring their work appropriately.



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### **Duty of Care**

In general, in administering a trust and its property, trustees are required to exercise the care, skill and diligence of an ordinary prudent person. Two aspects of this should be noted, as follows.

#### Control of Corporations

Where trustees hold sufficient shares of a corporation to enable them to control that corporation, their fundamental obligation is to exercise that control for the benefit of the trust, and in doing so they must act in accordance with the standard of care referred to above. Ordinarily, this requires that:

- (1) the trustees obtain appropriate representation on the board of directors and, typically, this will have the result that one or more of the trustees will be directors;
- (2) the trustees should obtain and review appropriate information about the corporation's affairs; and
- (3) the trustees must exercise their powers as shareholders in order to fully protect the interests of the trust.

The principal assets of the Trusts are the shares in and debt owed by Sawridge Holdings Ltd. and 352736 Alberta Ltd. and their various subsidiaries (the "Sawridge Corporations"). Until the re-organization carried out in 2006, the same persons acted as Trustees of the Trusts and as directors of Sawridge Corporations. Since then, the Trustees have elected qualified persons whom they consider suitable to act as directors, and none of the Trustees has sat on the boards of Sawridge Corporations. In the circumstances of the Trusts and the Sawridge Corporations, this arrangement was considered to be the best method of dealing with the Sawridge Corporations. There are two inter-related aspects to this arrangement. The first is that the Trustees will not individually interfere in the respective roles of the directors and of management of the corporations. The second is that the Trustees have sufficient information about the conduct of the Sawridge Corporations so that they can properly monitor the activities of the corporations and be able to make informed decisions about: their concerns and what should be communicated by the Trustees' Chair to the Chair of the Boards of Directors; the election of the boards of directors; and when it might be necessary – in unusual circumstances – to take a position by communication on a Chair-to-Chair basis regarding the management of the corporations. The following principles are applicable in this context:

- (1) The Trustees shall be routinely provided with the same information as is provided by management to directors.
- (2) The Trustees shall be routinely and promptly provided with the material received by directors at directors' meetings, including agenda and minutes of meetings.
- (3) Generally, the directors will supply any other information requested by the Trustees' Chair as collectively required by the Trustees.

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- (4) In order that the board of directors will not have concerns about providing confidential information, the Trustees receiving confidential information must respect the confidentiality of the information.
- (5) Communication between the Trustees and the directors will occur through the Trustees' positions being expressed collectively and through the Trustees' Chair. However, individual communications may occur at meetings of the Trustees as shareholders of the corporation, including at annual shareholder meetings.
- (6) Trustees should not interfere with management. If any Trustee has any concern relating to management, that concern should be brought to the attention of the other Trustees, and if considered by the other Trustees to be sufficiently material the Trustees' concern can then be communicated through the Trustees' Chair to the directors.

#### Investment

Paragraph 7 of both Trust Deeds gives the Trustees power to invest the Trust Fund in any investments authorized for trustees' investments by the *Alberta Trustee Act*, but the Trustees are not restricted to such investments and they may invest in any investment which they in their discretion think fit.

In dealing with investments, trustees are required to act in accordance with the standard of care described above. The Trusts were established in order to hold the Sawridge Corporations and the businesses carried on by them, and the exercise of the Trustees' investment responsibilities can properly be considered in light of this. However, it is also important for the Trustees to have regard to the principles generally applied, which are as follows:

- Trustees should, in selecting investments, perform an assessment of proposed investments, evaluating both the safety of the capital invested and the potential return from the investment. An assessment of risk, both of achieving the potential return and risk to the safety of the capital investment, should be considered.
- Ordinarily, trustees should diversify the investments of the trust, having regard to the requirements of the particular trust.
- The investment portfolio of the trust should be reviewed periodically as well as when unusual changes affecting the portfolio occur.
- Trustees may obtain expert professional advice on evaluating and selecting investments. Trustees may delegate authority to an agent with respect to the investments, so long as the trustees exercise appropriate care in the selection of the agent; the authority of the agent is clearly and appropriately restricted; and the performance of the agent is appropriately monitored.

#### Duty to Keep and Render Accounts and to Provide other Information

Under the general law of trusts, trustees have an obligation to maintain proper accounts dealing with the income and capital of the trust and, on request, to provide the accounts for the inspection of beneficiaries. Paragraph 10 of both Trust Deeds provides as follows:

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"The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust."

In addition to their right to inspect trust accounts, beneficiaries are also entitled to obtain information about the trust and its administration and to inspect trust documents. This includes a right to inspect legal opinions obtained by the trustees in their capacities as trustees. A recent court decision indicates that, at least in some circumstances, beneficiaries do not have an absolute entitlement to obtain trust information and documents but that the court has an overriding ability to control such entitlement. Nevertheless, the Trustees should assume that beneficiaries will, generally, be able to assert a right to obtain trust information and documents.

