

COURT FILE NUMBER 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

IN THE MATTER OF THE TRUSTEE  
ACT, RSA 2000, c T-8, AS  
AMENDED

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

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

DOCUMENT **BRIEF OF SAWRIDGE  
FIRST NATION**

ADDRESS FOR SERVICE AND CONTACT  
INFORMATION OF PARTY FILING THIS  
DOCUMENT

PARLEE McLAWS LLP  
1500 Manulife Place  
10180 – 101 Street  
Edmonton, AB T5J 4K1  
**Attention:** Edward H. Molstad, Q.C.  
Telephone: (780) 423-8500  
Facsimile: (780) 423-2870  
**File Number:** 64203-7/EHM

Clerk's Stamp



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1103 14112

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## I. INTRODUCTION

1. The Sawridge First Nation (“Sawridge”) is not a party to these proceedings; however, Sawridge has been named a respondent in the within application by the Office of the Public Trustee of Alberta (the “Public Trustee”). The Public Trustee is seeking an order requiring Sawridge to disclose a plethora of records concerning matters dating back 30 years. The disclosure sought includes requests for private confidential information concerning Sawridge’s members and membership applicants, records from court actions that spanned decades and that are protected under an implied undertaking of confidentiality, and a number of unspecified requests for what the Public Trustee describes as “relevant and material” documents.

2. Sawridge submits that the Public Trustee has failed to establish that it should be entitled to the records it is seeking from Sawridge. The requests for records sought by the Public Trustee go beyond what can be requested of Sawridge as a non-party to this matter. Furthermore, the Public Trustee has failed to establish the relevance and materiality of a number of the records sought, and has failed to establish that the records are of significant enough necessity to the within matter that they should be disclosed, despite the existence of strong countervailing privacy and other reasons militating against production.

3. The Public Trustee’s requests, rather than helping advance the matters in this proceeding, would only unnecessarily prejudice Sawridge and the adjudication of the matters at issue. Rather than attempting to obtain relevant and material records from a party to the within proceeding and then making an application for third party disclosure, the Public Trustee has improperly directed its initial request for records at Sawridge. The form of the Public Trustee’s request is indicative of a desire to turn this matter into an inquiry regarding Sawridge’s membership, rather than focusing on the actual issues to be adjudicated.

## II. STATEMENT OF FACTS

### Background/Parties

4. The within matter is related to the Sawridge Band Inter Vivos Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the “Sawridge Trust”), and concerns an application by

the Sawridge Trust's Trustees (the "Sawridge Trustees") for advice and direction related to defining who is a beneficiary of that trust.<sup>1</sup>

5. The Public Trustee was, by order of Justice D.R.G. Thomas, named as a party to this matter in order to represent, "the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation."<sup>2</sup>

6. Sawridge and the Sawridge Trust are distinct entities.

7. Since this matter was commenced, the Sawridge Trustees, with (when necessary) the assistance of Sawridge, have provided the Public Trustee with extensive disclosure. That disclosure is referred to at **Tab 2** and **Tab 7** of the Affidavit of Roman Bombak, filed by the Public Trustee. The records contained in those tabs indicate that the Sawridge Trustees have produced records which include the following:

- (a) Sawridge's current membership application form;
- (b) Sawridge's Membership Rules, Membership Appeal Process and a Membership Application Process chart;
- (c) Sawridge's Membership application statistics by year;
- (d) A chart outlining the relationship of admitted members of Sawridge with council members;
- (e) Sawridge's Constitution;
- (f) Sawridge's Governance Act;
- (g) Rejection and acceptance letters to individual applicants for membership;
- (h) Letters setting out missing information for certain membership applications;

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<sup>1</sup> 1985 *Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, ["1985 *Sawridge Trust* – QB"] at para 2 [Tab B1].

<sup>2</sup> Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012, at para 1. [Tab C1]

- (i) A list of the members of Sawridge's Membership Committee;
- (j) A list of Sawridge's Chief and Council from 1985 to present;
- (k) Information related to members of Sawridge's positions on committees and boards;
- (l) A list of membership applications both completed and pending, including the application dates and the dates that decisions were made regarding the applications; and
- (m) An updated list of all of the dependent children that qualified as beneficiaries under the Sawridge Trust, and those that did not qualify.<sup>3</sup>

8. On July 17, 2015, Sawridge, through its counsel, was served with a copy of an Amended Application by the Public Trustee, returnable September 2 and 3, 2015. Therein, the Public Trustee, at Paragraph 2, seeks an Order directing Sawridge to either file an Affidavit of Records or, in the alternative, an Order requiring Sawridge to produce all relevant and material records related to these proceedings, including but not limited to:

- (a) Records related to Sawridge's membership criteria, membership application process and membership decision-making process from 1985-present, including:
  - (i) All inquiries received about Sawridge membership or the process to apply for Sawridge membership and the responses to said inquiries;
  - (ii) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge membership, whether or not the inquiry was treated by Sawridge as an actual membership application;
  - (iii) Complete and incomplete Sawridge membership applications;
  - (iv) Sawridge membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all

