

Clerk's Stamp:



COURT FILE NUMBER:

1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

**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
(RESPONDENTS, in this Application)

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

(APPLICANT in this Application)

**OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA**

(Additional RESPONDENT
in this Application)

THE SAWRIDGE BAND

DOCUMENT

**AMENDED APPLICATION BY THE OFFICE
OF THE PUBLIC TRUSTEE OF ALBERTA**

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 ext.225
Fax: (780) 426-1293
File: 51433 JLH

NOTICE TO RESPONDENTS

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

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

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

Date: June 30, 2015 (adjourned to September 2 and 3, 2015)

Time: 2:00PM (10:00AM on September 2 and 3, 2015)

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas 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:

I. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees to file an Affidavit of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession, or which the Sawridge Trustees have reviewed or otherwise accessed, and that are relevant and material to the issues in the within proceeding, including, but not limited to:
 - i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:
 - a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;
 - b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;
 - c.) Complete and incomplete Sawridge Band membership applications;
 - d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and

Council or the Membership Appeal Committee in relation to membership applications;

- e.) 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 Band membership;
 - f.) Records from Federal Court Action T-66-86A or T-66-86B that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, and which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes;
 - g.) Records from Federal Court Action T-2655-89 that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;
 - h.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.
- ii.) Records relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;
 - iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;
 - iv.) Records relevant to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band's the Sawridge Band membership criteria, membership applications, or membership decision-making processes as they affect the Trust's beneficiary identification process;
 - v.) 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 in the Sawridge Band membership process;
 - vi.) 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;

2. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Band to file Affidavits of Records in accordance with the provisions of Part 5 of the *Alberta Rules of Court*, or in the alternative, an Order pursuant to Rule 5.13 of the *Alberta Rules of Court*, requiring Sawridge Band to provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:
 - i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:
 - a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;
 - b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;
 - c.) Complete and incomplete Sawridge Band membership applications;
 - d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;
 - e.) 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 Band membership;
 - f.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.
 - ii.) Records from Federal Court Action T-66-86A or T-66-86B, which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes
 - iii.) Records from Federal Court Action T-2655-89 which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

- iv.) Records in the power and possession of the Sawridge Band relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;
 - v.) Records in the possession or control of the Sawridge Band, and relevant or material to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;
 - vi.) Records in the possession or control of the Sawridge Band and relevant or material to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within Sawridge Band government and in the Sawridge membership process;
 - vii.) Records relevant and material to the details and listing of any assets held in trust by individuals for 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;
- 3. An Order, directed to the Sawridge Trustees and the Sawridge Band, confirming that bare assertions of confidentiality and privacy over Sawridge Band membership information and Sawridge Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.
 - 4. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.
 - 5. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-34.

II. Queen's Bench Action No. 1403 04885,

- 6. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.
- 7. Specifically, the parties will update the Court on matters including:

- i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.
 - ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.
8. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

9. An Order providing the Court's advice and directions on the following matters:
- i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:
 - a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
 - b.) The real issues in dispute in either proceeding;
 - c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
 - d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
 - e.) Any other matter consistent with the purposes of the *Alberta Rules of Court*.
 - ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

- 10. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.
- 11. Neither the Sawridge Trustees nor the Sawridge Band are currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

12. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.
13. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.
14. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.
15. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.
16. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.
17. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.
18. The Court has discretion to compel production of relevant and material Records from Sawridge Band whether it is a party in the within proceeding or not, pursuant to Rule 5.13.
19. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.
20. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

21. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

22. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

SIMILARITIES	
<u>Issue #1: Who qualifies as Band Member/ Beneficiary-identification</u>	
<p><u>QB 1103 14112:</u></p> <ul style="list-style-type: none"> • “The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment (“Reasons”)] • “... it would be peculiar if, in varying the definition of “Beneficiaries” in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway” [para 48, Reasons] • “This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be “ascertained” [para 49, Reasons] • “The Trustees seek this Court’s direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to: (a) Determining the Beneficiaries of the 1985 Trust” [para 14(a), Affidavit of Paul Bujold, August 30, 2011] 	<p><u>QB 1403 04885:</u></p> <ul style="list-style-type: none"> • “Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with <i>Charter</i> principles and natural justice;” [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]
<u>Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both</u>	
<p><u>QB 1103 14112:</u></p> <ul style="list-style-type: none"> • “...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust.” [para 23, Reasons] • “...the key players in both the administration of the Sawridge Trust and of the Sawridge 	<p><u>QB 1403 04885:</u></p> <ul style="list-style-type: none"> • “Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band.” [Application for Advice and

Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.” [para 25, Reasons]

- “I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances.” [para 26, Reasons]
- “The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries” [para 28, Reasons]
- “The Public Trustee’s role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation.” [para 42, Reasons]

