Clerk's Stamp:

COURT FILE NUMBER:	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**REPLY BRIEF OF THE PUBLIC TRUSTEE OF ALBERTA TO THE REPLY BRIEF OF THE TRUSTEES FILED ON AUGUST 21, 2015**
ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #155, 10403 – 122 Street Edmonton, AB T5N 4C1 Attention: **Janet L. Hutchison** Telephone: (780) 423-3661 Fax: (780) 426-1293 File: 51433 JLH

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

Attention: Marco Poretti

Solicitors for the Sawridge Trustees

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Solicitors for the Sawridge Trustees

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

Attention: Karen Platten, Q.C.

Solicitors for Catherine Twinn

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

Attention: Priscilla Kennedy

Solicitors for June Kolosky and Aline Huzar

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

Attention: Nancy Cumming, Q.C.

Solicitors for the Sawridge Trustees

Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta
T5J 4K1

Attention: Edward Molstad, Q.C.

Solicitors for Sawridge First Nation

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The Matter At Issue: Disclosure of Membership Processes and Beneficiary Identification

1. With regard to the First Nation, the Public Trustee is simply asking that the First Nation file an Affidavit of Records – there is no reason that they cannot do what every other litigant[1] in Alberta does in the normal course.

2. Although the Sawridge Trustees' have agreed to file an Affidavit of Records, it is clear the parties have different views of what is relevant and material in the within proceeding.

3. The Public Trustee and the Trustees' have exchanged correspondence on the scope of production. As of the date of this brief, it is expected that the Court's guidance will be required on the scope of production despite the Trustee's offer to file the Affidavit of Records.[2]

4. Paragraph 8 of the Trustees' August 21, 2015 Reply Brief states "the matter at issue is how to define the beneficiaries of the trust to remove the discriminatory nature of the current definition." The Trustees' appear to be now saying this should limit or narrow the Court and the Public Trustee's inquiry as to how the Sawridge First Nation membership process is intended to operate and how it actually operates in practice.

5. The manner by which the Sawridge First Nation membership process operates is directly relevant to, and indeed determinative of, how beneficiary status is determined. The two processes are effectively one in the same.

6. The Trustees' submissions in this matter also completely ignore the need for greater production to permit the full and accurate identification of not only minor beneficiaries but also what Justice J. Thomas has called "candidate children".

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[1] see Public Trustee's Reply Brief at paras 6-15, paras 8 and 10 in particular

[2] Sawridge Trustees August 12, 2015 Correspondence [Sawridge Trustees Authorities, August 21, 2015 Reply Brief, Tab 1]; Public Trustees August 14, 2015, August 18, 2015 and August 28, 2015 Correspondence [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 3]

7. In light of substantial agreement between the parties with respect to the need to 'define the beneficiaries of the trust', the material requested of Sawridge First Nation (and the Trustees) should be disclosed forthwith.

8. As stated previously at Paragraph 37 of the Public Trustee's Reply (dated August 21st, 2015), Thomas J. found the Court has an obligation to make inquiries as to the procedures and status of Band memberships:

> "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."[3]

9. Specifically, as stated in paragraph 21 of the Public Trustee's Reply, the Court has directed the Public Trustee to make certain requests of the Sawridge First Nation:

> "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".[4]

10. See also paragraphs 22, 26, 28 of the Public Trustee's Reply.

11. The beneficiary class *cannot* be ascertained if identification of Band membership is 'difficult or impossible' to determine – the uncertainty created by such a scheme would

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[3] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 53 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]. *Emphasis added.*

[4] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 55 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4] *Emphasis added.*

be contrary to the necessary "Three Certainties of Trust", could disrupt the 'certainty of object', and thereby render the trust completely invalid.[5]

Ample Evidence the Membership Process Is Not Working

12. The Sawridge Trustees' submit at paragraph 27 of their August 21, 2015 Reply that there is ample evidence the Sawridge First Nation membership process is working.

13. This submission ignores the ample evidence that individuals, including evidence filed by Dentons' former client, Catherine Twinn, have serious concerns that the membership process is indeed not working.[6]

14. The evidence provided by these well-informed and concerned individuals is uncontroverted at this time. Certainly, that evidence is more than sufficient to put this Court and the Public Trustee on inquiry about exactly how the Sawridge First Nation membership process is working. All the Public Trustee is asking for is information – information that is standard in any Affidavit of Records.

Sawridge Trustees Must Disclose Relevant and Material Information

15. Thomas J. has already concluded that ordering judicial review of these processes would be inappropriate because it grants a form of relief exclusively within the jurisdiction of the Federal Court (firmly within the scope of Section 92(13) of the *Constitution Act*) (see Paragraph 41 of Public Trustee Reply dated August 21, 2015).

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[5] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 47 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]

[6] Affidavit of Roman Bombak, dated June 26, 2015; Affidavit of Catherine Twinn, dated December 8, 2014 [Affidavit of Roman Bombak, dated June 12, 2015, ex. 16]; Pleadings from Court of Queen's Bench Action No. 1503 08727 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 2]

16. Again, the Court of Queen's Bench *cannot* order the judicial review of Band membership procedure, but *can* order a disclosure for purposes squarely within provincial jurisdiction (property and civil rights) (see para 42 of Public Trustee Reply dated August 21, 2015).[7]

17. For Thomas J., this Honourable Court already has authority to do the following:

a. examine band membership processes

b. evaluate whether band membership processes are discriminatory, biased, unreasonable, delayed without reason, breach *Charter* principles, or run afoul of the natural justice requirements[8] (see paragraph 40 of the Public Trustee's Reply dated August 21st, 2015).

18. In *Kaddoura*, the 'fishing expedition' argument was rejected – it was not known *for sure* whether there were any additional files relevant and material to the proceedings.[9] The Alberta Court of Appeal concluded as follows: "When it comes to record disclosure, if there are fish, the respondents do not have to go fishing for them."[10]

19. Importantly, the Alberta Court of Appeal found the right to disclosure of records does not depend on the requestor litigant "...proving with certainty that some relevant records exist." Rather, the onus is on the other requestee litigant to review its own records and prepare an affidavit of records listing relevant records that do exist.[11] In support of this proposition, the Court cited the following decisions: *Myers v Elman*, [1940] AC 282

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[7] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 54 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]
[8] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2012 ABQB 365 at para 54 [Public Trustee's Authorities, August 21, 2015 Reply Brief, Tab 4]
[9] *Royal Bank of Canada* v. *Kaddoura*, A.J. No. 489 (C.A.) at para 17 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 4]
[10] *Royal Bank of Canada* v. *Kaddoura*, A.J. No. 489 (C.A.) at para 17 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 4]
[11] *Royal Bank of Canada* v. *Kaddoura*, A.J. No. 489 (C.A.) at para 17 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 4]

at p. 322 (HL); *Canada (Attorney General) v Spencer*, 2000 SKCA 96 (CanLII) at paras. 16, 24-6, 199 Sask R 127, 7 CPC (5th) 280; and *Alberta (Director of Child Welfare) v C.H.S.*, 2005 ABQB 695 (CanLII) at para. 15, 55 Alta LR (4th) 168, 385 AR 119.

Issue Estoppel is Discretionary: Abstaining Where an Injustice Follows

20. In *Stoney*,[12] the Court did not take the Applicant's potential entitlement to benefits under the 1985 Sawridge Trust into consideration.

21. In *Penner*,[13] a majority of the Supreme Court of Canada held that: "The principle underpinning this discretion is that '[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice'"[14]

22. Where a 'significant difference' exists between the purpose or 'stakes involved' in the two proceedings, an injustice may arise from using the results of the prior judgment to preclude subsequent proceedings.[15]

23. In other words, even if the requirements of issue estoppel are met in the present matter, the Court can exercise its discretion to abstain from applying the doctrine as per *Penner* (especially in light of the fundamental difference between the proceedings – one for membership, the other for an entitlement under the 1985 Sawridge Trust).

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[12] *Stoney v. Sawridge First Nation*, 2013 FC 509 [Sawridge Trustees Authorities, August 21, 2015 Reply Brief, Tab 3]
[13] *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 1]
[14] *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19 at para 30 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 1]
[15] *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19 at para 42 [Public Trustee's Authorities, August 31, 2015 Reply Brief, Tab 1]

24. Nothing in the Federal Court decision precludes the Public Trustee from merely seeking information additional beneficiaries, and minor beneficiaries in particular.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 31st day of August, 2015.

HUTCHISON LAW

Per: _____
JANET L. HUTCHISON
Solicitors for the Public Trustee

List of Authorities

1. *Penner v. Niagara (Regional Police Services Board),* [2013] 2 SCR 125, 2013 SCC 19
2. Pleadings from Court of Queen's Bench Action No. 1503 08727
3. Public Trustee's August 14, 2015, August 18, 2015 and August 28, 2015 Correspondence
4. *Royal Bank of Canada* v. *Kaddoura*, A.J. No. 489 (C.A.)

Tab 1

Indexed as:

Penner v. Niagara (Regional Police Services Board)

Wayne Penner, Appellant;

v.

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow, Respondents, and

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association, Interveners.

[2013] 2 S.C.R. 125

[2013] 2 R.C.S. 125

[2013] S.C.J. No. 19

[2013] A.C.S. no 19

2013 SCC 19

File No.: 33959.

Supreme Court of Canada

Heard: January 11, 2012;
Judgment: April 5, 2013.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

(127 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Civil procedure -- Issue estoppel -- Administrative law -- Police disciplinary proceedings -- Complaint alleging police misconduct brought under Police Services Act, R.S.O. 1990, c. P.15 ("PSA") -- Civil action for damages arising from same incident also commenced -- PSA hearing officer finding no misconduct and dismissing complaint -- Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer's decision -- Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created -- Whether unfairness arises from application of issue estoppel in this case.

[page126]

Summary:

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act* ("*PSA*"), alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil action struck on the basis of issue estoppel. While finding several factors weighed against the application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

Held (LeBel, Abella and Rothstein JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in [page127] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way; however, the Court of Appeal failed to fully analyze the fairness of using the results of that process to preclude P's civil action. Nothing in the legislative text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face [page128] two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

Per LeBel, Abella and Rothstein JJ. (dissenting): The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle assuring the fairness and

efficacy of the justice system in Canada. The doctrine of issue estoppel seeks to protect the reasonable expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [page129] [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the "very limited" discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel -- that there should be an end to litigation and that the same party shall not be harassed twice for the same cause -- are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. The ultimate goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to administrative law. The Court's residual discretion to refuse to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *PSA* and that required in a civil trial is irrelevant in this case. The hearing officer made unequivocal findings that there was virtually no evidence to support P's [page130] claims. That means that there is simply no evidence to support P's claims whatever standard of proof is applied. P should not be allowed to circumvent the clear

findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of Police designated an outside prosecutor and an independent adjudicator. Similar methods of appointment are quite common in other parts of the law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

Cases Cited

By Cromwell and Karakatsanis JJ.

Applied: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Dunsmuir v. [page131] New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ. (dissenting)

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Parker v. Niagara Regional Police Service* (2008), 232 O.A.C. 317; *EnerNorth Industries Inc.,*

29 The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

30 The principle underpinning this discretion is that "[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice": *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.