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<sup>3</sup> Affidavit of Roman Bombak, filed June 12, 2015 [*"Bombak Affidavit"*], at tabs 2 and 7.

information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;

- (v) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge membership;
- (vi) Any other records that would assist in assessing whether or not the Sawridge membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice (Paragraph 2(i));
- (b) Records from Federal Court Actions T-66-86A or T-66-86B (Paragraph 2(ii));
- (c) Records from Federal Court Action T-2655-89 (Paragraph 2(iii));
- (d) Records that are relevant and material to certain issues set out in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014 and filed in Court of Queen's Bench Action 1403 04885, including Catherine Twinn's sworn but unfiled Affidavit (Paragraph 2(iv));
- (e) Records that are relevant and material to the Sawridge Trustees' proposal to establish a tribunal for determining beneficiary status (Paragraph 2(v));
- (f) Records that are relevant and material to conflict of interest issues arising from the multiple roles of the Sawridge Trustees (Paragraph 2(vi)); and
- (g) Records that are relevant and material to the details and listing of any assets held in trust by individuals for Sawridge prior to 1982, transferred to the 1982 Trust, and transferred to the 1985 Trust (Paragraph 2(vii)).<sup>4</sup>

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<sup>4</sup> Amended Application of the Public Trustee, filed July 16, 2015, at pp 4 and 5.

Summary of Sawridge Policies on Membership

9. Sawridge has enacted Membership Rules.<sup>5</sup> Those rules outline the membership application process and a number of other matters relevant to Sawridge's control over its membership.

10. On August 24, 2009, Sawridge passed its *Constitution Act* (the "*SFN Constitution*") by a referendum. The *SFN Constitution* affirms, among other points, that Sawridge shall have control of its own membership in conformity with its laws, codes, customs, practices, traditions and values.<sup>6</sup>

11. Since passing the *SFN Constitution*, Sawridge has also passed legislation that affirm that personal information provided to Sawridge and its employees is kept confidential, and that it will not be disclosed.<sup>7</sup> The confidentiality provisions of Sawridge's legislation extend to the information that it receives from members and applicants for membership.<sup>8</sup>

12. As part of its membership application process, Sawridge receives a significant amount of information concerning membership applicants, including personal information and documents (e.g. social insurance number, birth certificate and driver's license) related to the applicants, personal information concerning the applicants' families, and information concerning the applicants' financial resources, criminal history and health.<sup>9</sup>

Federal Court Actions T66-86-A and T66-86-B

13. Federal Court Actions T66-86-A and T66-86-B concerned a constitutional challenge to certain provisions of the *Indian Act* concerning First Nations' membership (the "Constitutional Actions"). Specifically, the plaintiffs in the Constitutional Actions sought a declaration that certain 1985 and 1988 amendments to the *Indian Act* were unconstitutional. These amendments included provisions which purport to add certain categories of persons to the

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<sup>5</sup> See *Bombak Affidavit*, at tab 2, pp 69-71.

<sup>6</sup> *Bombak Affidavit*, at tab 2, pp 94 and 101.

<sup>7</sup> See *Sawridge Governance Act*, passed October 16, 2010, at Part III, ss. 2(10), 4 – 12; *Bombak Affidavit*, at tab 2, pp 74, 82, 84 and 85.

<sup>8</sup> Sawridge Indian Band Membership Application Form, wherein it is explicitly stated that the answers to the questions in the form would be kept confidential; *Bombak Affidavit*, at tab 2, p 15.

<sup>9</sup> *Bombak Affidavit*, at tab 2, pp 16-23.



First Nations' membership lists without their knowledge or consent. The plaintiffs claimed that these provisions violate their aboriginal and treaty rights regarding the determination of membership, as protected by section 35(1) of the *Constitution Act*, 1982.

14. The Constitutional Actions were initially commenced on January 15, 1986, with six representative First Nations participating. An initial trial was held in 1993. The plaintiffs in the first trial were the Sawridge Indian Band (now Sawridge), the Ermineskin Band and the Sarcee Band (now known as the Tsuu T'ina First Nation). The other parties were Her Majesty the Queen (defendant), the Native Council of Canada (intervener), the Native Council of Canada (Alberta) (intervener), and the Non-Status Indian Association of Alberta (intervener).<sup>10</sup> The decision from the first trial was released in 1995. The 1995 decision was set aside and the Constitutional Actions were sent down for retrial as a result of a Federal Court of Appeal decision in 1997.

15. The second trial began in 2007, following 10 more years of record production and discovery.<sup>11</sup> The plaintiffs in the second trial were Sawridge and the Tsuu T'ina First Nation. The defendant was Her Majesty the Queen, and the interveners were the Congress of Aboriginal Peoples, the Native Council of Canada (Alberta), the Non-Status Indian Association of Alberta and the Native Women's Association of Canada.