It is not completely clear to what extent beneficiaries are entitled to information relating to corporations, shares of which are directly or indirectly held in the Trust. It should be assumed that the beneficiaries will be entitled to obtain all information and documents in the possession of the Trustees as trustees or which the Trustees are entitled to obtain as trustees. This will likely include any information or documents relating to any of the Sawridge Corporations, unless the production of such information or documents involves a breach of confidence or otherwise would be improper. Even in this situation, court controlled production of information or documents may permit disclosure to be made in a controlled manner. As was stated in the recent case referred to above:

"Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards may have to be put in place."

It is the orthodox position that trustees cannot be required to provide beneficiaries with the reasons for their exercise of discretionary powers and, similarly, that documents expressing such reasons can be withheld. However, the Trustees should not rely on this orthodox position and should assume that their reasons for decisions (and the documents expressing them) will be scrutinized by beneficiaries and, in the event of a dispute, by the court.

The law is unclear as to trustees' obligations to volunteer information about the trust. As stated above, it is suggested that, at least when the Trustees have adopted a programme involving selection among beneficiaries, the availability of the programme should be made known to the beneficiaries.

#### **Duty of Loyalty: Conflict of Interest and Duty**

##### No Statutory Code

Unlike corporate law, trust law provides no statutory code dealing with the fiduciary obligations of trustees or, in particular, with conflict of interest and duty.

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### General Principles

The overriding obligation of trustees is to act in the best interests of the beneficiaries, and to prefer the interests of the beneficiaries over their personal interests. This is often described as the duty of loyalty. There are two, overlapping, aspects of the duty of loyalty. First, a trustee must not place himself in a position of conflict between his self-interest and his duty. Second, a trustee must not profit from his position as trustee. In general, a trustee who puts himself in a position of conflict is liable to disgorge any of the gains made from so doing and is liable for losses to the trust flowing from the breach of his trustee obligation. These general principles are applied very strictly against trustees. Liability does not depend on proof that the trustee in fact abused his or her position and the liability to disgorge gains does not require proof that the trust suffered any loss. Also, the liability to disgorge gains extends to those obtained indirectly as well as those obtained directly.

### Remuneration as Trustees

The general principles dealing with conflict of interest and duty are subject to modification by the terms of a particular trust. Paragraph 9 of each of the Trust Deeds provides for the Trustees to receive reasonable fees for their services as trustees in the administration of the Trusts.

### Application of General Principles

Clear examples of conflict occur if:

- a trustee makes use of trust property for his personal benefit;
- a trustee sells her own property to the trust;
- a trustee purchases property from the trust;
- a trustee establishes for herself personally a business competing directly with an established business of the trust; and
- a trustee takes advantage of a "maturing business opportunity" of the trust. For example, if trustees were negotiating to obtain some business opportunity for the trust, it would be improper for a trustee to obtain such business opportunity for himself or herself.

It is not clear whether a trustee may obtain for himself a business opportunity obtained otherwise than through his position as trustee in the circumstances that the business opportunity is of a type that the trust has adopted a policy of attempting to obtain.

It is not clear to what extent and in what circumstances the conflict principles apply where a benefit is obtained by the spouse or other close relative of the trustee. However, the Trustees should assume that the conflict principle will be applied in respect of any benefit that may be obtained indirectly by the Trustee, including where the benefit is obtained by the spouse or close relative.

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### Application of Principles Where Trustees are Also Beneficiaries

The application of the general principles discussed above gives rise to some difficulty when the same persons are both trustees and beneficiaries since a conflict will often be inevitable in such circumstances. Some conflict is inherent in the two Trusts. In particular, the 1985 Trust requires that at least two Trustees be beneficiaries. Also, although it would be possible to have three Trustees of the 1986 Trust who are non-beneficiaries, for tax reasons it is preferable to have the same Trustees of the two Trusts.

As stated above, both of the Trusts give the Trustees a wide discretion to distribute income or capital of the respective Trusts to one or more of the beneficiaries. Obviously, the Trustees may be in a position of conflict – one created by the Trust arrangements and not one they have put themselves into – in exercising their discretion in a way that might benefit themselves as beneficiaries. This conflict is not acute if the policy is adopted of making distributions from the Trusts that are of general benefit for the beneficiaries, for example, if a distribution of a particular amount was distributed to each and every beneficiary or if funds were expended in creating facilities or programs available for the general benefit of beneficiaries. However, the conflict may be problematic if a policy is adopted involving the exercise of discretion to make distributions – either by way of grant or by way of loan – to particular beneficiaries. There is an obvious danger that the Trustees could be accused of acting improperly if their powers are used to benefit one or more of their own number, particularly if applications for assistance are denied to other beneficiaries.