31 Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to [page143] ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

B. *No Public Policy Rule Precluding Issue Estoppel With Respect to Police Disciplinary Hearings*

32 The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

33 Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 213 O.A.C. 371, at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the

Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint "retired police officers not associated with [page144] this force is capable of founding such independence as necessary". See also the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

34 The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

35 We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

C. *Discretionary Application of Issue Estoppel*

(1) Approach to the Exercise of Discretion

36 We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

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37 This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

38 The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

39 Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where

the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) *Fairness of the Prior Proceedings*

40 If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

41 Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the [page146] issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

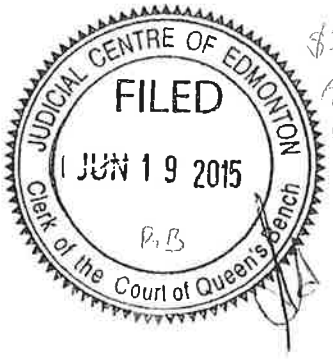
42 The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

43 Two factors discussed in *Danyluk* - "the wording of the statute from which the power to issue the administrative order derives" (paras. 68-70) [page147] and "the purpose of the legislation" (paras. 71-73), including the degree of financial stakes involved - are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in

Tab 2

Form 10
[Rule 3.25]

Clerk's stamp:



$250
Advised of Rule 13.6(2)

COURT FILE NUMBER	1503 08727
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
PLAINTIFF(S)	Catherine Twinn
DEFENDANT(S)	Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker
DOCUMENT	**STATEMENT OF CLAIM**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Brian P. Kaliel, Q.C. Lawyer's Email: bkaliel@millerthomson.com File No.: 121435.01

NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

The Parties

1. The Plaintiff, Catherine Twinn resides at the Sawridge Indian Reserve near Slave Lake, in the Province of Alberta and at the City of Edmonton, in the Province of Alberta.

2. The Defendants, Roland Twinn, Bertha L'Hirondelle and Everett Justin Twin reside at the Sawridge Indian Reserve near Slave Lake, in the Province of Alberta.

3. The Defendant, Brian Heidecker resides at or near Edmonton, in the Province of Alberta.

4. The Defendant, Margaret Ward, resides at or near Wetaskiwin, in the Province of Alberta.

5. Roland Twinn has been the Chief of the Sawridge Indian Band (the "Band") since 2003. The Defendants, Bertha L'Hirondelle and Everett Justin Twin are former members of the Band Council.

6. The Plaintiff, Catherine Twinn, is 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").

7. The Trusts currently have an estimated gross asset value of $300 million.

8. Catherine Twinn was appointed as a Trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. She has continuously maintained that position since this appointment.

9. The Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward are the other current Trustees of the Trusts (the "Defendant Trustees").

10. The Defendant, Brian Heidecker ("Heidecker") is not a Trustee. He is the current Chair of the Trustees and holds the position of "Trustee's Chair".

Ascertainment of Trust Beneficiaries and Conflict of Interest Issues

11. The 1985 Trust defines "beneficiaries", in part, as:

> "All persons who at [April 15, 1982] qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act, R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982..."

12. The 1986 Trust defines "beneficiaries" as:

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

13. In or about August and September of 2011, Bujold filed Affidavits in Queen's Bench Action No. 1103 14112 (the "Trusts Application") seeking the opinion, advice and direction of the Alberta Court of Queen's Bench with respect to the definition of "beneficiaries" contained in the 1985 Sawridge Trust and, if necessary, to vary the 1985 Sawridge Trust to clarify the definition of "beneficiaries" and adopt the definition of "beneficiaries" that exists in the 1986 Trust. These changes would, based on the current practice of the Band, render individuals who are accepted by the Chief and Council as Band members as the only beneficiaries of the 1985 Trust.

14. In Reasons for Judgment dated June 12, 2012 in the Trusts Application, the Honourable Mr. Justice D.R.G. Thomas expressed concerns that persons excluded by the Band from Band membership would thereby also be excluded as beneficiaries of the 1985 Trust if the 1985 Trust adopted the 1986 Trust's definition of beneficiaries; that the Public Trustee should make enquiries into the membership and application processes and practices of the Band; that there is an overlap between the Trustees and the Sawridge Band Chief and

Council; that there is a potential conflict between the personal interests of the Sawridge Trustees (including the Chief and Council) and their duties as fiduciaries under the Trusts, and that the Court of Queen's Bench 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 in breach of Charter principles and the requirements of natural justice".

15. Mr. Justice Thomas directed the appointment of the Public Trustee for the Province of Alberta to represent the interests of children potentially affected by the application with authority to enquire into the Band's processes for admission of individuals as Band members and to report to the Court whether the Band's system is fair, reasonable, timely, unbiased and in accordance with Charter principles and natural justice.

16. The Band currently has 44 Band members, the majority of whom are comprised of the Twin(n) family.

17. The Plaintiff has, for a number of years, expressed concerns with respect to the potential conflict of interest in having elected officials of the Sawridge First Nation act as Trustees; the need to ensure a de-politicized independent Board of Trustees; a Trustee succession plan which involves the appointment of independent and qualified Trustees, and a system for ascertaining beneficiaries which is fair, timely, reasonable and unbiased in accordance with Charter principles and natural justice. The Plaintiff had at various times to no avail, put forward recommendations to fairly ascertain beneficiaries under both Trusts and for an independent Board.

18. On January 17, 2014, the Plaintiff wrote the then Trustees an open letter reminding them of their fiduciary obligations under the Trusts in this regard and urging them to address these issues. The Plaintiff hoped that the letter would bring about a non-litigious resolution.

19. The then Trustees, including the Defendants, Roland Twinn and Bertha L'Hirondelle, and the late Clara Midbo, and Heidecker refused to discuss these issues. On January 21, 2014 the other Trustees appointed a Band Councillor, the Defendant, Everett Justin Twin as a replacement Trustee with no regard to his eligibility.

20. On August 12, 2014, without any prior notice to the Plaintiff, the Defendants, Roland Twinn, Bertha L'Hirondelle and Everett Justin Twin appointed the Defendant, Margaret Ward as a Trustee to replace Clara Midbo who died on or about July 13, 2014.

21. On September 26, 2014, the Plaintiff brought an application in Queen's Bench Action No. 1403 04885 for advice and direction with respect to the eligibility of the Defendant, Everett Justin Twin to be appointed as a Trustee of the 1985 Trust and for assistance from the Court with respect to, among other things, the appointment of an appropriate replacement Trustee for Everett Justin Twin and the deceased Trustee, Clara Midbo.

The Code of Conduct Agreement

22. By virtue of an agreement dated January 12, 2009, the then Trustees of the Trusts agreed to the terms of a Code of Conduct (the "Code of Conduct") which the Trustees affirmed their basic obligation of acting in the best interests of beneficiaries, integrity, impartiality and without conflicts of interest. They also agreed to an elective procedure for resolving disputes arising from the Code of Conduct.

23. The Plaintiff and the Defendant Trustees have all signed and agreed to the terms of the Code of Conduct.

24. Clauses 8(b) and (c) of the Code of Conduct provide as follows with respect to any concerns any Trustee has about the conduct of other Trustees:

> "The following are the guiding principles applicable to the application of this Code of Conduct:
>
> ***
>
> (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..."

25. Pursuant to the Code of Conduct, the Plaintiff and the Defendant Trustees agreed, pledged and committed, expressly or implied, that they would, among other things:

(a) Act in the best interests of the beneficiaries;

(b) Communicate with one another fairly and effectively

(c) Use their best efforts to include all Trustees in their deliberations so that each Trustee felt that he or she had a meaningful opportunity to contribute to the discussion and that his or her views and values were given fair and full consideration;

(d) Be fair, open, truthful and sincere when dealing with each other and at all times avoid attempts to deceive or mislead each other;

(e) Where possible, work towards unanimous agreement and where unanimous agreement is not possible, to try to come to a consensus;

(f) Base their decisions upon relevant facts and information in a way that is not biased by undisclosed personal feelings or opinions;

(g) Have appropriate regard to one another's legitimate interests;

(h) Act with care, skill and diligence, integrity and impartiality;

(i) Avoid conflicts of interest and duty.

The Complaints

26. On February 5, 2015, Heidecker served the Plaintiff with four complaints under the Code of Conduct that were signed by each of the Defendant Trustees (the "Complaints").

27. The Complaints were all prepared in late January or early February of 2015.

28. None of the Defendant Trustees had contacted the Plaintiff privately with respect to the concerns set forth in the Complaints as required by clauses 8(b) and (c) of the Code of Conduct.

29. None of the Defendant Trustees had attempted to resolve any of their concerns informally.

30. None of the Defendant Trustees contacted the Plaintiff as regards the appointment of a mediator/arbitrator after the Complaints were served by Heidecker.

31. The Plaintiff, through her solicitors, advised Mr. Heidecker that the fact that clauses 8(b) and (c) of the Code of Conduct had not been complied with and that the failure to do so deprived Heidecker of any legal authority to appoint a mediator/arbitrator pursuant to the Code of Conduct.

32. Both Heidecker and the Defendant Trustees, through their legal counsel, have ignored this objection. Heidecker has appointed J. Leslie Wallace as a mediator/arbitrator.

33. The Complaints were prepared and submitted collectively. Much of the content of the Complaints is biased and untrue and contains materials which are irrelevant and predate the Code of Conduct or relate to the legitimate conduct of the Plaintiff in the discharge of her fiduciary duties.

Breach of Contract and Fiduciary Duties

34. Heidecker had no authority to appoint a mediator/arbitrator as, among other things, the contractual pre-conditions under clauses 8(b) and 8(c) of the Code of conduct have not been satisfied with respect to the Complaints. The appointment of J. Leslie Wallace to mediate and arbitrate the Complaints is void.

35. It was a reasonable expectation of the Plaintiff and the beneficiaries, both current and potential, pursuant to the Code of Conduct, that any exercise of the Trustees' duties and powers, including bring a complaint, would not be used in bad faith, malice or for purposes not motivated by or in furtherance of the beneficiaries' best interests.

36. At all material times, the Defendant Trustees occupied fiduciary roles as Trustees to the Trusts. Pursuant to their roles as fiduciaries, as well as the provisions agreed to in the Code of Conduct, the Defendant Trustees owed statutory, contractual, common law, and fiduciary duties to the beneficiaries, which they breached, particulars of which include, but are not restricted to, the following:

(a) Creating contrived, irrelevant and biased Complaints motivated by malice for the Plaintiff, for the improper purpose of:

(i) preventing the Plaintiff from performing her fiduciary obligations under the Trusts as it relates to the ascertainment and recognition of Trust beneficiaries and fulfillment of Trust objects by independent Trustees, and

(ii) attempting to silence the Plaintiff from voicing legitimate concerns with respect to the ascertainment of beneficiaries and the independence of the Trustees, which were simply attempts to discharge her fiduciary duties of disclosure and to impartially act for all beneficiaries and individuals who qualified as beneficiaries,

thereby breaching the overarching duty of utmost loyalty to act in a selfless manner while in their capacity as Trustees, for the benefit of the Trusts and its beneficiaries;

(b) Failing to give appropriate regard to the Plaintiff's legitimate interests regarding the Code of Conduct and the Trusts;

(c) Failing to engage in reasonable and fair discussions or consensual decision-making with the Plaintiff pursuant to decisions to be made relating to the Trusts;

(d) Failing to avoid conflicts of interest;

(e) Failing to exercise the degree of care, diligence and skill that a reasonably prudent Trustee would exercise in comparable circumstances;

(f) Failing to discharge their roles as Trustees of the Trusts honestly, in good faith and in the best interests of the beneficiaries, by failing to promote the best interests of the beneficiaries but instead facilitating, assisting or participating in conduct motivated by personal reasons;

(g) Generally, failing to honour the Code of Conduct's true purpose and intent, which was to act cooperatively with integrity and impartiality in managing the Trusts so as to further the beneficiaries' best interests;

(h) Generally, failing to carry out their duties and powers under the Code of Conduct honestly, cooperatively, and in good faith consistent with fair dealing, in an effort to remove the Plaintiff from her position as Trustee, by basing their Complaints on irrelevant information in a way that was biased by undisclosed personal feelings or opinions;

(i) Such further and other breaches of duty as may be proven at the trial of this action.