16. In light of the number of years of litigation involved in the Constitutional Actions, the amount of evidence and records related to same is voluminous.

#### Federal Court Action T2655-89

17. Federal Court Action T2655-89 was commenced in 1989 by Elizabeth Poitras, and initially concerned whether Ms. Poitras was entitled to membership in Sawridge (the "Poitras Action").<sup>12</sup> Ms. Poitras named Walter Patrick Twinn, The Council of the Sawridge Band and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian Affairs and Northern Development as defendants in that action.

<sup>10</sup> *Sawridge Band v Canada*, [1996] 1 FCR 3. [Tab B2]

<sup>11</sup> For a brief overview of the Constitutional Actions, see *Sawridge Band v Canada*, 2009 FCA 123, at paras 1-5. [Tab B3]

<sup>12</sup> For an overview of the Poitras Action, see *Poitras v Sawridge Band*, 2013 FC 910, ["*Poitras*"] at para 10. [Tab B4]

18. The Poitras Action was stayed pending the outcome of the Constitutional Actions, because the Constitutional Actions concerned issues that were similar to those raised by Ms. Poitras. During that stay, the parties engaged in certain steps to move the action forward, including the production of records.

19. In 2003, Justice Hugessen ordered that Sawridge enter or register on its membership list the names of individuals who acquired the right to be members through the amendments to the *Indian Act* that were the subject of the Constitutional Actions. Ms. Poitras was one of the individuals who acquired membership in Sawridge as a result of that order.<sup>13</sup>

20. In 2010, Justice Hugessen held that in light of the Constitutional Actions having been decided, and given that Ms. Poitras became a member of Sawridge as a result of that action, the issue of Ms. Poitras' membership was now moot.<sup>14</sup>

21. On August 23, 2013, Justice Aalto ordered that Ms. Poitras could amend her claim to include a claim for damages.<sup>15</sup> The damages claim is still before the Federal Court.

22. In light of the number of years that the Poitras Action has proceeded, Sawridge's production from that action contains approximately 7,100 records.

### III. ISSUES

23. The sole issue in the within application that concerns Sawridge is whether this Honourable Court should grant the Order sought by the Public Trustee in Paragraph 2 of the Public Trustee's Amended Application, filed July 16, 2015, requiring Sawridge to produce the listed records.

### IV. ANALYSIS

#### A. *Fundamentals of Disclosure by Third Parties – Scope of Request*

24. At the outset, it is important to note that the within matter was commenced by an originating application and not by a Statement of Claim. Accordingly, the rules pertaining to the

<sup>13</sup> *Sawridge Band v Canada*, [2003] 4 FCR 748. [Tab B5]

<sup>14</sup> *Poitras*, supra note 12, at paras 10-12. [Tab B4]

<sup>15</sup> *Ibid.* [Tab B4]

disclosure of documents in Part 5 of the *Rules of Court* (including the rules related to the preparation of an Affidavit of Records) do not apply to these proceedings unless this Honourable Court orders otherwise.<sup>16</sup> This Court has not made any Orders to date that would lead to the rules in Part 5 being applied.

25. If this Court were to use its discretion to apply Part 5 of the *Rules of Court*, then it would only be able to compel parties to the within matter to produce an Affidavit of Records. Generally, parties to an action are only entitled to document discovery from the other parties named in that action. The *Rules of Court*, for example, state that only parties to an action are required to prepare an Affidavit of Records.<sup>17</sup> The rules do not state that a non-party is required to produce an Affidavit of Records.

26. The *Rules of Court* create a narrow exception to this general rule, and provide parties with a means of accessing particular records held by a third party. Specifically, Rule 5.13 provides as follows:

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

- (a) the record is under the control of that person,
- (b) there is reason to believe that the record is relevant and material, and
- (c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.<sup>18</sup>

27. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party to that action.<sup>19</sup> Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by

<sup>16</sup> *Rules of Court*, Alta Reg 124/2010 [“*Rules of Court*”], at 3.14. [Tab A1]

<sup>17</sup> *Rules of Court*, at 5.5(1). [Tab A2]

<sup>18</sup> *Rules of Court*, at 5.13. [Tab A3]

<sup>19</sup> *InnerSense International Inc. v University of Alberta* 2007 ABQB 157, at para 6. [Tab B6]

parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.<sup>20</sup>

28. The party seeking records from a third party has the burden of establishing that the Court should order the production of those records.<sup>21</sup>

29. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the third party has those records.<sup>22</sup> Failing to adequately describe a record is fatal to an application under Rule 5.13.<sup>23</sup> In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.<sup>24</sup>

30. The mere fact that there is a close relationship between a third party to an action and a party to that action is not a basis for ordering disclosure from the third party. The *Rules of Court* clearly distinguish between parties and non-parties. Neither the express wording of the *Rules of Court* nor the case law interpreting said rules indicates that the disclosure-related rules that apply to parties can apply to non-parties solely because of the proximity of the relationship between those parties.<sup>25</sup>

31. In the within application, the Public Trustee is seeking to have Sawridge produce a significant number and variety of records. Notably, the Public Trustee has requested that Sawridge provide all documents that are “relevant and material to the issues in the within proceedings.”