There are two possible ways in which the inherent conflict in which the Trustees may find themselves can be managed. They are as follows:

- (1) One possibility would be for Trustees (and perhaps others closely connected to them, such as spouse and other close relations) to be excluded from benefit from any programs that involve choice among beneficiaries. However, this appears to be unfair to persons who choose to take on the responsibility of being trustees and may be an inappropriate disincentive. It must be remembered in this context that the terms of the trust instrument clearly contemplate that not only may the same person be both a trustee and a beneficiary but, particularly in the case of the 1985 Trust, it is required that some trustees must be beneficiaries.
- (2) Another possibility is to permit trustees to benefit from programmes of the sort under consideration but to manage the conflict arising from that by the use of arrangements such as the typical provisions applicable to corporations. For example, section 120 of the *Canada Business Corporations Act* contains a scheme applicable to directors under which directors are required to disclose their interests when they have a personal interest in a matter involving the corporation and they are then excluded from voting on any resolution of the board of directors relating to such matter.

The second alternative is not perfect since trust law does not contain any provision or other rule absolving a trustee from responsibility with regard to a decision affecting a matter in the circumstances described in the second alternative. Nevertheless, in the special circumstances of

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the Sawridge Trusts this is the better of the two alternatives and should provide the most appropriate method of minimizing the conflict to the extent reasonably possible.

### **Dealing with Conflict**

Certain preliminary points should be emphasized. First, although a "working definition" of a conflict will be set out below, and although there are situations in which it is clear that there will be an improper conflict, there will be many other situations in which it will not be possible to determine with certainty whether it would be considered there was an improper conflict. Second, the relevant principles of trust law are typically applied strictly against trustees. Therefore, when in doubt the safe course is for trustees to avoid acting in a way that could be characterized as putting themselves into a position of conflict. This presumption in favour of caution is particularly applicable to the Trustees as the Trustees must be particularly careful not to attract the criticism that they may be improperly taking advantage of their position as Trustees to benefit themselves.

In order to deal with the management of conflicts, the following is a useful "working definition" of a conflict:

There will be a conflict whenever a Trustee may obtain some benefit, directly or indirectly, from his or her position as Trustee or when the Trustee is in a position in which his or her decision-making as Trustee may potentially be influenced, directly or indirectly, by his or her personal interests. It will be assumed that a Trustee may obtain such a benefit if the benefit is obtained, not only by the Trustee, but also by the spouse, parent, sibling or child of the Trustee. Similarly, it will be assumed that a Trustee may be influenced if, not only the Trustee, but also the spouse, parent, sibling or child of the Trustee may be affected by the decision.

Not every conflict literally falling within this definition is necessarily problematic. Where a decision of the Trustees will benefit a group of beneficiaries that may include some or all of the Trustees who are themselves beneficiaries, or other beneficiaries related to them, as long as there is no ulterior purpose of conferring advantages on Trustees or their relatives under the guise of a scheme purportedly for the benefit of a broader category of beneficiaries, the fact that Trustees or their relatives may incidentally benefit should not preclude the Trustees from making such a decision. As previously noted, the terms of the Trusts require some Trustees to be beneficiaries, so that it cannot have been the intention that decisions of the Trustees be disinterested in the sense of there being no possible interest of any Trustee in the administration of the Trusts.

**SCHEDULE B1****THE SAWRIDGE BAND INTER VIVOS SETTLEMENT****Resolution of Trustees: Process of Decision-Making****WHEREAS:**

- (1) The Sawridge Band Inter Vivos Settlement (the "Trust") was settled by Chief Walter P. Twinn on April 15, 1985.
- (2) The undersigned, Bertha L'Hirondelle, Walter Felix Twinn, Roland Twinn, Catherine Twinn and Clara Midbo, are the present Trustees of the Trust.
- (3) Paragraph 13 of the Deed applying to the Trust provides that any decision of the Trustees may be made by a majority of 50% of the Trustees.
- (4) The Trustees, subject to the provisions of the Trust, wish to regulate the manner of making decisions by them as Trustees.

**NOW THEREFORE BE IT RESOLVED THAT:****1. Chair of Trustee Meetings**

- (a) Ronald Ewoniak shall be invited to attend meetings of the Trustees and shall act as chair (the "Chair") of such meetings, provided that the Trustees may terminate such arrangement on reasonable notice to Ronald Ewoniak and shall from time to time appoint one of the Trustees or some other person to act as Chair.