37. The Defendant Trustees' conduct as outlined above is also in breach of the fiduciary obligations of the Defendant Trustees to individuals who qualify as beneficiaries of the 1986 Trust, but have been improperly refused or delayed Band membership, as well as to those individuals who qualify under the rules in the 1985 Trust, by failing to implement any number of fair processes to apply these rules to individuals to ascertain their beneficiary status.

38. In furtherance of these improper purposes the Defendants improperly used to Trust assets to indemnify the Defendant Trustees for legal costs they incurred to retain a

lawyer in order to assist them in removing the Plaintiff as a Trustee through the mediation/arbitration process under the Code of Conduct.

39. These actions bring the Trusts and the Trustees into disrepute and jeopardize the Trust Assets, by improperly influencing the administration of the Trusts through the political and personal agendas of the Defendant Trustees and their supporters.

Losses

40. The full extent of the Plaintiff's, beneficiaries' and potential beneficiaries' losses and damages remain unknown to the Plaintiff at the time of the delivery of the Statement of Claim.

41. The Defendant Trustees' breaches will cause the Plaintiff to suffer irreparable harm. There is a serious risk of her removal as a Trustee to the Trusts by the mediator/ arbitrator. The Plaintiff is the only Trustee who has advocated for the interests of potential present and future beneficiaries who have been improperly excluded as beneficiaries. The carrying out of these duties affects fundamental aspects of these individuals' lives. This cannot be adequately compensated by damages.

42. Further, the Defendant Trustees' breaches will cause irreparable harm to individuals who qualify as beneficiaries but whose applications for Band membership and beneficiary status have been improperly rejected, hindered or delayed, or not yet ascertained. These breaches will cause irreparable future damage to future generations of potential beneficiaries.

43. The Plaintiff has incurred expenses and damages, including legal and related costs, to protect the interests of individuals who qualify as beneficiaries but whose applications for Band membership or beneficiary status have been improperly rejected, hindered or delayed, and to protect the interests of future generations of potential beneficiaries. It is inequitable for the Trusts to pay the legal costs of the Defendant Trustees for the purpose of defeating this objective. The Plaintiff seeks an Order prohibiting the Defendant Trustees from seeking payment of their legal costs from the Trusts and requiring the Defendants to reimburse the Trusts for all such legal costs paid to date.

44. If the Defendant Trustees are entitled to indemnification for their legal costs under the Trusts, the Plaintiff seeks a declaration that she is also entitled to indemnification from the Trusts for her legal costs on a solicitor and client full indemnity basis.

Jurisdiction

45. The dispute resolution clause provided for in the Code of Conduct is permissive and elective, not mandatory. It is restricted to concerns related to the Code of Conduct. The Plaintiff has redress to this Court for the matters addressed in this Statement of Claim.

46. This Court has inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts, pursuant to *The Constitution Act*, 1867, 30 & 31, Vict, c3, s 96. This Court has inherent jurisdiction as the support of Trustees, protector of the incapacitated, and guardian of the trust.

47. In the alternative, the Court may intervene to decide this matter so as to ensure that the arbitration is carried on in accordance with the Code of Conduct, and/or to prevent

manifestly unfair or unequal treatment of the Plaintiff pursuant to the *Arbitration Act*, RSA 2000, c A-43, s 6(b) and (c).

Remedy sought:

48. An Order and declaration that Brian Heidecker has no authority to appoint a mediator/arbitrator pursuant to the Code of Conduct, as the contractual pre-conditions under clauses 8(b) and 8(c) of the Code of Conduct have not been satisfied with respect to the Complaints, and that the appointment of J. Leslie Wallace to mediate and arbitrate the Complaints is void.

49. Such directions as the Court may think fit or proper pursuant to the provisions of the *Arbitration Act*.

50. An interim and permanent injunction restraining the Defendants from proceeding with the Complaints, or similar complaints.

51. Damages against the Defendant Trustees in such amount as may be proven at trial.

52. An Order directing the Defendant Trustees to reimburse the Trusts for all legal costs received by them or their solicitors with respect to the Complaints and the proposed mediation/arbitration referred to in this Statement of Claim.

53. In the alternative, a declaration that the Plaintiff is entitled to indemnification for her legal costs on a solicitor and client full indemnity basis from the Trusts.

54. A judgment for legal costs against the Defendant Trustees as between solicitor and client on a full indemnity basis.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's' address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.

$50.00
JC

Form 27
[Rules 6.3 and 10.52(1)]

Clerk's stamp:

COURT FILE NUMBER	1503 08127
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
PLAINTIFF(S)	Catherine Twinn
DEFENDANT(S)	Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker
DOCUMENT	**APPLICATION BY THE PLAINTIFF, CATHERINE TWINN**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Brian P. Kaliel, Q.C. Lawyer's Email: bkaliel@millerthomson.com File No.: 121435.01

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date	June 26, 2015
Time	10:00 a.m.
Where	Law Courts, Edmonton AB
Before Whom	Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. An Order adjourning this application to a special Chambers hearing.

2. A declaration that the Trusts' Chair, Brian Heidecker, had no authority to appoint a mediator and arbitrator pursuant to the Code of Conduct, as the contractual preconditions under clauses 8(b) and 8(c) of the Code of Conduct had not been satisfied and that the appointment of J. Leslie Wallace to mediate and arbitrate the complaints is void.

3. A stay of the mediation/arbitration proceedings in question in this action until this issue has been determined.

4. Costs against the Defendant Trustees on a solicitor and client full indemnity basis.

Grounds for making this application:

5. The Plaintiff, Catherine Twinn, is 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").

6. Catherine Twinn was appointed as a trustee of the 1985 Trust on December 18, 1986 and of the 1986 Trust on August 15, 1986. She has continuously maintained that position since this appointment.

7. The Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin and Margaret Ward are the other current trustees of the Trusts (the "Defendant Trustees").

8. The Defendant, Brian Heidecker is not a trustee. He is the current Chair of the trustees and holds the position of "Trustee's Chair".

9. By virtue of an agreement dated January 12, 2009, the Plaintiff and the Defendant Trustees agreed to the terms of a Code of Conduct (the "Code of Conduct") in which they, among other things, affirmed their basic obligation of acting in the best interests of beneficiaries, integrity, impartiality and without conflicts of interest. They also agreed to a procedure for resolving disputes arising from the Code of Conduct.

10. Clauses 8(b) and (c) of the Code of Conduct provide as follows with respect to any concerns any trustee has about the conduct of other trustees:

> "The following are the guiding principles applicable to the application of this Code of Conduct:
>
> ***
>
> (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..."

11. In late January, 2015, the Defendant Trustees, in concert submitted complaints to Mr. Heidecker under the Code of Conduct.

12. The complaints were served on the Applicant by Mr. Heidecker on or about February 5, 2015.

13. Mr. Heidecker has purported to appoint J. Leslie Wallace as mediator/arbitrator pursuant to the Code of Conduct.

14. No discussions to attempt to resolve the Complaints preceded the purported appointment of J. Leslie Wallace as required by clauses 8(b) and 8(c) of the Code of Conduct.

15. The Applicant has, through her solicitors, notified the trustees' Chair and the Defendant Trustees of their failure to comply with clauses 8(b) and 8(c) of the Code of Conduct, however they have ignored this request and have taken the position that they wish to proceed with the mediation/arbitration.

Material or evidence to be relied on:

16. Affidavit of Catherine Twinn.

Applicable rules:

17. Rules of Court, Rules 7.1.

Applicable Acts and regulations:

18. *Arbitration Act*, ch. A-43, RSA 200, s. 6(b) and (c).

Any irregularity complained of or objection relied on:

19. As set forth above.

How the application is proposed to be heard or considered:

20. Special Chambers.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and

Form 49
[Rule 13.19]

Clerk's stamp:

COURT FILE NUMBER	1503 - 08727
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Edmonton
APPLICANT	Catherine Twinn
RESPONDENTS	Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, Margaret Ward and Brian Heidecker
DOCUMENT	**AFFIDAVIT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Brian P. Kaliel, Q.C. Lawyer's Email: bkaliel@millerthomson.com File No.: 121435.01

AFFIDAVIT OF CATHERINE TWINN

Sworn on June 19, 2015

I, Catherine Twinn, of the Sawridge Indian Reserve 150G and the City of Edmonton, 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 except 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 trustee since these appointments.

3. True copies of the 1985 Trust deed and the 1986 Trust deed are attached as Exhibits "A" and "B" hereto.

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 grounds, 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 majority of 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 proper process put into place to make this determination.

7. Brian Heidecker ("Mr. Heidecker") has been the Chair of the Trusts since May 10, 2010. Mr. Heidecker is not a trustee of the Trusts and has no voting power.

8. Paul Bujold ("Mr. Bujold") has been the Administrator since September of 2009. He is not a Trustee and has no voting power.

9. The current trustees of the Trusts are:

   (a) Myself;

   (b) Bertha L'Hirondelle (until recently, a paid elected elder of the Band and former Band Councillor and Chief);

   (c) Roland C. Twinn (also the elected Chief of the Band);

   (d) E. Justin Twin (until recently, an elected Band Councillor), appointed January 21, 2014; and

   (e) Peggy Ward, appointed August 12, 2014.

10. All of the trustees, except for myself, are present or former Band Chiefs or Councillors, or persons who were appointed as trustees by them. They take the position that the Chief and Band Council have the ability to determine who is a beneficiary under the 1986 Trust and (as a majority of the trustees) that they have the right to ascertain who should be beneficiaries under the 1985 Trust. I have long been concerned that the ascertainment of beneficiaries, and those entitled to financial benefits from the Trusts, has been tainted by the political motivation of the Chief and Council to approve Band membership to family and supporters who will vote for them, and to reward the same individuals with the financial benefits as beneficiaries of the Trusts, and to exclude those who qualify for Band membership and as beneficiaries for the same political motivations.

11. The Trusts are currently involved in legal proceedings in Court of Queen's Bench Action No. 1103 14112 which involve an application for advice and direction by the trustees with respect to proposed amendments to the definition of "beneficiaries" in the 1985 Sawridge Trust (the "Trusts Application") and a proposed variation of this definition.