Direction, September 26, 2014]

- “Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it actual, structural or of the appearance of conflict of interest;” [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]

Issue #3: Transfer of Assets to 1985 Trust

QB 1103 14112:

- “To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust” [para 1(b), Order by Justice D.R.G. Thomas, September 6, 2011]

QB 1403 04885:

- “Determination of how assets were held and transferred from Trust inception to the present day;” [Exhibit J, para E(6), Affidavit of Ms. Twinn, December 8, 2014]

Issue #4: Administration and Management of 1985 Trust

QB 1103 14112:

- “An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to

QB 1403 04885:

- “I have serious concerns regarding the administration of the Trusts and it is my belief that it is important and my duty that this information be brought to the attention of the Court. It is my intention to provide a copy of my Affidavit, unfiled, to the Court at the

as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011]

- The Public Trustee of Alberta must protect the interests of any minor beneficiaries or potential beneficiaries in relation to the 1985 Trust. [*Public Trustee Act*, s.21 and s.22]

hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard." [para 16, Affidavit of Ms. Twinn, December 8, 2014]

- "...I have raised the issues of trustee succession, accountability, beneficiary determination, undue influence and conflict of interest on numerous occasions, including putting forward a proposal in writing shortly after the June 12, 2012 decision issued by Justice Thomas in QB Action No. 1103-14112, but have been unable to obtain any results. A recent example of this is in May 2014 when I provided a Binding Issue Resolution Process Agreement to the other trustees for their review and comment in order to set out a process in which to discuss and resolve the issues that are the subject matter of the Application. The other trustees refused and/or willfully failed to engage in this or any process. I believe that I have exhausted my ability to address these matters internally and that adjudication by the Courts has become the only avenue available to address and resolve these matters. Attached as Exhibit "J" to my Affidavit is a copy of the Binding Issue Process Agreement I circulated." [para 23, Affidavit of Ms. Twinn, December 8, 2014]

DISSIMILARITIES

QB 1103 14112:

- "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"." [para 1(a), Order by Justice D.R.G. Thomas, September 6, 2011]

- Not in issue

QB 1403 04885:

- Not in issue

- Approval of appointment of individual Trustees

23. Once all parties are on an even playing field in relation to relevant and material evidence, consolidation must be considered to assess whether it would best serve the interests of the administration of justice, save time and resources, and reduce the combined time for hearing the applications, without creating undue prejudice to any party.
24. The parties should update the case management judge on this issue within a reasonable time after the additional document production contemplated by paragraph 1 is received.

III. Advice and Direction

i.) Communication Between Counsel

25. Communications as between counsel in a proceeding and in related proceedings is a normal occurrence. Such communications can serve to narrow issues in dispute and avoid duplication of effort. Such communications increase the opportunities for settlement and pre-trial resolution and focus all parties on issues that actually require the assistance of the Court.
26. Communication between counsel acting in the within proceeding and counsel acting in QB Action No. 1403 04885, particularly given the overlapping issues, should be encouraged rather than circumscribed.

ii.) Costs

27. The Court ordered the Sawridge Trustees to provide the Public Trustee for “full and advance indemnification” for its costs to participate in the within proceeding. The plain meaning of indemnification applies and should include all reasonable costs incurred by the Public Trustee.
28. The Sawridge Trustees object to the Public Trustees incurring costs related to the use of agent counsel who may work with existing counsel from time to time to move this proceeding forward.
29. The Public Trustee has taken care to propose agent counsel who is already highly experienced in the relevant areas of law and has specific experience on matters related to Sawridge Band membership issues. As such, agent counsel that have been proposed are in a position to provide more cost effective services than agent counsel lacking this background.
30. The Public Trustee’s requests for resources in order to fulfill its role in this proceeding have been, and remain, reasonable and certainly less extensive than the resources available to the Applicants.

Material or evidence to be relied upon:

1. Excerpts from the transcript from the Questioning of Paul Bujold, held May 27 & 28, 2014;
2. Excerpts from the transcripts from the Questioning of Elizabeth Poitras, held May 29, 2014 and April 9, 2015;
3. Exhibits from the Questioning of Paul Bujold;
4. Exhibits from the Questioning of Elizabeth Poitras;
5. Excerpts from the Answers to Undertakings of Paul Bujold, received December 1, 2014;
6. Affidavit of Roman Bombak, dated June 12, 2015
7. Pleadings filed in Queen's Bench Action No. 1403 04885
8. Pleadings filed in Queen's Bench Action No. 1103 14112
9. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3.72, 4.11, 5.1, 5.2, 6.3, and 6.11

Applicable Acts and regulation:

11. *Public Trustee Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM. (now adjourned to September 2 and 3, 2015)

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant 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 that 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.