32. Sawridge submits that the Public Trustee’s request is clearly an attempt to obtain document discovery from Sawridge, despite Sawridge not being a party to the within

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<sup>20</sup> *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) [“*Ed Miller*”], at para 13 [Tab B7]; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 [“*Trimay*”], at paras 13 and 18. [Tab B8]

<sup>21</sup> *Wasylyshen v Canadian Broadcasting Corp.*, [2006] AJ No 1169 (QB) [“*Wasylyshen*”], at para 6. [Tab B9]

<sup>22</sup> *Ed Miller*, supra note 20, at paras 13-15. [Tab B7]

<sup>23</sup> *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144 [“*Esso*”], at paras 12 and 13. [Tab B10]

<sup>24</sup> *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. [Tab B11]

<sup>25</sup> *Trimay*, supra note 20, at para 17. [Tab B8]

proceedings. Rather than asking Sawridge to produce certain records, as is allowed under Rule 5.13, the Public Trustee has framed its request using language that mirrors the document production provisions of the *Rules of Court*. In light of the above-cited authorities, it is submitted that the Public Trustee's request should accordingly be dismissed.

33. Even if Sawridge were able to discern what particular records the Public Trustee is seeking, Sawridge submits that no evidence has been proffered to suggest that it has any of the types of records that have been requested. Particularly, the Public Trustee has failed to provide any evidence that suggests that Sawridge has documents in its possession related to the requests outlined in Paragraphs 2(iv) to 2(vii). Those requests all concern records related to the Sawridge Trust, its trustees and beneficiaries, and the trust property. Given that the Sawridge Trust and Sawridge are distinct entities, it is submitted that it cannot be said that Sawridge would have any records in its possession related to those requests. As such, it should not be ordered to disclose any of those records.

***B. Fundamentals of Disclosure by Third Parties – Relevance and Materiality***

*Defining Relevance and Materiality*

34. In order for a document to be considered producible by either a party to an action or a third party, that document must be relevant and material to the issues in dispute. The *Rules of Court* affirm that a party is only required to disclose documents that are relevant and material. Relevance and materiality are defined based upon the parties' pleadings:

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

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

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*]<sup>26</sup>

35. In addition to reviewing the parties' pleadings, a court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another

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<sup>26</sup> *Rules of Court*, at R.5.2. [Tab A4]

party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.<sup>27</sup> With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.<sup>28</sup>

36. Courts in a number of cases have affirmed that the *Rules of Court* do not allow parties to obtain the disclosure of records that are of tertiary relevance. Case law distinguishes between facts that are of primary, secondary and tertiary relevance. Facts that are of primary relevance are facts that are in issue, and facts that are of secondary relevance are facts from which primary facts can be inferred. While parties are entitled to discovery related to primary and secondary facts, they are not entitled to discovery related to "information that could reasonably be expected to lead to facts or records of secondary relevance" (i.e., tertiary facts).<sup>29</sup>

37. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.<sup>30</sup> In order to satisfy this burden of proof, the moving party must provide evidence that establishes that the subject record is relevant and material to the issues in an action. Whether or not a court orders the disclosure of a record thus becomes a question of evidence regarding the particular record being sought.<sup>31</sup>

38. If a moving party fails to meet its burden of proving that a record should be produced, then a court must dismiss that party's application for disclosure. In *Dow Chemical Canada Inc v Nova Chemicals Corporation*, for example, Chief Justice Wittmann refused to

<sup>27</sup> *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. [Tab B12]

<sup>28</sup> *Ibid*, at paras 16-17. [Tab B12]

<sup>29</sup> *NAC Constructors Ltd. v Alberta Capital Region Wastewater Commission*, 2006 ABCA 246, at para 12. [Tab B13]

<sup>30</sup> *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. [Tab B15]

<sup>31</sup> *Ibid*, at paras 20-21 [Tab B15]; see also *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2 ["*Dow Chemical*"], at para 21. [Tab B14]

grant an Order compelling the production of certain documents sought by plaintiffs to a commercial dispute, because the plaintiffs failed to meet their burden of proof.<sup>32</sup>

*Relevance and Materiality of Membership Issues*

39. Any assessment of relevance and materiality must be determined based on the issues before this Honourable Court, as referred to in the pleadings. Those issues were clearly outlined by Justice Thomas in his Order of August 31, 2011. That Order states that the purposes of this matter are the following:

- (a) To seek direction with respect to the definition of “Beneficiaries” contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of “Beneficiaries”; and
- (b) To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.<sup>33</sup>