   (a) Exhibit "C", being a copy of an Order dated August 31, 2011 which, among other things, directs the trustee to serve a copy of the notice of advice for direction and directions on a number of individuals, including individuals who had applied for

membership in the Band and any individuals whom the trustees may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

(b) Exhibit "D", being the June 12, 2012 Reasons for Judgment of the Honourable Mr. Justice D.R.G. Thomas in which Mr. Justice Thomas, among other things, expressed concerns that persons excluded by the Band from Band membership could also be excluded as beneficiaries of the Trust; that the Public Trustee should make enquiries into the membership and application processes and practices of the Band; that there is an overlap between the trustees and the Sawridge Band Chief and Council [at para. 11]; that there are very large sums of money at play [at para. 25]; that there is a potential conflict between the personal interests of the Sawridge trustees (including the Chief and Council) and their duties as fiduciaries under the Trusts [at para. 28], and that the 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 in breach of Charter principles and the requirements of natural justice" [at para. 54]. Mr. Justice Thomas directed the appointment of the Public Trustee as litigation representative for potentially interested children to investigate and report to the Court on the Band's system for determining membership;

(c) Exhibit "E", being the June 19, 2013 Reasons for Judgment of the Alberta Court of Appeal, dismissing the Trusts' appeal of Justice Thomas' Order directing that the Trusts pay the Public Trustee's solicitor and his own client costs in advance.

12. In August of 2012, having regard to Mr. Justice Thomas' decision, I recommended to the other Trustees that we resign and replace ourselves with independent Trustees who would cooperate with the Public Trustee in its investigation of Band membership, and correct any weaknesses in how beneficiaries are ascertained. This was rejected.

13. As a trustee, I have a number of concerns:

(a) <u>The ascertainment of beneficiaries</u>:

(i) <u>The 1986 Trust</u>: I am very concerned that the Trusts' process for ascertaining beneficiaries through Band membership is discriminatory, biased, unreasonable, delayed without reason and in breach of Charter principles. The membership rules and who makes the decisions cause me concern. I have spoken to a number of individuals who, in my view, qualify for Band membership but whose membership has been, in my view, improperly delayed, hindered or denied by the Chief and Council and/or their supporters. I am personally aware of the recent expedited appointment of the Chief's son to Band membership, while other memberships have been delayed, hindered or denied. This, in my view, led to the Chief's recent re-election by a one vote majority,

(ii) <u>The 1985 Trust</u>: For years, I have recommended an independent, fair process to ascertain these beneficiaries, in accordance with the wording of the 1985 Trusts deed. Roland Twinn has repeatedly stated these beneficiaries cannot be ascertained. That is not correct. For decades, the rules in the 1985 Trust have been applied by the Department of Indian Affairs, now Aboriginal and Northern Affairs Canada. The Chief and Council reject these rules, preferring that Band membership define beneficiary status. I have provided the Trusts with two independent legal

opinions from Larry Gilbert, former acting Registrar for Indian and Northern Affairs Canada and the author of Entitlement to Indian Status and Membership Codes in Canada, which concluded that Justin Twin did not qualify as a beneficiary under the 1985 Trust. These opinions are attached as Exhibit "F" hereto. If Band membership becomes the definition of beneficiary in the 1985 Trust it will, in my view, exclude many family members, including the wives and children of Sawridge men, who are unlikely to ever be admitted into Band membership under the current system. In my view, the combined rules in both Trusts ensures all women and children enjoy the beneficiary status which the Settlor intended.

(b) Conflict of interest and independent trustees: In my view, a conflict of interest is inevitable so long as the Chief and Council (who determine Band membership) and their supporters (who have political or personal motivations) are also trustees. I have long favoured the establishment of an independent Board of trustees and have, on a number of occasions, indicated I would be prepared to resign if the other trustees also did so. Other similar trusts have adopted what I call the separation rule – that elected Band officials, their employees and agents cannot be Trustees. Trustees must fearlessly ask the difficult questions and forcefully distance themselves from local or personal issues and political pressures. In my view, the Defendant Trustees cannot do this. The unilateral appointment of replacement trustees by trustees who are also members of the Chief and Council or their supporters is a serious concern to me.

14. My view is that expressing and fearlessly discussing these concerns is in compliance and furtherance of the fiduciary duties of all trustees to the beneficiaries of the Trusts. I have attempted to do so, however none of the other trustees were prepared to engage with me in a genuine process to objectively consider and resolve these issues.

15. On September 26, 2014, I filed an application in Queen's Bench Action No. 1403 04885 (the "Advice and Direction Action") for advice and direction concerning the selection of two replacement trustees by the other trustees and the replacement of trustees with independent trustees approved by the Court. A copy of the application is Exhibit "G" hereto.

16. The trustees are bound by a Code of Conduct, dated January 12, 2009 a copy of which is annexed as Exhibit "H" hereto.

17. In the course of the Advice and Direction Action, I sought leave to refer to confidential information set forth in an unfiled Affidavit sworn September 23, 2014 either through a sealing Order, or with the consent of the other trustees, because the Code of Conduct in relation to the Trusts requires, in clause 6:

> "That 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 business and affairs."

18. I sought this assurance because I believed that the other trustees would attempt to use the Code of Conduct to silence me if I did not have this assurance.

19. On October 1, 2014 my solicitors in the Advice and Direction Action provided a copy of my unfiled Affidavit sworn September 23, 2014 to the solicitors for the other trustees. I seek leave of the Court to rely on this Affidavit in this Action, on the condition that the contents thereof will be sealed.

Allegations that I breached the Code of Conduct

20. On February 5, 2015, I received a letter from Mr. Heidecker which is marked Exhibit "I" hereto. Attached to Mr. Heidecker's letter were the following:

(a) An excerpt of clause 8 of the Sawridge Trusts Code of Conduct. Sections 8(a) and (c) thereof provide as follows:

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

***

(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..."

(b) A letter dated February 2, 2015 from Margaret Ward to Mr. Heidecker. Margaret Ward does not make a complaint based on any matter in which she had personal involvement, but rather from her alleged review of Board minutes;

(c) An undated letter from Roland Twinn to Mr. Heidecker. Roland Twinn is also the Chief of the Sawridge Band Council and my stepson. I have experienced threats, intimidation and other forms of bullying and scapegoating from Roland for many years. Many of the grievances in his letter are old. Some concern accounts due to me for legal services I rendered to the Band and to the Trusts before the Code was implemented in 2009;

(d) A letter dated January 26, 2015 from Justin Twin to Mr. Heidecker. Justin Twin was elected as a trustee on January 21, 2014. I opposed Justin's appointment because in my view he was neither eligible nor independent. Justin's primary complaint relates to a letter dated January 17, 2014 which I sent to the trustees and others before he was elected;

(e) A letter dated January 30, 2015 from Bertha L'Hirondelle to Mr. Heidecker. Bertha L'Hirondelle supports Roland Twinn. I have also experienced threats, intimidation

> and other forms of bullying and scapegoating from her for years. Many of her alleged grievances are old. Some, such as the legal fees which were never paid to me, predate the Code of Conduct.

The four letters attached to Mr. Heidecker's letter are herein referred to as the "Complaints".

21. None of the other Trustees had contacted me privately with respect to the concerns set forth in their complaints as required by clause 8(b) and (c) of the Code of Conduct. None of them attempted to resolve any of their concerns informally.

22. None of the other Trustees contacted me as regards the appointment of a mediator/ arbitrator as requested by Mr. Heidecker.

23. I retained Miller Thomson LLP to act for me in relation to the Complaints. Attached and marked as Exhibit "J" is a letter dated March 5, 2015 from James Duke, Q.C. of Miller Thomson LLP to Mr. Heidecker setting out the fact that clause 8(b) of the Code of Conduct had not been complied with and that Mr. Heidecker therefore had no legal authority to appoint a mediator/arbitrator pursuant to the Code of Conduct. The letter advised Mr. Heidecker that I would, nevertheless, be prepared to proceed with a mediation/arbitration if we could agree on a mutually acceptable independent mediator/arbitrator.

24. I am advised by Miller Thomson LLP, and I verily believe, that this letter was not sent to Mr. Heidecker until March 20, 2015 due to an administrative oversight.

25. I received the attached letter dated March 18, 2015 from Mr. Heidecker attached and marked as Exhibit "K" indicating he indicated to appoint a mediator recommended to him by the Trusts' legal advisors. The letter indicated that Mr. Heidecker had not only sent the Complaint letters to the proposed arbitrator, but that the arbitrator had also been "briefed as to what this assignment might entail" and that he was requesting each of the trustees who had filed Complaints to provide him with "their expectations of what the result of this process should be".

26. Attached and marked Exhibit "L" hereto is a copy of a letter dated April 28, 2015 is a copy of a notice of mediation I received from J. Leslie Wallace Professional Corporation regarding a proposed mediation scheduled for May 1, 2015.

27. Attached and marked Exhibit "M" hereto is a copy of a letter dated April 29, 2015 from my solicitors to Mr. Wallace expressing concerns about Mr. Heidecker's authority to appoint a mediator and the fact that he had not responded to Mr. Duke's letter of March 5, 2015.

28. Attached and marked Exhibit "N" hereto is a copy of a letter dated April 30, 2015 from Mr. Wallace to my solicitors. Mr. Wallace indicated, among other things:

> "I am not entirely unfamiliar with the issues you raise. I have previously received a copy of your Mr. Duke's letter to the Trusts of March 20, 2015, and Mr. Heidecker's response to him of March 26, 2015 [sic] copy accompanying this letter."

29. Attached to Mr. Wallace's April 30, 2015 letter (Exhibit "N") was a letter dated March 23, 2015 from Mr. Heidecker to Mr. Duke.

30. I am advised by my solicitors, and I verily believe, that neither Mr. Duke, nor Miller Thomson LLP has any record of receiving this letter.

31. In this letter, Mr. Heidecker states:

"In response to the points raised by your client, I been advised by the remaining Trustees of the following:

1. Since the signing of the Code of Conduct on January 12, 2009, the Trustees have been involved in numerous mediation events with Ms. Twinn, none of which has been successful.

2. Contrary to the Code of Conduct, on January 17, 2014, Ms. Twinn sent a letter to the Trustees regarding trustee duties, impugning the ability of the current Trustees to carry out their duties legally or effectively. This lengthy letter with numerous attachments was, in contravention of the Code of Conduct confidentiality clause, copied to beneficiaries, the Sawridge Group of Companies Board and senior officers, the Office of the Public Trustee of Alberta, the Federal Minister of Aboriginal Affairs and Northern Development and numerous others. Ms. Twinn was asked to withdraw this letter and to indicate in writing her adherence to the Code of Conduct. She verbally refused on a number of occasions.

3. Ms. Twinn directly caused three separate legal actions to be taken, at considerable cost to the Trusts and to the subsequent detriment to the beneficiaries, because of her refusal to cooperate with the other Trustees according to the terms of the Code of conduct and universally accepted best governance practices.

It is in my view that the conditions for discussion of the issues between the Trustees and Ms. Twinn have been met under the Code of Conduct clause 8(b)..."

32. The fact that Mr. Heidecker, who is supposed to be neutral, advocated to Mr. Wallace on behalf of other trustees is of great concern to me. A number of his allegations are not mentioned in the Complaints. With respect to the allegations:

(a) The innuendo that there had been previous mediation attempts concerning Code of Conduct violations involving me is incorrect;

(b) The January 17, 2014 letter is attached and marked Exhibit "O" hereto. It does not breach the Code. I do not consider this letter to be disrespectful, but a legitimate effort to discharge my fiduciary duties, and to urge other trustees to do so as well. I only sent the letter after my many efforts to discuss these issues with the Trustees were met with personal attacks and obstruction. I had hoped the letter would prompt a substantial discussion and avoid litigation. No discussion followed. I attempted to approach the Trustees during Trustee meetings and offered to meet privately to discuss the issues, however they all refused to speak to me except Justin Twin, who did meet with me once on March 3, 2014 concerning his eligibility as a beneficiary under the 1985 Trust, however these discussions did not proceed as a result of an intervention by Mr. Heidecker. Mr. Heidecker's suggestion that the requirements of clause 8(b) or (c) had been satisfied by virtue of alleged discussions with preceded the Complaints is wrong. There was no attempt by any of the Defendant Trustees to discuss the Complaints privately or otherwise.