**2. Meetings of Trustees**

- (a) Subject to paragraph 3 below, all decisions of the Trustees shall be made at meetings of the Trustees.
- (b) The Trustees shall meet at least once every quarter.
- (c) The Chair shall be responsible for calling the regularly scheduled quarterly meetings of the Trustees and additional meetings which may be called by the Chair on 48 hours' notice to the Trustees.
- (d) Meetings in addition to the regularly scheduled meetings may be called by the Chair or any Trustee on 48 hours' notice to the Chair (if not calling the meeting) and to the other Trustees.
- (e) Notice may be given in writing, by e-mail, fax or telephone or in person.
- (f) Any person may participate in a meeting by means of telephone, electronic or other communication facility as permits all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

- (g) A majority of the Trustees shall constitute a quorum of Trustees.
- (h) A reasonable time before each meeting, the Chair shall circulate to all Trustees an agenda to which shall be attached all relevant documents for consideration by the Trustees at the meeting.
- (i) The Trustees present at a meeting shall appoint one of the Trustees or some other person to act as the secretary of the meeting and to record the minutes of the meeting, including decisions of the Trustees.

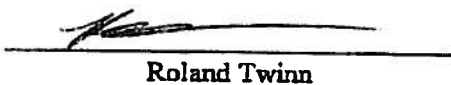
3. Resolutions of Trustees

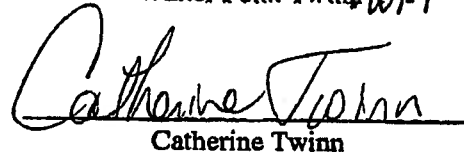
A decision of the Trustees may be also made by a resolution in writing signed by all of the Trustees.

DATED this 12<sup>th</sup> day of January, 2009.

  
 \_\_\_\_\_  
 Bertha L'Hirondelle

  
 \_\_\_\_\_  
 Walter Felix Twinn #WFT

  
 \_\_\_\_\_  
 Roland Twinn

  
 \_\_\_\_\_  
 Catherine Twinn

  
 \_\_\_\_\_  
 Clara Midbo



**SCHEDULE B2****THE SAWRIDGE TRUST****Resolution of Trustees: Process of Decision-Making****WHEREAS:**

- (1) The Sawridge Trust (the "Trust") was settled by Chief Walter P. Twinn on August 15, 1986.
- (2) The undersigned, Bertha L'Hirondelle, Walter Felix Twinn, Roland Twinn, Catherine Twinn and Clara Midbo, are the present Trustees of the Trust.
- (3) Paragraph 13 of the Deed applying to the Trust provides that any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claims whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.
- (4) The Trustees, subject to the provisions of the Trust, wish to regulate the manner of making decisions by them as Trustees.

**NOW THEREFORE BE IT RESOLVED THAT:****1. Chair of Trustee Meetings**

- (a) Ronald Ewoniak shall be invited to attend meetings of the Trustees and shall act as chair (the "Chair") of such meetings, provided that the Trustees may terminate such arrangement on reasonable notice to Ronald Ewoniak and shall from time to time appoint one of the Trustees or some other person to act as Chair.

**2. Meetings of Trustees**

- (a) Subject to paragraph 3 below, all decisions of the Trustees shall be made at meetings of the Trustees.
- (b) The Trustees shall meet at least once every quarter.
- (c) The Chair shall be responsible for calling the regularly scheduled quarterly meetings of the Trustees and additional meetings which may be called by the Chair on 48 hours' notice to the Trustees.
- (d) Meetings in addition to the regularly scheduled meetings may be called by the Chair or any Trustee on 48 hours' notice to the Chair (if not calling the meeting) and to the other Trustees.
- (e) Notice may be given in writing, by e-mail, fax or telephone or in person.

- (f) Any person may participate in a meeting by means of telephone, electronic or other communication facility as permits all persons participating in the meeting to communicate with each other simultaneously and instantaneously.
- (g) A majority of the Trustees shall constitute a quorum of Trustees.
- (h) A reasonable time before each meeting, the Chair shall circulate to all Trustees an agenda to which shall be attached all relevant documents for consideration by the Trustees at the meeting.
- (i) The Trustees present at a meeting shall appoint one of the Trustees or some other person to act as the secretary of the meeting and to record the minutes of the meeting, including decisions of the Trustees.

3. Resolutions of Trustees

A decision of the Trustees may be also made by a resolution in writing signed by all of the Trustees.

DATED this 12<sup>th</sup> day of January

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WFT  
LLP

Bertha L'Hirondelle  
Bertha L'Hirondelle

Walter Felix Twinn  
Walter Felix Twinn WFT

Roland Twinn  
Roland Twinn

Catherine Twinn  
Catherine Twinn

Clara Midbo  
Clara Midbo

Thank you for your attention to this matter.

Yours truly,

**HUTCHISON LAW**

For: 

**PER: JANET L. HUTCHISON**

JLH/cm

Enclosure

cc: The Office of the Public Trustee

cc: Eugene Meehan Q.C., Supreme Advocacy