40. In Justice Thomas’ June 12, 2012 decision in these proceedings, he elaborated upon the scope of the membership-related issues that could be addressed in the context of this matter. Specifically, Justice Thomas noted that Sawridge’s membership definition and application process were relevant and material to this matter, and that, accordingly, the Public Trustee was entitled to proceed with examinations related to same.<sup>34</sup> Importantly, Justice Thomas also noted that the Public Trustee’s examinations could not interfere with or duplicate Sawridge’s membership application process and the processes associated to individual membership decisions.<sup>35</sup>

41. The Order arising from the June 12, 2012 decision explicitly provides what questions the Public Trustee may ask in relation to Sawridge’s membership:

The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge

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<sup>32</sup> *Dow Chemical, ibid*, at paras 21 and 44. [Tab B14]

<sup>33</sup> Order of Justice D.R.G. Thomas, pronounced August 31, 2011, filed September 6, 2011, at para 1. [Tab C2]

<sup>34</sup> *1985 Sawridge Trust – QB*, supra note 1, at para 55. [Tab B1]

<sup>35</sup> *Ibid*, at paras 53-54. [Tab B1]

Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.<sup>36</sup>

42. As is clear from the plain wording of Justice Thomas' decision and of his Order, the only aspects of the Sawridge's membership process that are relevant and material for the purposes of this matter concern the process used to determine and define membership, and the status and number of applications currently awaiting determination. Accordingly, it is submitted that the Public Trustee is only entitled to records related to those membership-related issues. Again, given that Sawridge is not a party to the within proceedings, it maintains that said disclosure is not properly given by it.

43. The Public Trustee's request for records goes significantly further than what Justice Thomas held was relevant and material. Rather, a number of the records that have been requested by the Public Trustee concern individual membership decisions and the processes related thereto. Paragraph 2(i) of its Amended Application, for example, contains requests for records related to individual applications, correspondences related to those applications, and decisions made concerning those applications. Compelling the disclosure of those records would directly interfere with both the regime that Sawridge has in place for addressing individual membership decisions, and the Federal Court process for reviewing those decisions. In light of Justice Thomas' previous decision, it is submitted that disclosure should not be ordered.

44. Similarly, the Public Trustee's request for records from the Constitutional Actions cannot be granted, because those records are neither relevant nor materials to the issues in this matter. The records in the Constitutional Actions are records that concern the issues being litigated therein (i.e., whether amendments to the *Indian Act* violated the applicants' aboriginal and treaty right to govern themselves in relation to their membership). The issues raised in the Constitutional Actions are in no way related to the issues in the within proceedings, as described above. Accordingly, and given that the Public Trustee has failed to provide any evidence to establish the relevance and materiality of any records from the Constitutional Actions, it is submitted that this Honourable Court should not order the production of same.

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<sup>36</sup> Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012, at para 4. [Tab C1]



45. Furthermore, none of the records from the Poitras Action can be said to be either relevant or material to these proceedings. The membership-related aspects of that decision were not determined in the course of that action, but rather were determined as a result of the ruling in the Constitutional Actions that Ms. Poitras was entitled to membership in Sawridge on the basis of her status under Bill C-31. Her membership status is unique to her and cannot be said to be indicative of the process of membership for Sawridge. The particulars of Ms. Poitras' membership claim have been addressed and are therefore not relevant to this matter. The action has continued as a claim for damages for which no evidence has been produced to show that the records are relevant and material to this matter. As such, it is submitted that none of the records in the Poitras Action are properly producible by Sawridge. In any event, the Public Trustee has access to such records through Ms. Poitras and if they believe any such records are producible, they may ask Ms. Poitras for them.

46. In its submissions, the Public Trustee suggests that individual information is relevant and material to determining issues arising from Sawridge's membership process generally. In support of this submission, it has provided examples of information from individual membership applicants who have experienced alleged difficulties with the membership process. Rather than being illustrative of the need for disclosure of records related to individual applications and membership decisions, those examples re-affirm that there are processes already in place to address the particular issues that are raised in those membership cases. In Ms. Poitras' case, for example, she was able to address her concerns related to her membership through the Federal Court.

47. In its Affidavit and written submissions, the Public Trustee alleges directly and indirectly that Sawridge and the Sawridge Trustees have been selective in the records that have been produced in these proceedings.<sup>37</sup> Despite making numerous allegations related to same, the Public Trustee has failed to provide any evidence supporting those allegations. The only attempt to proffer evidence related to these alleged disclosure-related issues is contained in the Affidavit sworn by Roman Bombak, which merely discusses the Public Trustee's "apprehension"

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<sup>37</sup> *Bombak Affidavit*, at paras 10-11, tab 11, pp 3, 166, 168-169; see also Written Brief of the Applicant, the Public Trustee of Alberta, filed June 12, 2015, at paras 19, 67, 68, and 74.

regarding disclosure, and appends certain correspondences that fail to demonstrate any misfeasance by Sawridge or the Sawridge Trustees.<sup>38</sup>

48. In light of the lack of evidence to substantiate the Public Trustee's allegations regarding the selective production of records, Sawridge submits that the Public Trustee has failed to establish that there has been any withholding of relevant and material records by either the Sawridge Trustees or by Sawridge. Rather, the Sawridge Trustees have been forthright in producing relevant and material records requested by the Public Trustee. Sawridge has assisted where it was able to provide information. This is evident in the many references in the undertakings to information being supplied by Sawridge. To suggest that Sawridge or the Sawridge Trustees have engaged in any improper conduct is inflammatory at best.