(c) The statement related to "three separate legal actions" I had allegedly taken is not correct.

33. Attached and marked Exhibit "P" is a letter dated May 6, 2014 from my solicitors to Mr. Wallace, which was copied to Mr. Heidecker, indicating that I had instructed my solicitors to challenge whether the mediation/arbitration had been properly constituted.

34. Attached and marked Exhibit "Q" hereto is a copy of an e-mail dated May 7, 2014 from Mr. Heidecker advising Mr. Wallace to "Please put this project on hold until further instruction".

35. Attached and marked Exhibit "R" hereto is an e-mail from Mr. Heidecker to Mr. Wallace which advises him to "Please resume activities on the Sawridge Code of Conduct mediation/arbitration project".

36. Attached and marked Exhibit "S" hereto is a copy of a letter dated May 21, 2015 from Mr. Wallace to my solicitors and the complainants' solicitors which, among other things, asks whether the parties want a "mediation" step.

37. Attached and marked Exhibit "T" hereto is a copy of a letter dated May 22, 2015 from my solicitors to Mr. Wallace questioning his authority to conduct the arbitration on the grounds that, among other things, circumstances exist that give rise to a reasonable apprehension of bias. These grounds included concerns raised with respect to Mr. Heidecker's communications with Mr. Wallace, and information recently acquired with respect to Mr. Wallace's past association with the law firm which the Trusts' solicitors either practiced, or had previously practiced.

38. Attached and marked Exhibit "U" hereto is a letter dated June 1, 2015 from the solicitors for the other trustees indicating that in their view, the mediation should proceed and that they would vigorously oppose any application to challenge the appointment of the mediator.

39. I make this Affidavit in support of an application for an Order declaring that Mr. Heidecker did not have the authority to appoint a mediator/arbitrator under the Code of Conduct and that the appointment of the proposed mediator/arbitrator is void.

SWORN BEFORE ME at the City of Edmonton, Alberta, this 9 day of June, 2015.

Elaine Demers

Commissioner for Oaths in and for the Province of Alberta

ELAINE M. DEMERS
Commission Expires
February 1, 20 16

Catherine Twinn

Catherine Twinn

FORM 27
[RULES 6.3 AND 10.52(1)]

CLERK'S STAMP

COURT FILE NUMBER	1503 08727
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF(S)	CATHERINE TWINN
DEFENDANT(S)	ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, MARGARET WARD and BRIAN HEIDECKER
DOCUMENT	**APPLICATION BY BRIAN HEIDECKER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 3200 TELUS House, South Tower 10020 – 100th Street Edmonton, Alberta T5J 0N3 Attention: Barbara Stratton, Q.C. Telephone No.: 780-917-4255 Fax No.: 780-421-7951 Client File No.: 74393.1

NOTICE TO RESPONDENT: CATHERINE TWINN

This application is made against you. You are a respondent.
You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	July 14, 2015
Time:	10:00 AM
Where:	Edmonton Courthouse
Before Whom:	The Presiding Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicant, Brian Heidecker ("Mr. Heidecker") seeks an Order:

   (a) Directing that the Plaintiff's claim be stayed pursuant to Section 7 of the *Arbitration Act*, or, in the alternative, struck;

   (b) Granting costs of the application and this action, calculated on a solicitor and own client basis; and

   (c) Granting such further and other relief as this Honourable Court deems just.

Grounds for making this application:

2. The Plaintiff, Catherine Twinn, and the Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, and Margaret Ward (the "Trustees"), are the trustees of two trusts, being the Sawridge Band Inter Vivos Settlement, settled on April 15, 1985, and the Sawridge Trust, settled on August 15, 1986.

3. Mr. Heidecker is currently appointed by the Trustees to carry out the role of an independent chair of their meetings, and was so appointed at all material times.

4. On January 12, 2009, the Trustees entered into a Code of Conduct governing their conduct in managing the Trusts (the "Code of Conduct"). The Code of Conduct provided a means of resolving disputes between the Trustees through binding arbitration.

5. Between January 26, 2015 and February 2, 2015, all of the Trustees, aside from Ms. Twinn, submitted complaints to Mr. Heidecker raising allegations about Ms. Twinn's conduct as a trustee (the "Complaints").

6. In accordance with the terms of the Code of Conduct, Mr. Heidecker appointed J. Leslie Wallace ("Mr. Wallace") as an arbitrator and referred the Complaints to him for arbitration as contemplated in the Code of Conduct (the "Arbitration").

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes.

If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Form 27
Alberta Rules of Court
Rule 6.3 and 10.52(1)

COURT FILE NUMBER	1503 08727
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	**CATHERINE TWINN**
DEFENDANTS	**ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, MARGARET WARD and BRIAN HEIDECKER**
DOCUMENT	**APPLICATION**
PARTY FILING THIS DOCUMENT	**ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, MARGARET WARD**
ADDRESS FOR SERVICE OF LAWYER OF RECORD	BRYAN & COMPANY LLP 2600 Manulife Place 10180 – 101 Street Edmonton, AB T5J 3Y2
LAWYER IN CHARGE	Joseph J. Kueber, Q.C. Phone: 780.423.5730 File: 29793-1

Clerk's Stamp

NOTICE TO RESPONDENT:

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Judge.

To do so, you must be in Court when the application is heard as shown below:

Date	July 14, 2015
Time	10:00 am
Where	Law Courts Building, 1A Sir Winston Churchill Square, Edmonton, AB T5J 0R2
Before	Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. Directing that the Plaintiff's claim be stayed pursuant to Section 7 of the *Arbitration Act*, or, in the alternative, struck.

2. Costs of the application and this action, calculated on a solicitor and his own client full indemnity basis.

3. Such further and other relief as this Honourable Court deems just.

Grounds for making this application:

4. The Plaintiff, Catherine Twinn, and the Defendants, Roland Twinn, Bertha L'Hirondelle, Everett Justin Twin, and Margaret Ward (the "Trustees"), are the trustees of two trusts, being the Sawridge Band Inter Vivos Settlement, settled on April 15, 1985, and the Sawridge Trust, settled on August 15, 1986.

5. Mr. Heidecker is currently appointed by the Trustees to carry out the role of an independent chair of their meetings, and was so appointed at all material times.

6. On January 12, 2009, the Trustees entered into a Code of Conduct governing their conduct in managing the Trusts (the "Code of Conduct"). The Code of Conduct provided a means of resolving disputes between the Trustees through binding arbitration.

7. Between January 26, 2015 and February 2, 2015, all of the Trustees, aside from Ms. Twinn, submitted complaints to Mr. Heidecker raising allegations about Ms. Twinn's conduct as a trustee (the "Complaints").

8. In accordance with the terms of the Code of Conduct, Mr. Heidecker appointed J. Leslie Wallace ("Mr. Wallace") as an arbitrator and referred the Complaints to him for arbitration as contemplated in the Code of Conduct (the "Arbitration").

9. The allegations raised in the Statement of Claim concern matters in dispute that are to be submitted to arbitration pursuant to the Code of Conduct and fall properly within the jurisdiction of Mr. Wallace, as arbitrator, to decide.

10. As a result, the Action should be stayed in favour of the Arbitration.

11. Further, or in the alternative, this Action does not disclose a cause of action against the Trustees and should be struck.

Material or evidence to be relied on:

12. Paragraphs 1-4, 7-9, 15, 16, 20-31 and 33-38 of the Affidavit of Catherine Twinn, filed in the within Action on June 22, 2015.

13. The Pleadings filed in the within Action.

Applicable rules:

14. Rule 3.68 of the Alberta Rules of Court.

Applicable Acts and regulations:

15. *Arbitration Act*, RSA 2000, c. A-43, Section 7.

Any irregularity complained of or objection relied on:

16. None.

How the application is proposed to be heard or considered:

17. In person before the presiding justice in chambers.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicants what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Tab 3

HUTCHISON LAW

#155 Glenora Gates
10403 122 Street
Edmonton, Alberta
T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

SENT BY EMAIL ONLY

COPY

Our File: 51433 JLH

August 14, 2015

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

Attention: Marco Poretti

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

Attention: Doris Bonora

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

Attention: Nancy Cumming, Q.C.

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

Attention: Karen Platten, Q.C.

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

Attention: Edward Molstad, 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

In relation to the above noted matter, we wish to acknowledge receipt of the Trustees' "with prejudice" proposal regarding the Amended Production Application, which was sent to our office by email at 7:07 PM on August 12, 2015 and received on August 13, 2015.

We are in the process of reviewing this proposal and obtaining instructions from the Public Trustee. We will have a response to Dentons no later than **August 18, 2015**.

We note that Ms. Barbara Stratton, Q.C. of Bennett Jones LLP is now being included in

correspondence by Dentons on this matter. We were not previously aware of this new law firm's involvement in the within proceeding. We would ask that Denton's advise as to the role of this new law firm.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: The Office of the Public Trustee

cc: E. Meehan, Q.C., Supreme Advocacy LLP

HUTCHISON LAW

#155 Glenora Gates
10403 122 Street
Edmonton, Alberta
T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

COPY

Our File: 51433 JLH

SENT BY EMAIL ONLY

August 18, 2015

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Dear Madam:

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

In relation to your correspondence dated August 12, 2015, setting out the Sawridge Trustee's proposal to deal with the Amended Production Application, we have instructions to agree to that proposal, subject to confirmation and clarification of certain items. We also have instructions to begin discussions on the terms of a consent order to present to the Court on September 2 and 3, 2015.

Several aspects of the proposal require clarification, either in the Consent Order, or if consensus cannot be reached, by way of input from the Court, including:

1.) Whether documents the Trustees have been given access to by the Nation, but which are no longer in the Trustees' possession, are documents within the Trustees' control, within the meaning of Rule 5.6;

2.) Confirmation that the unsworn Affidavit of Catherine Twinn is in the Trustees' control and is producible. In that regard, please refer to Exhibit D to Catherine Twinn's December 8, 2014 Affidavit filed in 1403 04885;

3.) The Trustees agree to be bound by the Court's findings regarding paragraph 3 of the Amended Production Application, as may result from the hearing of the application as it

relates to the Nation;

4.) Are documents in the control of Trustees as a result of their multiple roles (i.e. Trustee, member of Council, member of the Membership Committee, member of Membership appeal committees) documents that are in the Trustees' control for the purposes of compliance with Part 5 of the Rules;

We look forward to hearing from you on these four points. Also, in order that we can draft an appropriate form of consent Order, please advise as to the Trustees' anticipated timeline to provide a filed Affidavit of Records.

In relation to point #4 of the August 12, 2015 correspondence, the Trustees appear to be suggesting the Public Trustee now take the lead in the staging and scheduling of next steps in this proceeding. With respect, we do not consider this a viable approach at the present time for several reasons:

1.) The Public Trustee has no information regarding the timelines upon which the Trustees will be filing their Affidavit of Records, or insight into the additional volume of documents that production will generate;

2.) Until the result of the Amended Production Application in relation to the Nation is known, it would be premature to set the date for the further questioning of Paul Bujold;

3.) The Trustees appear to be asking the Public Trustee to undertake the work to move the Trustees' application along, at a time when the Trustees are challenging the amount of time the Public Trustee is spending on this matter. These two positions are inconsistent.

