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1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA
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

APPLICANTS

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

DOCUMENT

**REPLY BRIEF OF THE TRUSTEES FOR
SPECIAL CHAMBERS CASE
MANAGEMENT MEETING ON JUNE 30,
2015**

ADDRESS FOR SERVICE AND
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PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. The Office of the Public Trustee of Alberta ("Public Trustee") seeks an Order providing the Court's advice and direction regarding the following issues:
 - (a) Production of records, including the request that Affidavits of Records be filed that would include documents produced in Federal Court Actions T-66-86 and T-2655-89;
 - (b) Addressing issues arising in the within proceeding and in Court of Queen's Bench Action No. 1403 04885, including the merits of consolidation of these actions and the propriety of communications between legal counsel; and
 - (c) Costs of third party agency legal services.
2. The trustees of the 1985 Sawridge Trust (the "trustees") are concerned about the direction these proceedings are taking. The trustees initiated these proceedings on August 31, 2011. It sought the advice and direction of the Court to address, *inter alia*, the discriminatory definition of "beneficiaries" contained in the Sawridge Band *Inter Vivos* Settlement dated April 15, 1985 (the "1985 Sawridge Trust" or "Trust"). The trustees wish to seek a resolution of this matter in an efficient manner in keeping with the foundational rules of the Alberta *Rules of Court*.

Alberta *Rules of Court*, Rule 1.2. **[Tab 1]**

3. The trustees provided notice of their application to the Public Trustee given that minor beneficiaries were involved. At the time, there were 23 minor dependent children that qualified as beneficiaries of the 1985 Sawridge Trust, and these minors would have lost their status as beneficiaries in the event that the definition was changed to equate to membership in the First Nation.
4. The Public Trustee wished to make inquiries into the membership and application processes and practices of the Sawridge First Nation.
5. At the application to determine the issue, counsel for the trustees expressed concerns, and noted that the issue of membership was the jurisdiction of the Sawridge First Nation.
6. In response to these concerns, counsel for the Public Trustee advised the Court as follows:

MS. HUTCHISON: -- your indulgence, but I'm just going to respond very quickly on that last point. I have to disagree with my friend that to determine functionality, you would have to engage in a -- such a detailed analysis. For instance, if we're able to determine that Chief and Council actually occasionally meets to review membership applications as opposed to they've never met to review membership applications, I would suggest that's a very large indicator of functionality that doesn't require you to go into assessing the

merits of each individual application. And at least my current instructions, if we are acting, is not to go into the minutia of each membership application; it's to try and assess whether or not there's actually some function process.

Transcript of Proceedings of the April 5, 2012
application, at page 62 **[Tab 2]**

7. In the Reasons for Judgment, the Court decided that the Public Trustee could make inquiries to examine the First Nation's membership definition and application processes, provided that the investigation was appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust and provided that the result of the investigation did not duplicate the exclusive jurisdiction of the Federal Court to order relief against the Sawridge Band Chief and Council. The Court confirmed that it did not have the jurisdiction to order a judicial review remedy against the First Nation.

1985 Sawridge Trust v. Alberta (Public Trustee), 2012
ABQB 365, at paras. 53 – 55 **[Tab 3]**

8. In the questioning of Paul Bujold, a review of the membership application process was provided. It is clear that applications are being approved at every level. Three applications have gone to judicial review and the Court upheld the decisions of the First Nation. Further, and most significantly in respect of the 23 original minor beneficiaries, four have been admitted to membership in the First Nation.

Answers to Undertakings of Paul Bujold #33 **[Tab 4]**

Answers to Undertakings of Paul Bujold #45 and 46
[Tab 5]

9. The trustees have recently put forth a "with prejudice" offer to the Public Trustee whereby the definition of "beneficiaries" would be changed to equate to membership, and all minor beneficiaries who would thereby lose their status as beneficiaries would be "grandfathered" such that they would retain beneficiary status for the rest of their lives, regardless of whether they ultimately became members of the First Nation.
10. The trustees have asked the Court to invoke *inter alia* its inherent *parens patriae* jurisdiction in order to review this offer of settlement with a view to bringing this matter to a close in a manner that is fair, equitable and that takes into account the interests of all relevant parties, including the minor beneficiaries affected by the change in definition.
11. At paragraph 58 of their Written Brief, the Public Trustee takes the position that resolution of this matter "cannot be seriously considered while there are dramatic gaps in the information available."