49. Finally, it is respectfully submitted that the Public Trustee's requests for membership-related records constitute an attempt to usurp the usual rules for determining a record's producibility. Rather than simply requesting those records that are relevant and material to the issues in this matter, the Public Trustee has attempted to define relevance and materiality based on issues that it believes are relevant and material. Accordingly, Sawridge submits that any order for production should not be based on the Public Trustee's proposed definition of relevance and materiality.

### C. *Fundamentals of Disclosure by Third Parties – Necessity of Disclosure*

50. A third party cannot be compelled to disclose records when those records could be obtained through a party to the action.<sup>39</sup> The production of records by a third party to an action is an exceptional remedy. Accordingly, disclosure should only be ordered where production is not available through the parties. In *Esso*, Justice Stevenson, writing for a majority of the Court of Appeal, explained that the previous iteration of Rule 5.13 could not be used to compel disclosure by a third party where disclosure could be provided by a party to an action:

In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means, in this case, through a party. If the document is relevant, and was in the possession of the

<sup>38</sup> *Bombak Affidavit*, at paras 10-11, p 3.

<sup>39</sup> *Esso*, supra note 23, at para 12. [Tab B10]

plaintiffs they are required to disclose its existence under rule 186, and may be asked about its disposition in the course of oral discovery.<sup>40</sup> [*Emphasis Added*]

51. Pursuant to Justice Thomas' decision, the Public Trustee proceeded with its examination of Paul Bujold on May 27 and 28, 2014. During Mr. Bujold's questioning, fifty undertakings were requested, and responses were provided on or around December 1, 2014, via letter.<sup>41</sup>

52. The Public Trustee has failed to establish that Sawridge should be ordered to produce any records rather than having said records be produced by the Sawridge Trustees. The Sawridge Trustees have to date provided the Public Trustee with answers to all relevant and material questions and requests for records. In light of the fact that no Order has been required against Sawridge in order to obtain these records, it is respectfully submitted that any proper disclosure requests made by the Public Trustee could be addressed via the Sawridge Trustees.

53. The Sawridge Trustees have indicated that they are prepared to complete an Affidavit of Records in relation to this matter. Once the Sawridge Trustees have prepared their Affidavit of Records, the Public Trustee will presumably have the ability to question the Sawridge Trustees' representative regarding that production. If, following that process, there are certain records that have not been provided to the Public Trustee and that could (pursuant to the above-described law) be disclosed by a third party, then it may be appropriate to bring an application to compel Sawridge to disclose certain records. The Public Trustee's application, having preceded all of the above, is premature.

54. With regards to the documents sought in Paragraph 2(iii), that action, as noted above, was an action commenced by Elizabeth Poitras. Ms. Poitras being a party to that action has access to any documents that could be produced as part of this matter, and over which no implied undertaking applies. Ms. Poitras and the Public Trustee's interactions indicate that the Public Trustee could obtain copies of Ms. Poitras' records from her. The Public Trustee's counsel attended at the questioning of Ms. Poitras in relation to her affidavit. During that questioning, the Public Trustee's counsel objected to questions on behalf of Ms. Poitras, directed Ms. Poitras not to answer a question, responded to undertaking requests on Ms. Poitras' behalf,

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<sup>40</sup> *Ibid.* [Tab B10]

<sup>41</sup> *Bombak Affidavit*, at Exhibit 7, pp. 142-157.

intervened on her behalf, and in doing so conducted herself as if she and Ms. Poitras had a solicitor-client relationship.<sup>42</sup> As is made clear by Ms. Poitras' involvement in these proceedings and based on her relationship with the Public Trustee, the Public Trustee has clear access to the records from the Poitras Action through her. Accordingly, it is submitted that there need not be any Order made in relation to those records.

**D. *Balancing a Record's Probative Value and its Prejudicial Effects***

55. Prior to making any determinations regarding the production of records, the Court must consider whether compelling the disclosure of said records would result in a prejudice.<sup>43</sup> Specifically, the Court must look at the probative value of records being sought, and determine if that value outweighs the prejudicial effect of that production. The need to consider the balancing of the probative value and the prejudicial effect of disclosing records is affirmed in the *Rules of Court*.<sup>44</sup>

*Harmful Disclosure of Private Information*

56. One way in which harm can arise as a result of a record being disclosed is that said disclosure would lead to the production of sensitive personal information. Courts have recognized the importance of protecting individuals' rights to privacy in their information, and that same could be of greater importance than the production of records.<sup>45</sup>

57. The relationship between informational privacy and a Court's use of its discretion to compel a non-party to disclose records was addressed at length by the Ontario Court of Appeal in *RBC*. That case concerned a request by the applicant bank to obtain copies of a mortgage discharge statement concerning individuals from another bank. The respondent bank refused to disclose the mortgage statement, because it argued that doing so would violate the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The Court of Appeal held that the information contained in the mortgage statement (the current balance of the mortgage)

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<sup>42</sup> See Transcript of Questioning on Affidavit of Elizabeth Poitras, dated April 9, 2015, at p 23; Excerpts from Pleadings, Transcripts, Exhibits and Answers to Undertakings, filed June 12, 2015, at p212.