The Public Trustee looks forward to working cooperatively with the Trustees' in relation to finalizing the Trustees' litigation plan and look forward to discussion of the same once more information is available regarding applicable timeframes.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON

cc: The Office of the Public Trustee
cc: E. Meehan, Q.C., Supreme Advocacy LLP
cc: M.Poretti, RMRF LLP
cc: E. Molstad, Q.C., Parlee McLaws LLP
cc: P. Kennedy, DLA Piper LLP
cc: K. Platten, Q.C., McLennan Ross LLP
cc: N. Cumming, Q.C., Bryan & Co.

HUTCHISON LAW

#155 Glenora Gates
10403 122 Street
Edmonton, Alberta
T5N 4C1

Telephone: (780) 423-3661
Fax: (780) 426-1293
Email: jhutchison@jlhlaw.ca
Website: www.jlhlaw.ca

COPY

Our File: 51433 JLH

SENT BY EMAIL ONLY

August 28, 2015

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora

Dear Madam:

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

We are writing in relation to our discussions about a form of consent order to document the agreement reached between the Sawridge Trustees and the Public Trustee in relation to the Public Trustee's Amended Application for Production. We are also writing to respond to your email correspondence dated August 19, 2015.

On review of the August 19, 2015 correspondence, the Public Trustee suggests the most efficient approach would be to seek the further guidance of the Court on the issues raised in the Amended Application for Production, and our exchange of correspondence, regarding the appropriate scope of production.

Please find attached our proposed form of Consent Order, which includes the topics for further guidance from the Court (see para.6). If we are not able to agree on the list of topics guidance is required on, the Public Trustee will, regardless, seek the guidance of the Court on those topics during the September 2 and 3, 2015 appearance.

We would appreciate hearing your position on the Consent Order by noon on September 1, 2015.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON

Enclosure

cc: The Office of the Public Trustee

cc: E. Meehan, Q.C., Supreme Advocacy LLP

cc: M.Poretti, RMRF LLP

cc: E. Molstad, Q.C., Parlee McLaws LLP

cc: P. Kennedy, DLA Piper LLP

cc: K. Platten, Q.C., McLennan Ross LLP

Form 11
[Rule 3.31]

Clerk's Stamp

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Hutchison Law** #155, 10403 122 Street Edmonton, AB T5N 4C1 Attention: Janet L. Hutchison Telephone: (780) 423-3661 Facsimile: (780) 426-1293 File No.: 51433 JLH

DATE ON WHICH ORDER WAS PRONOUNCED: September 2, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of the Applicants, the Public Trustee of Alberta, without a hearing and by consent;

IT IS HEREBY ORDERED THAT:

1. The Sawridge Trustees will prepare and serve an Affidavit of Records in compliance with Part 5 of the *Alberta Rules of Court* within 60 days of the date of this order;

2. Specifically, the Sawridge Trustees will abide by the definition of relevant and material as such is defined in Rule 5.2;

3. The Sawridge Trustees will disclose all records that are or have been under the control of the Sawridge Trustees;

4. The Sawridge Trustees agree to be bound by Rule 5.10 such that they will provide notice of any records that come to their attention subsequent to service of the Affidavit of Records;

5. The Sawridge Trustees agree that any finding of this Court regarding paragraph 3 of the Public Trustee's Amended Production Application as it relates to the Sawridge First Nation will apply equally to the Sawridge Trustees;

6. The Sawridge Trustees agree the parties will request further direction from the Court on September 2 and 3, 2015, on the following questions:

    a) Are records the Sawridge Trustees have reviewed or otherwise been given access to by the Sawridge First Nation, records that are, or have been, in the possession or control of the Sawridge Trustees;

    b) Are the records that are, or have been, in the possession or control of individual Sawridge Trustees, for reasons including the multiple roles of the Trustees within the Nation, deemed to be in the possession or control of Sawridge Trustees;

c) Is the unsworn Affidavit of Catherine Twinn from Court of Queen's Bench Action No. 1403 04885 a document that is, or has been, in the possession or control of the Sawridge Trustees;

d) Are records relevant to the Sawridge Trustees' proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band's membership criteria, membership applications, or membership decision-making processes as they affect the Trust's beneficiary identification process, relevant, material and producible under Part 5 of the Rules;

e) Are records relevant to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within the Sawridge Band government and as decision makers within the Sawridge Band membership process, relevant, material and producible under Part 5 of the Rules;

f) Are records providing the details and listing of any assets held in trust by individuals for the Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust relevant, material and producible under Part 5 of the Rules;

7. The remedies sought under the heading "Part II Queen's Bench Action No. 1403 04885" of the Public Trustee's Amended Production application are adjourned, *sine die*, to be rescheduled following production of documents by the Trustees and the Nation;

8. The Trustees withdraw their Settlement Application (filed June 12, 2015) and their Litigation Plan Application (filed June 12, 2015).

_____

Hon. Justice D.R.G. Thomas

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS NOTED ABOVE:

Reynolds, Mirth, Richards & Farmer LLP

Per:_____

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:_____

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:_____
Janet Hutchison, Counsel for the Office of the
Public Trustee

Tab 4

Document1

Case Name:

Royal Bank of Canada v. Kaddoura

Between
Ali Kaddoura, Respondent (Defendant), and
Harris H. Hanson and Hanson Associates,
Appellants (Third Party Defendants),
and
Royal Bank of Canada, Not Party to the Appeal (Plaintiff), and
Law Society of Alberta, Intervenor
And between
Travis Eade, Respondent (Plaintiff), and
Linda Anderson, Appellant (Defendant), and
Perry Young, Kathy Young and Neil Barclay,
Not Parties to the Appeal
(Plaintiffs), and
Royal Bank of Canada, Canada Mortgage
and Housing Corporation, Duc Bao Lam,
1282350 Alberta Ltd, Taranjeet Aujla,
George Georgeou, Remax House of Real
Estate, Guy Rivard, Shaun Folk, Monica
Maksymik Folk, John R. Condin, K.
Grant Watson, Kevin Graham, Mirrella Desantis,
Keith Worral, Tien Lam, Tri
Lam, Not Parties to the Appeal (Defendants), and
George Georgeou, Not Party to the
Appeal (Third Party Defendant)

[2015] A.J. No. 489

2015 ABCA 154

2015 CarswellAlta 780

[2015] 6 W.W.R. 535

254 A.C.W.S. (3d) 306

67 C.P.C. (7th) 376

15 Alta. L.R. (6th) 37

Dockets: 1401-0203-AC, 1401-0204-AC

Registry: Calgary

Alberta Court of Appeal

P.W.L. Martin and F.F. Slatter JJ.A.
and K.D. Yamauchi J. (ad hoc)

Heard: April 9, 2015.
Judgment: May 6, 2015.

(39 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Affidavit or list of documents -- Sufficiency -- Privileged documents -- Solicitor-client privilege -- Relevancy -- Appeal by lawyers from order that they disclose, but not produce, files they handled for other straw buyers dismissed -- Banks sued straw buyers, who commenced claims against lawyers who represented them in real estate transactions -- Straw buyers alleged lawyers failed to provide legal advice, explain transactions or disclose conflict of interest and sought production of other clients' files to prove claim -- Client files were relevant and material -- Concerns about privilege were premature because Master only ordered disclosure, not production, of files -- Lawyers had control of files because they were in their possession.

Legal profession -- Barristers and solicitors -- Liability -- Real estate transactions -- Standard of care and negligence -- Relationship with client -- Conflict of interest -- Lawyer acting for more than one party -- Appeal by lawyers from order that they disclose, but not produce, files they handled for other straw buyers dismissed -- Banks sued straw buyers, who commenced claims against lawyers who represented them in real estate transactions -- Straw buyers alleged lawyers failed to provide legal advice, explain transactions or disclose conflict of interest and sought production of other clients' files to prove claim -- Client files were relevant and material -- Concerns about privilege were premature because Master only ordered disclosure, not production, of files -- Lawyers had control of files because they were in their possession.

Professional responsibility -- Self-governing professions -- Duties -- Duty to inform -- Files and records -- Production on discovery -- Professions -- Legal -- Barristers and solicitors -- Appeal by lawyers from order that they disclose, but not produce, files they handled for other straw buyers dismissed -- Banks sued straw buyers, who commenced claims against lawyers who represented them in real estate transactions -- Straw buyers alleged lawyers failed to provide legal advice, explain transactions or disclose conflict of interest and sought production of other clients' files to

prove claim -- Client files were relevant and material -- Concerns about privilege were premature because Master only ordered disclosure, not production, of files -- Lawyers had control of files because they were in their possession.

Appeal by lawyers from an order that they disclose, but not produce, files they handled for other straw buyers. The within actions arose from a straw buyer mortgage fraud scheme. In the first action, the bank sued the straw buyer who, in turn, commenced a third party proceeding against the lawyer who represented him in the real estate transaction. In the second action, the bank sued the straw buyer who commenced a separate action against his lawyer and other parties. The straw buyers claimed the lawyers failed to provide legal advice, failed to explain the nature of the transaction and failed to disclose their conflict of interest. The lawyers denied these allegations and denied knowledge of the scheme. In order to prove their claim, the straw buyers wished to have access to other client files in the lawyer's officer relating to similar transactions involving the same alleged main fraudster and bank loans officer. The Master concluded that the client files were relevant and material, were under the control and the lawyers, and they therefore had to be listed in the Affidavit of Records. Once they were listed, the Affidavits would form the basis for further inquiries into whether the files were privileged. A Queen's Bench judge dismissed the lawyers' appeal, but allowed the lawyers to list the client files by number rather than name. The lawyers appealed the order arguing that they were not required to disclose or produce the files, for various reasons.

HELD: Appeal dismissed. The client files were relevant and material. The straw buyers' request did not amount to a fishing expedition as the lawyers were to disclose all relevant documents that were in existence. The straw buyers did not have to prove the records existed. While there might be other methods of obtaining the records, the discovery process was an efficient and comprehensive method of obtaining the material. The lawyers' concerns about privilege were premature because the Master only ordered the disclosure of the files, not their production. The lawyers had control of the files because they were in their possession.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 5.1, Rule 5.1(1)(b), Rule 5.2, Rule 5.3(1)(b), Rule 5.6, Rule 5.6(1)(b), Rule 5.6(1)(b)(ii), Rule 5.6(2)(b), Rule 5.8, Rule 5.11, Rule 5.11(1)(b), Rule 5.13, Rule 5.25(1)(a), Rule 5.33, Rule 13.16

Appeal From:

On appeal from the Decisions by the Honourable Madam Justice S.L. Martin Dated the 24th day of June, 2014, Filed on the 13th day of August, 2014 (Docket: 0801-14897; 0901-16409).

Counsel:

J.D. Poole and M.S. Parsons, for the Respondents Ali Kaddoura and Travis Eade.

C. Jensen, Q.C. and E.J. Baker, for the Appellants Harris H. Hanson and Hanson Associates and Linda Anderson.

S.E. Borgland, for the Intervenor Law Society of Alberta.

Memorandum of Judgment

The following judgment was delivered by

1 THE COURT:-- These two consolidated appeals raise issues about the obligations of "mortgage fraud" litigants to produce documents that are in the possession of lawyers sued in that litigation. A Master in Chambers ordered that the disputed documents must be disclosed by the lawyers; he did not order that they be produced: ***Royal Bank of Canada v Kaddoura***, 2013 ABQB 630, 54 CPC (7th) 208. On appeal, a Queen's Bench Judge affirmed that decision with one minor modification.