12. Rather than considering resolution of this matter, the Public Trustee seeks an Order of the Court requiring extensive document production, the consolidation of these proceedings with an unrelated action, the expansion of the issues before the Court and the ability to question numerous individuals in the process. The cost will be exorbitant, and the proper administration of the Trust will be further delayed.
13. In considering whether the cost and delay would be in the best interests of the Trust, it is submitted that an inquiry must be made as to what might be gained from such a process.
14. Clearly, the membership issue is no longer relevant with respect to the minor beneficiaries that will be grandfathered. These minors will be granted beneficiary status for the rest of their lives, regardless of whether they ever become members of the Sawridge First Nation.
15. There is no uncertainty with respect to the identity of the current minor beneficiaries. It is unclear whether the Public Trustee has any concerns in this regard. If so, legal counsel for the trustees are prepared to recommend to the trustees that a process be put in place whereby any minor that contests the current list of minor beneficiaries may bring the matter to the trustees for consideration and determination. The trustees would provide funding for legal representation for the minor.
16. The Public Trustee does not seem concerned with the list of current minor beneficiaries, nor does it suggest that the analysis of these affected minors is flawed.
17. The Public Trustee seems concerned with another group of minors, namely the minor children of parents who are applying for membership in the First Nation, referred to as the "candidate children". These minors are not directly affected by the change in definition. They are not currently beneficiaries of the trust. However, the change in definition would improve their chances to benefit from the Trust. If the Trust remains unchanged, admission to membership in the First Nation does not result in beneficiary status being attained. With a change in definition, admission to membership results in beneficiary status.
18. It is respectfully submitted that the Public Trustee is not recognizing the significant benefits that would be granted to the grandfathered children and has failed to recognize the benefits that the change in definition would give to all children.
19. The Court has confirmed that it does not have the jurisdiction to order a judicial review remedy against the First Nation in respect of its membership process. As such, potential beneficiaries can have no recourse in the context of these proceedings. Any concerns with respect to a specific membership application must be dealt with through the process that has been established by the Sawridge First Nation pursuant to the *Indian Act*, which includes an appeal

process and which allows for judicial review by the Court of any decisions made in respect of a membership application.

20. The "potential" minor beneficiaries have no beneficial interest in the Trust assets. Under the new definition of beneficiaries, however, these individuals would at least have the opportunity to become members of the First Nation and as such, beneficiaries of the 1985 Sawridge Trust. However, whether such status is to be attained by any of these individuals cannot be determined in these proceedings.
21. In the circumstances, it is submitted that the with prejudice settlement offer be canvassed immediately to determine whether these proceedings can be brought to a close. To the extent that there are any outstanding issues or concerns, of which the trustees are unaware, these can be discussed and addressed by the parties and the Court. Any such outstanding issues should be specifically identified and a plan should be put in place to address them without delay.
22. It is the trustees' desire to remove the discriminatory provision from the Trust deed without delay, so that it can administer the Trust in accordance with the terms of the deed and the intention of the settlor of the Trust. The funds in the Trust were to be used for the benefit of the members of the First Nation. These proceedings have been extremely costly and time-consuming, and it is respectfully submitted that the cost and delay has not been in the best interests of the beneficiaries of the Trust. The Public Trustee now seeks further extensive document production, questioning, and a further expansion of the issues to be addressed, including those relating to the selection of trustees. The Public Trustee seeks this information prior to considering settlement of the matter and without detailing the results they hope to achieve. It is respectfully submitted that the settlement proposal put forth by the trustees should be reviewed immediately, without more, and the trustees seek the direction of the Court to conduct this review and bring this matter to a close.

DOCUMENT PRODUCTION

23. The Public Trustee seeks an Order pursuant to Rule 3.10 and 3.14 of the Alberta *Rules of Court* requiring the Sawridge trustees and the Sawridge First Nation to file Affidavits of Records in accordance with the provisions of Part V of the Alberta *Rules of Court*.
24. The Sawridge First Nation has requested an adjournment of the application relating to document production. The parties have consented to this adjournment request.
25. All issues in relation to document production will be addressed in a separate Brief, to be filed prior to the hearing of the application.