<sup>43</sup> *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, 1992 CarswellBC 227 (SC), at para 8. [Tab B16]

<sup>44</sup> *Rules of Court*, at Rule 5.3(1). [Tab A5]

<sup>45</sup> *Royal Bank of Canada v Trang*, 2014 ONCA 883 [*"RBC"*], at paras 87-89. [Tab B17]

was personal information that was protected by *PIPEDA*.<sup>46</sup> In light of the fact that the personal information was protected by *PIPEDA*, and given the nature of that information, the Court affirmed that the respondent bank was not required to disclose the mortgage statement.

58. Similarly, in *Kiedynk v John Doe*, Justice Virtue affirmed that legislative provisions limiting the disclosure of information by an entity must be taken into account when considering whether a record should be produced.<sup>47</sup> Particularly, Justice Virtue noted that a hospital was not required to produce records concerning patients pursuant to a request under the previous version of Rule 5.13, because that disclosure would run contrary to the explicit bar against disclosure contained in the *Alberta Hospitals Act*.<sup>48</sup>

59. One factor that is important when determining whether a record containing personal information should be disclosed is whether the subject matter of that information has provided consent to disclose the information. In *RBC*, the Court of Appeal affirmed that under *PIPEDA*, personal information cannot be disclosed without express consent if that information is sensitive and if the subject matter of that information could not reasonably expect that the information would be disclosed.<sup>49</sup>

60. As is made clear by the membership-related records that have already been disclosed to the Public Trustee, the records it is seeking concerning individual membership applications contain a significant amount of personal information related to applicants and their families. Given the amount of private information contained in the applications, it is submitted that any probative elements related to those applications are eclipsed by the prejudicial effect they would cause to the membership applicants' rights to keep their personal information confidential.

61. Sawridge submits that as a First Nation that falls under the scope of federal legislation, its disclosure of personal information would be governed by *PIPEDA*.<sup>50</sup> In light of the holding in *RBC*, and taking into account the express statements in Sawridge's own laws

<sup>46</sup> *Ibid*, at paras 36 and 51. [Tab B17]

<sup>47</sup> *Kiedynk v John Doe*, 1991 CarswellAlta 37 (QB). [Tab B18]

<sup>48</sup> *Ibid*, at paras 20-21. [Tab B18]

<sup>49</sup> *RBC*, supra note 45, at para 63. [Tab B17]

<sup>50</sup> *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, at ss. 2(1) and 4(1)(b). [Tab A6]

concerning the confidential nature of information that it receives, it is accordingly submitted that this Honourable Court should not compel Sawridge to produce individual membership applications.

62. Furthermore, the decision in *RBC* indicates that the Public Trustee should not be entitled to records containing particular applicants' personal information without first obtaining their express consent. As noted above, the applicants are required to give very sensitive personal information to Sawridge as part of the application process. In addition, the applicants have a clear reasonable expectation that their personal information will not be disclosed; specifically, the *SFN Constitution*, the *Governance Act* and the first page of Sawridge's membership application form all affirm that the information provided as part of the application process will be kept confidential. Accordingly, and given that the applicants have not consented to any disclosure, Sawridge submits that the Public Trustee should not be entitled to any records concerning individual membership applications.

#### *Financial Harm*

63. Another harm that is relevant to assessing the merits in compelling disclosure is the expense and effort required to proceed with that disclosure. Rule 5.3 explicitly states that a court must consider whether the production of a record will result in an expense that is disproportionate to the likely benefit of disclosing that record.<sup>51</sup>

64. In its Amended Application (particularly Paragraphs 2(i) to (iii)), the Public Trustee has asked that Sawridge review decades of materials related to its membership and related to litigation matters, and that it only provide those documents that it deems relevant and material. The sheer volume of the amount of records that Sawridge would be required to review would necessarily result in Sawridge incurring a very significant expense. That expense is of great importance when compared to the relatively minor probative value of the records sought by the Public Trustee in relation to the individual membership applications.