Facts

2 None of the facts alleged in these two actions have been proven, but the pleaded facts can be presumed to be true for the purpose of these appeals. The pleadings allege a type of mortgage fraud that has been observed before in this province. The general scenario is as follows:

(a) the main fraudster contracts to buy a piece of land from the original owner for what is presumptively the fair market value of that land;

(b) the main fraudster then recruits a straw buyer, who agrees to buy the land from the main fraudster for an inflated value;

(c) the land is then transferred immediately (through one or more conveyances) from the original owner to the straw buyer at the inflated value. The main fraudster never goes on title;

(d) a mortgagee is induced to lend money on a high ratio mortgage based on the inflated land value, generating more cash than has to be paid to the original owner. The mortgage is obtained by misrepresentations about the price, and the role of the straw buyer. Sometimes there is a false appraisal

of the value of the land. Since all the transactions close concurrently, the money flows from the mortgagee, notionally through the straw buyer, back to the original owner. The main fraudster keeps the surplus cash, realizing an immediate profit;

(e) the straw buyer is paid a fee for allowing his or her name to be used in the transaction, but the straw buyer ends up as the mortgagor and is therefore liable to pay the mortgage debt;

(f) all of the parties are often represented by one solicitor, who is either complicit in the fraud, or duped by the main fraudster;

(g) the mortgage goes into default, often immediately, and when the mortgagee realizes on the property a shortfall results. The straw buyer ends up being liable for that shortfall.

These two actions plead, in general terms, this type of scheme.

3 In the first case, the Royal Bank was the mortgagee, and the defendant Kaddoura is alleged to be one of the straw buyers, and therefore a mortgagor. When the mortgage went into default, the Royal Bank sued Kaddoura, who in turn brought a third party claim against the lawyer who allegedly represented him in the transaction, Harris Hanson. The issue in this appeal involves the records that Hanson has to disclose under Part 5 of the Rules of Court.

4 In the second case, the Royal Bank sued the alleged straw buyer Eade, who in turn brought a second action against various parties, including the lawyer who allegedly represented him in the transaction, Linda Anderson. The same issues arise. The Law Society of Alberta has intervened to argue issues respecting solicitor and client privilege.

5 The straw buyers' claims against the lawyers rest, in part, on an allegation that the lawyers actually knew, or ought to have known, that the underlying real estate transactions were not legitimate. In the case of actual knowledge or wilful blindness of all the underlying facts, the lawyer could be complicit in the scheme. If the lawyer was not complicit, but ought to have known the transaction was illegitimate, then it is alleged that the lawyer failed to advise properly and protect the straw buyer clients. In their pleadings, the lawyers deny knowledge of the scheme and any complicity or negligent representation, and indeed allege that they were misled by the straw buyers. In order to prove the claim, the straw buyers wish to have access to other client files in the lawyer's office relating to similar transactions involving the same alleged main fraudster and bank loans officer. The lawyers assert that they are not required to disclose or produce these files, for various reasons.

6 The applicable Rules and basic principles are not in dispute:

* Each litigant must disclose documents and answer questions that are "relevant and material": R. 5.2, 5.25(1)(a);

* Each litigant must prepare an Affidavit of Records which lists ("discloses") the relevant and material records under the "control" of that litigant: R. 5.6(1)(b)(ii);

* Parties can object to production of documents or to questions that are subject to solicitor and client privilege: R. 5.6(2)(b), 5.25(1)(a);

* Documents in the client files of lawyers are presumptively subject to privilege;

* Information produced as part of the discovery process must be kept confidential and may not be used for collateral purposes: R. 5.33 (the "implied undertaking" rule).

These appeals concern the application of these well-known Rules to the particular facts of this litigation.

7 The Master in Chambers concluded that the client files were relevant and material, they were under the control of the lawyers, and they therefore had to be listed in the Affidavit of Records. Once they were so listed, the Affidavits would form the basis for further inquiries as to whether the client files were privileged or confidential. Likewise, the extent of permitted questioning would depend on findings as to privilege. The Master made no specific findings on the scope of questioning, or the privilege issue generally. Those issues were deferred until the Affidavits of Records were prepared. He accordingly ordered that the defendant lawyers prepare supplemental Affidavits of Records which listed the client files, but which asserted that they objected to produce those files. The Queen's Bench Judge dismissed the appeal, but did allow the lawyers to list the client files using a file number, rather than the client's name.

Issues and Standard of Review

8 The appellants raise the same three issues in these two appeals:

(a) whether the collateral client files are "relevant and material";

(b) if so, whether those collateral client files are under the "control" of the lawyers;

(c) whether the Master erred in that he paid insufficient attention to the confidentiality of the client files.

The issues on appeal relating to the interpretation of the Rules of Court, and to the law of confidentiality and privilege, are primarily issues of law reviewed for correctness. To the extent that the Master or the chambers judge exercised any discretion with respect to procedural matters, that exercise of discretion will be reviewed for reasonableness.

Relevance and Materiality

9 The litigants must disclose all documents that are relevant and material. Rule 5.2 provides that documents meet those criteria if they might "significantly help determine one or more of the issues", or might "ascertain evidence that could reasonably be expected" to do so.

10 As noted, the claims against the lawyers are based on either their complicity in the mortgage scheme, their actual knowledge of the underlying facts, or their failure to realize that the transactions were illegitimate and to advise the straw buyer clients accordingly. In order to prove this portion of the claim, the straw buyers wish to have access to other client files in the lawyer's office relating to similar transactions.

11 The respondents' proposed line of argument is that if the lawyer was involved in numerous other files involving the same main fraudster, it would support an inference that the lawyer actually knew, or "ought to have known" that something illegitimate was going on. In other words, the straw buyers seek to use circumstantial evidence to prove the state of mind or state of knowledge of the lawyers. Irregularities in any one real estate file may simply be an aberration; a pattern of files with similar irregularities arguably calls for an explanation. In order to support this line of argument, the straw buyers seek production of other client files in the lawyer's offices involving the same alleged main fraudster or bank loans officer. The argument is that if those files disclose a pattern of irregularities, it will assist the straw buyers in proving one of the issues in the litigation.

12 The plaintiffs essentially seek "similar fact evidence" in the discovery process. While that sort of evidence is more common in criminal cases, it can be used in civil cases as well. ***Mood Music Publishing Co. v De Wolfe Ltd.***, [1976] Ch 119, [1976] 1 All ER 763 (CA), concerned allegations of breach of copyright. The defendant pleaded that any similarity between its published work and that of the plaintiff was mere coincidence. The plaintiff was permitted to use evidence of other breaches of copyright by the defendant in order to show a pattern of conduct. The evidence was circumstantial evidence of the defendant's knowledge and intent.

13 This type of evidence was also used in ***Greenglass v Rusonik***, [1983] OJ No 40 (CA), an

action against solicitors over a complex real estate transaction. An inflated sale price was one feature of the scheme. Evidence that the defendant solicitors had participated in other similar transactions was admitted "to show system, state of mind, knowledge and intent" (at para. 48). If that sort of evidence can potentially be probative at trial, there is no reason in principle why it cannot be explored during the discovery process.

14 At the production stage of the litigation, it is not necessary to decide whether the trial judge will or will not be prepared to draw the inferences from the circumstantial evidence put forward by the respondents. Nor must the respondents demonstrate conclusively that the discovered records will in fact contain any evidence of assistance to them. It may be that the client files will be produced, be examined, and be shown to have no probative value under any theory of the case. However, at this stage of the litigation the respondents need only show a plausible line of argument: ***Dow Chemical Canada ULC v Nova Chemicals Corp.***, 2014 ABCA 244 at para. 21, 577 AR 335; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69 at para. 16, 11 Alta LR (4th) 183, 337 AR 180.

15 The appellants cite cases that suggest that a litigant need not disclose records which might be of "secondary" or "tertiary" use in proving facts. The precise difference between primary, secondary, and tertiary evidence is elusive, and is not satisfactorily delineated in these cases. That line of analysis is not helpful in determining which records should be produced because it does not accommodate proving facts using inferences and circumstantial evidence. There is no fixed standard of what is "material". Production of records is not required just because some remote and unlikely line of analysis can be advanced, and it will not be ordered to support lines of pretrial discovery that are unrealistic, speculative, or without any air of reality: ***Dow Chemical*** at paras. 19, 21. Discovery will not be permitted if its cost is grossly disproportionate to any likely benefit: R. 5.3(1)(b). Where the state of mind of the litigants is relevant, however, it is often only possible to prove that state of mind using circumstantial evidence. Describing such evidence as "secondary" or "tertiary" does not assist, because the underlying records might nevertheless "significantly help determine one or more of the issues". The Master did not err in determining that the client files were "relevant and material" within the meaning of the Rule.

16 The Law Society argued that some of the related questions need not be answered in any event because the respondents "already know the answer". For example, one respondent asserted in an affidavit that the original owner of the building in which he bought a unit was also a client of the same lawyer. It was suggested that the lawyer need not answer a question confirming that, on the basis that the respondent already knew the answer. This, however, overlooks the legitimate role of questioning in obtaining admissions about facts that are not in dispute. Rule 5.1(1)(b) confirms that one of the purposes of discovery is to narrow and define the issues between the parties. If a fact is not in dispute, it need not be proven at trial. Those facts are often admitted at trial, but if not the opposing litigant can simply read the question and answer containing the admission onto the trial record. It is no objection that the questioning litigant may already "know" the answer to a question, because the objective of the question is to get the other side to admit the fact.

17 The appellants also argue that the respondents are on a "fishing expedition", because they do not know for sure whether there are any other files involving the same alleged main fraudster or bank loans officer. If there are no other files, the supplemental Affidavits of Records ordered by the Master will be very short. Hopefully these appeals are not about records that do not exist. In any event, the right to disclosure of records does not depend on the litigant proving with certainty that some relevant records exist. Rather, the onus is on the other litigant to review its own records and prepare an affidavit of records listing relevant records that do exist: ***Myers v Elman***, [1940] AC 282 at p. 322 (HL); ***Canada (Attorney General) v Spencer***, 2000 SKCA 96 at paras. 16, 24-6, 199 Sask R 127, 7 CPC (5th) 280; ***Alberta (Director of Child Welfare) v C.H.S.***, 2005 ABQB 695 at para. 15, 55 Alta LR (4th) 168, 385 AR 119. When it comes to record disclosure, if there are fish, the respondents do not have to go fishing for them.

18 Finally, the appellants argue that the records should not be disclosed because the respondents have "other methods" of getting the same information. They argue, for example, that some of the information may be on file at the Land Titles office (assuming that one knew where to look). The discovery process in Part 5 of the Rules is an efficient, structured, and comprehensive method of obtaining relevant and material information in litigation, and it is no answer to legitimate discovery inquiries that information in the hands of a litigant might also be available through other methods. In any event, if the information is contained in public registries, any privilege is likely lost, and any objection to disclosing the records disappears.