26. It should be further noted that at no time have the trustees been asked for an affidavit of records. The first request came in the filed application. If the Public Trustee can clarify the need for an affidavit of records the trustees will consider consenting without the need for a court order. The trustees take exception to the costs incurred in seeking a judicial remedy before a request is made of the parties.
27. In any event, the trustees submit that they have produced all relevant and material documentation in their possession, and in the circumstances there is no need to file an Affidavit of Records.
28. Further, the Public Trustee has had an opportunity to question Paul Bujold, the Chief Executive Officer of the Sawridge Trusts, and have obtained significant documentation as a result of the questioning and undertakings given by Mr. Bujold.
29. As noted above, no further document production is required to identify the affected minors and it is in order for the parties and the Court to consider the settlement offer advanced by the trustees.

COURT OF QUEEN'S BENCH ACTION NO. 1403 04885 – CONSOLIDATION OF ACTIONS

30. The Public Trustee seeks an Order directing the parties to report back to the Court on the merits of consolidation of the within action with Court of Queen's Bench Action No. 1403 04885, which report is to occur within 60 days of the Public Trustee's receipt of the completed additional document production it requests.
31. It is submitted that rather than granting such an Order, the Public Trustee should first determine whether consolidation of the actions is appropriate, and if so, should seek the consent of the parties. If the consent is not forthcoming, it should bring an application for consolidation in accordance with the *Rules of Court* and the relevant case law.
32. While the Court is not being asked for any substantive relief by the Public Trustee at this time, the trustees nonetheless wish to raise a concern with respect to the submissions made by the Public Trustee relating to the overlap between the two actions. In the Public Trustee's Application, its Written Brief and the supporting affidavit of Roman Bombak, references are made to the overlap between the two actions based upon a review of the "pleadings" filed in the actions. The Public Trustee then refers to statements made in certain affidavits and exhibits filed in Action No. 1403 04885 in support of this submission. The affidavits and exhibits do not constitute "pleadings", and a review of the actual pleadings in the actions reveals that there is no overlap between the two actions.

ADVICE AND DIRECTION REGARDING COMMUNICATION BETWEEN COUNSEL

33. The Public Trustee seeks an Order allowing it to communicate with any or all counsel in Court of Queen's Bench Action No. 1403 04885, whether individually or as a group, in respect of the following matters:
- i) The evidence produced pursuant to the order requested herein;
 - ii) The real issues in dispute in either proceeding;
 - iii) The merits of consolidation, or concurrent hearings, of the two proceedings;
 - iv) The most efficient way to resolve the issues that overlap as between the two proceedings; or
 - v) Any other matter consistent with the purposes of the *Alberta Rules of Court*.
34. The Public Trustee seeks the approval of the Court to resume discussions with all counsel, including Karen Platten, Q.C. Ms. Platten is legal counsel to Catherine Twinn in Action No. 1403 04885.
35. It should be noted that counsel for the trustees did not say that discussions could not take place. Counsel for the trustees simply wanted to be in attendance at any such discussions. It is not understood why the meeting needed to be held without representatives of the trustees present.
36. We have advised counsel for the Public Trustee of our concern with respect to such communications. In particular, by way of email dated April 27, 2015, we advised counsel for the Public Trustee as follows:
- (a) We act for the trustees of the Sawridge Trusts, including Catherine Twinn. Obviously, it would be improper for Ms. Hutchison to meet directly with our client, without our consent. Ms. Hutchison proposes to meet with Ms. Platten, who acts for Catherine Twinn. Our concern is that through such a meeting, Ms. Hutchison is accomplishing indirectly what she cannot do directly.
 - (b) To the extent that, as a result of any such meeting, Ms. Hutchison is in receipt of any relevant confidential information that is prejudicial to our client, it may be that Ms. Hutchison could no longer act against our client. The definition of "confidential information" in our Code is quite broad, and would include information covered by solicitor/client privilege and litigation privilege.
- Email from Poretti to Hutchison et al. dated April 27,
2015 [Tab 6]
37. At paragraph 42 of its Brief, the Public Trustee states that counsel for the trustees "indicated they regarded themselves as being legal counsel to Catherine Twinn, apparently as an individual rather than incidentally to their representation of the Sawridge Trust as an entity." In response to

this statement, we submit that the "Sawridge Trust" is not a separate legal entity. A trust is a relationship between the trustees and the beneficiaries. As counsel to the trustees, our clients are the individual trustees, including Catherine Twinn. While Catherine Twinn is entitled to seek independent legal counsel if she so desires, this does not make her any less our client.