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<sup>51</sup> *Rules of Court*, at Rule 5.3(1)(b). [Tab A5]

*E. Implied Undertaking of Confidentiality*

65. At common law, records produced during an action are subject to an implied undertaking of confidentiality. In *Juman v Doucette*, Justice Binnie affirmed that the undertaking existed for a number of reasons, including to ensure complete disclosure by parties during litigation. As was noted by the Justice, “this is of particular interest in an era where documentary production is of a magnitude as often to preclude careful pre-screening...”<sup>52</sup>

66. Rule 5.33 affirms that documents disclosed pursuant to the *Rules of Court* are under an implied undertaking of confidentiality, and that (subject to fulfilling certain criteria) those documents cannot be used for other purposes.<sup>53</sup>

67. In order to set the implied undertaking aside, a party must establish it is in the public interest for the implied undertaking to be removed, and that said public interest is greater than the value of the undertaking.<sup>54</sup> In making this assessment, courts have emphasized the exceptional nature of removing the undertaking. In *Juman*, Justice Binnie noted that, “unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.”<sup>55</sup>

68. In addition, in order to remove the implied undertaking, all parties who are affected (i.e., the parties to the action during which the records were disclosed) must be given notice of the application to remove the undertaking.<sup>56</sup>

69. The Public Trustee has requested that Sawridge produce relevant and material records from the Constitutional Actions and from the Poitras Action. The Public Trustee has not specified whether those requests would exclude documents that are subject to the implied undertaking of confidentiality.

70. If the request includes documents covered by the implied undertaking of confidentiality, then Sawridge submits that the request should be dismissed, because the Public

<sup>52</sup> *Juman v Doucette*, 2008 SCC 8 [“*Juman*”], at para 26. [Tab B19]

<sup>53</sup> *Rules of Court*, Alta Reg 124/2010, at R. 5.33. [Tab A7]

<sup>54</sup> *Juman*, supra note 52, at para 30 [Tab B19]; see also *Kent v Martin*, 2013 ABQB 27, at para 6. [Tab B20]

<sup>55</sup> *Juman*, *ibid*, at para 32. [Tab B19]

<sup>56</sup> *Ibid*, at para 52. [Tab B19]

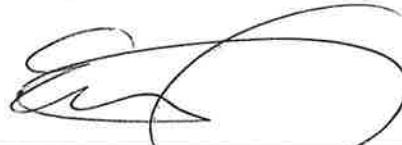
Trustee has failed to provide adequate notice to the other parties to the Constitutional Actions and the Poitras Action. With regards to the Constitutional Actions, the Public Trustee has failed to provide notice to the Tsuu T'ina First Nation, Her Majesty the Queen, or to any of the interveners. Insofar as the Poitras Action, the Public Trustee has failed to provide notice to the Attorney General of Canada.

**V. RELIEF REQUESTED**

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August, 2015.

**PARLEE McLAWS LLP**

A handwritten signature in black ink, appearing to read 'E. Molstad', is written over a horizontal line.

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



## LIST OF AUTHORITIES

### A. LEGISLATION AND RULES

- Tab 1**      *Rules of Court*, Alta Reg 124/2010, 3.14
- Tab 2**      *Rules of Court*, Alta Reg 124/2010, 5.5
- Tab 3**      *Rules of Court*, Alta Reg 124/2010, 5.13
- Tab 4**      *Rules of Court*, Alta Reg 124/2010, 5.2
- Tab 5**      *Rules of Court*, Alta Reg 124/2010, 5.3
- Tab 6**      *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, ss. 2, 4
- Tab 7**      *Rules of Court*, Alta Reg 124/2010, 5.33

### B. CASE LAW

- Tab 1**      *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365
- Tab 2**      *Sawridge Band v Canada*, [1996] 1 FCR 3
- Tab 3**      *Sawridge Band v Canada*, 2009 FCA 123
- Tab 4**      *Poitras v Sawridge Band*, 2013 FC 910
- Tab 5**      *Sawridge Band v Canada*, [2003] 4 FCR 748
- Tab 6**      *InnerSense International Inc. v University of Alberta* 2007 ABQB 157
- Tab 7**      *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB)
- Tab 8**      *Trimay Wear Plate v Way*, 2008 ABQB 601
- Tab 9**      *Wasylshen v Canadian Broadcasting Corp.*, [2006] AJ No 1169 (QB)
- Tab 10**     *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144
- Tab 11**     *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA)

- Tab 12**     *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69
- Tab 13**     *NAC Constructors Ltd. v Alberta Capital Region Wastewater Commission*, 2006 ABCA 246
- Tab 14**     *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2
- Tab 15**     *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk)
- Tab 16**     *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, 1992 CarswellBC 227 (SC)
- Tab 17**     *Royal Bank of Canada v Trang*, 2014 ONCA 883
- Tab 18**     *Kiedynk v John Doe*, 1991 CarswellAlta 37 (QB)
- Tab 19**     *Juman v Doucette*, 2008 SCC 8
- Tab 20**     *Kent v Martin*, 2013 ABQB 27

**C.     PRIOR ORDERS**

- Tab 1**     Order of Justice D.R.G. Thomas, pronounced June 12, 2012, filed September 20, 2012
- Tab 2**     Order of Justice D.R.G. Thomas, pronounced August 31, 2011, filed September 6, 2011