Privilege and Confidentiality

19 The main basis of the lawyers' objection to the disclosure of the client records relates to issues of confidentiality and privilege. It is not disputed that solicitor and client privilege is one of the most carefully guarded principles of our legal system: ***Canada (Privacy Commissioner) v Blood Tribe Department of Health***, 2008 SCC 44 at para. 9, [2008] 2 SCR 574; ***Canada (Attorney General) v Federation of Law Societies of Canada***, 2015 SCC 7 at paras. 44, 120; ***University of Calgary v JR***, 2015 ABCA 118 at para. 19. The contents of a solicitor's file will presumptively be privileged, subject to a very narrow list of exceptions. As a collateral argument, the lawyers argue that, for similar reasons, the client files are not under their "control", an issue discussed below. The Law Society of Alberta has intervened on these issues.

20 The appellants and the Law Society argue that i) the Master's order compromises the privilege over the files; ii) the files are third party records and should only be obtained using the procedure under R. 5.13; and iii) the Master's order was made without notice being given to the clients.

21 The Rules on the production of records recognize that privilege may be asserted over some records, and specifically deal with the issue. As noted, the Rules draw a distinction between the "disclosure" of records and the subsequent "production" of records. Under R. 5.6 a party must "disclose all records", or in other words must make a list of them all. Rule 5.6(2)(b) recognizes that there may be valid objections to "producing" certain records, but still requires the litigants to

"disclose" or list them. Rule 5.8 confirms that if a party objects to production of any records, they must still be identified in some suitable manner, and disclosed. Rule 5.11(1)(b) then states that the court can rule on any claim of privilege before the record is actually produced for inspection.

22 The concerns of the appellants and the Law Society are addressed by the structure of the Rules. The Master did not order the production of any records, only their disclosure or listing. The Master specifically declined (at para. 33) to consider any issue of privilege, recognizing that the review of the claim for privilege under R. 5.11(1)(b) would follow later. The formal order specifically states that issues of privilege are left for future consideration.

23 It can be argued that the mere listing of the client files involves some inroad into privilege: ***Thompson v Canada (Minister of National Revenue)***, 2013 FCA 197 at paras. 41-2, 366 DLR (4th) 169, argued and reserved SCC #35590. That may be so, but the Rules of Court nevertheless require that they be disclosed, even if not eventually produced because of a valid claim of privilege. Exceptions to solicitor and client privilege are not easily recognized, but when an enactment specifically calls for disclosure, the enactment prevails. The chambers judge modified the Master's order to the extent of allowing the files to be disclosed anonymously, a modification which effectively mitigated any objection that might be made on this ground.

24 Thus the appellants' arguments about breaches of privilege are premature. No court has yet ordered that the respondents are entitled to see these files. Likewise, the clients have not been effectively deprived of their claim to privilege or confidentiality, or notice of the application. When an application is brought for production of the files, it will probably be prudent to give the clients notice. Any dispute about the need for, method of, or extent of notice can be resolved at that time. Whether disclosure of the files is eventually adjudicated by an application under R. 5.11(1)(b) or R. 5.13 makes little difference if the clients are given notice either way.

25 There is a chicken-and-egg aspect to the appellants' position. The respondents do not want to see or review every file in the offices of the defendant lawyers. They are only interested in real estate files involving the same alleged main fraudster and bank loans officer. If the respondents were really required to proceed under R. 5.13 relating to the production of documents of third parties, and if they could only proceed on notice to the other straw buyer clients, how would they know which clients to serve with the application? If they are not entitled to a list of the relevant records, they would be forced to give notice to every client of the lawyers. Under the Master's order, there will be a discrete target list of clients who have files that are said to be within the scope of relevance. This is undoubtedly why the Rules require that even privileged documents be listed, with issues of production and privilege deferred until later.

26 It is agreed that the privilege in these appeals belongs to the other clients (the straw buyers or the main fraudster), and can only be waived by them. The appellants assert that R. 5.6(1)(b) only allows a litigant to claim a privilege if it belongs to the litigant. The Rule itself contains no such limitation. A lawyer has an obligation to protect the client's rights of confidentiality and privilege.

When preparing an affidavit of records in cases like this, it is open to the litigant lawyer to flag documents under his or her control that may not be producible, at least not until the clients have been heard. That does not amount to any impermissible "asserting" of the privilege of others.

27 The chambers judge accommodated the appellants' concern about confidentiality of the names of clients by providing that the records could be disclosed in an anonymous form. This may create complications in terms of serving those clients with any application to produce the documents, but that logistical hurdle can undoubtedly be overcome through the application of common sense.

28 The Master recognized that the claim for privilege would be complex. There is the possibility of the defendant lawyers having acted for more than one party, which may raise issues about whether any joint client is entitled to assert a privilege against the others. Fraud may be an exception to privilege. Some of the documents may now be found in the public registries, hence any privilege has arguably been lost. The status of transactional documents (e.g., agreements of sale) between the client and third parties will have to be considered. All of these issues will undoubtedly have to be explored, but the Master correctly recognized that the starting point was to identify the relevant files and clients.

29 The appellants cite cases which hold that privileged documents should not be seized by the state until the lawyer has had an opportunity to advise the client of the seizure, and protect the claim to privilege. The Rules of Court, however, set out a different sequence of disclosure of the existence of the records over which privilege is claimed, followed by a ruling on the privilege. The appellants argue that the Master's order "irredeemably deprives" the clients of their privilege. As noted, there has as yet been no order allowing the respondents to see the files. The privilege is intact. Nothing prevented the lawyers from giving the clients notice that the order was being applied for, or that it had been made. The lawyers could have advised the clients of the Master's order, and that they were appealing the order. The clients could then have intervened to the extent they thought it advisable. Alternatively, the clients can be given notice of any subsequent application for production of the files. The long standing procedure in the Rules is designed to protect the claim for privilege, while providing an orderly method of determining if the claim is valid.

30 The appellants rely on ***Rhino Legal Finance Inc. v Salmon***, 2012 ABQB 169, 535 AR 191 (M) where the Master decided that the issues of control, privilege and confidentiality should be decided together, on notice to the client, under R. 5.13. That case involved a claim against a lawyer by a lender who had advanced funds to the injured client, expecting payment from the settlement proceeds. There was only one client (who was a client of the lender and the lawyer), only one file, the identity of the client was known to all, and the records related directly to the cause of action. In that context it made sense for all the issues to be decided at once. The present appeals involve multiple unknown files and clients, and the procedure adopted by the Master and chambers judge was appropriate in the circumstances.

31 The appellants and the Law Society also raise concerns about the confidentiality of lawyers'

files. They note that the lawyers' obligation to keep the business of their clients confidential may well be wider than the law of privilege. That is likely so, but the Rules of Court do not limit the obligation of litigants to produce relevant and material documents based on general assertions of confidentiality, although terms may be imposed to reflect legitimate concerns: ***Reichmann v Toronto Life Publishing Co.*** (1990), 71 OR (2d) 719 at p. 731-2, 66 DLR (4th) 162 (HCJ). The Rules recognize that many produced records are confidential, and therefore they are subject to the "implied undertaking" that the documents will not be used for collateral purposes: R. 5.33. The Master did not rule on any issues of confidentiality that the clients (assuming they are third parties with an interest in the files) may assert when the time comes.

32 The appellants express concern that the orders under appeal only allow them to decline to produce privileged material, not material that is merely confidential. They assert the latter information should also be withheld from production until the other clients are given notice. Rule 5.6(2)(b) does not limit the bases on which production can be resisted. While Form 26 contemplates that "privilege" will be the usual basis of the objection, R. 13.16 allows the modification of forms to meet the circumstances. Even though confidentiality is not usually a basis for non-production, in the particular context of this litigation the appellants are only required to disclose the files at this point, not to produce any parts of them. A purposeful reading of the orders of the Master and the chambers judge confirms this was their intention.

The "Control" of Records

33 The appellants and the Law Society also argue that the client files are not within the "control" of the lawyers, which is a precondition of the obligation to disclose.

34 The appellants correctly observe that the Rules only require a party to disclose and produce records that are or have been under its "control". Obviously, a litigant cannot be expected to produce records it does not control, an important rationale underlying the rule. The word "control" is a wide one, going beyond mere legal ownership or possession. The Rules do not imply that a document cannot be under the "control" of more than one party at any one time. The term "control" must be interpreted in the context of the purposes of the discovery process set out in R. 5.1, and the overriding philosophy of wide pretrial disclosure in Part 5.

35 On the face of it, the lawyers have control of the client files, because they have them in their possession. In a physical sense, they could produce them for inspection at any time. The appellant's argument is rather that since the files are in some respects the property of the clients, the lawyers are not entitled or authorized to disclose them. The Rules of Court, however, distinguish between the obligation to disclose the files, and a second obligation to produce them for inspection. Questions about entitlement to view the files are more properly examined in the context of claims of privilege and confidentiality. The appellants' arguments about "control" are, in the present context, merely another version of their arguments about privilege, confidentiality, and the related duty of the lawyer to maintain privacy over the client's business.

36 The appellants cite case law which discusses the "ownership" of a lawyer's file. Original documents that the client delivers to the lawyer to enable him or her to provide legal services likely remain the property of the client. The client can usually make a proprietary claim to transactional documents prepared by the lawyer at the expense of the client. The lawyer can likely claim an interest in working papers, notes, and other internal documents prepared in the course of providing legal services: *A Lawyer's Authority Over Documents on Termination of Retainer* (1981), 15 Law Soc. Upp. Can. Gaz. 103; ***Price v Lambrinos***, 2012 ONSC 4856 at paras. 18-21 (M).

37 But notwithstanding these issues of ownership, the files are physically under the control of the lawyer. They may also be under the "control" of the client, in the sense that the client could direct the lawyer to deliver up the file. As a litigant, the lawyer is nevertheless required to list the relevant files in the affidavit of records. If the client objects to production of his or her file in litigation involving his or her lawyer, notwithstanding the lawyer's possession of the file, that issue should be determined at the production stage of the discovery process. If the lawyer asserts a professional obligation not to disclose the client's file, and asserts that obligation overrides the legal duty to produce relevant documents, that dispute can be adjudicated under R. 5.11.

38 The Law Society also notes that its *Code of Conduct* places an obligation on a lawyer to protect the confidentiality of the client's files. Such provisions do not, however, automatically exempt a lawyer from any competing legal obligations to disclose information, for example under valid search warrants. General requirements of confidentiality do not necessarily excuse disclosure otherwise required by the Rules: ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226 at para. 32, 29 Alta LR (5th) 37, 482 AR 136; ***D. v National Society for Prevention of Cruelty to Children***, [1978] AC 171 at pp. 218-20 (HL). Rule 2.03(1)(b) of the *Code of Conduct* of the Law Society recognizes that by allowing disclosure when "required by law or a court". Rule 2.03(4) of the *Code of Conduct* permits disclosure of confidential information in defence of allegations that the lawyer is civilly liable with respect to a matter involving a client's affairs, or may have committed acts of professional negligence. The issue is not whether lawyers have an obligation to keep their clients' files confidential, but whether the competing obligation to disclose documents under the Rules of Court prevails. The Rules provide a two-step process for resolving such issues. The first step requires that the lawyer list the relevant files in the Affidavit of Records, to create a platform for resolution of the ultimate issue.

Conclusion

39 In conclusion, the Master's orders, which merely directed the disclosure of the related client files, and not their production, contained no reviewable errors. They were properly modified and affirmed by the chambers judge. The appeals are dismissed.

Memorandum filed at Calgary, Alberta this 6th day of May, 2015

P.W.L. MARTIN J.A.
F.F. SLATTER J.A.

K.D. YAMAUCHI J. (ad hoc)