Bronson v. Hewitt, 2013 BCCA 367 at para 70 [Tab 7]
Waters' Law of Trusts in Canada (3rd edition, 2005), at page 3 [Tab 8]

38. The fact that counsel for the Public Trustee considers there to be significant overlapping issues between the within action and Action No. 1403 04885 demands increased vigilance by all concerned.
39. The fact that counsel for the Public Trustee wishes to discuss evidence relevant to these proceedings is of real concern. It is our respectful submission that it would be improper for counsel for the Public Trustee to receive any relevant confidential information that originated with our client, whether directly through communications with our client or indirectly through communications with Ms. Platten.
40. We acknowledged that this is a unique and difficult fact situation. We further acknowledge that in these unique circumstances, there are certain matters that may be discussed between legal counsel that would not result in the exchange of relevant confidential information. However, it is difficult to establish any set rules or guidelines to govern the conduct of counsel given that the definition of "confidential information" is quite broad.
41. We concur that the advice and direction of the Court is required in respect of this matter, and respectfully submit that if meetings between counsel will assist with determination of the issues, then the meetings should occur but we submit that at a minimum, lawyers for the trustees be permitted to attend the meetings.

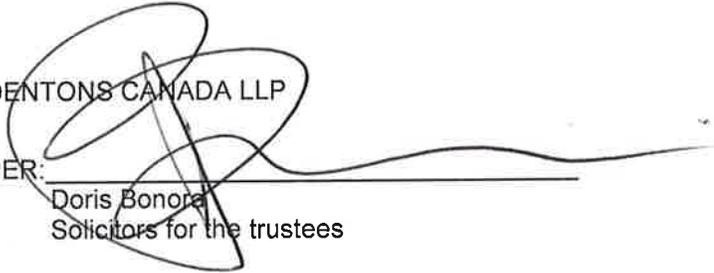
HIRING OF THIRD PARTY AGENT BY PUBLIC TRUSTEE

42. We addressed this issue in the Brief of the trustees filed on June 12, 2015. The trustees do not object in principle to the hiring of a third party agent, but are concerned about the unnecessary increase in fees that may result if appropriate oversight on these expenditures is not in place.
43. The trustees seek the advice and direction of the Court in respect of the ongoing expenditure of funds from the Trust.

44. We respectfully request that the trustees will have full access to the accounts unredacted at the conclusion of the matter and have the opportunity to have the accounts reviewed including a review of the appropriateness of the actions and costs involved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19 DAY OF JUNE, 2015.

DENTONS CANADA LLP

PER: 

Doris Bonora
Solicitors for the trustees

REYNOLDS MIRTH RICHARDS & FARMER LLP

PER: 

Marco S. Poretti
Solicitors for the trustees

LIST OF AUTHORITIES

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Alberta <i>Rules of Court</i> , Rule 1.2.	1
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<i>1985 Sawridge Trust v. Alberta (Public Trustee)</i> , 2012 ABQB 365	3
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<i>Waters' Law of Trusts in Canada (3rd edition, 2005)</i>	8

Tab 1

Part 1: Foundational Rules

Division 1 Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

- (a) the Court of Queen's Bench of Alberta, and
- (b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

- (a) to identify the real issues in dispute,
- (b) to facilitate the quickest means of resolving a claim at the least expense,
- (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
- (d) to oblige the parties to communicate honestly, openly and in a timely way, and
- (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

- (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
- (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,
- (c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and
- (d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2 Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

- (a) give any relief or remedy described or referred to in the *Judicature Act*;
- (b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 [*Purpose and intention of these rules*] the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

- (a) grant, refuse or dismiss an application or proceeding;
- (b) set aside any process exercised or purportedly exercised under these rules that is
 - (i) contrary to law,
 - (ii) an abuse of process, or
 - (iii) for an improper purpose;
- (c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;
- (d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;
- (e) impose terms, conditions and time limits;
- (f) give consent, permission or approval;
- (g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

Tab 2

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF 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").

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

Applicants

P R O C E E D I N G S

Edmonton, Alberta
April 5, 2012

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

1 Further Submissions by Ms. Bonora

2

3 MS. BONORA: My Lord, I wonder if could just address a
4 couple of issues raised by --

5

6 THE COURT: Sure.

7

8 MS. BONORA: My friend who -- that weren't addressed before,
9 our client is asking to advise you that the application that was referred to in Hugessen was
10 70 pages long, so perhaps that might be seen as onerous. The current application, I think,
11 is only six or seven pages long and you'll see it attached to the affidavit filed by
12 Ms. Hutchison. So there's a bit of a difference in terms of the applications that are
13 currently needed to be filled out compared to what was in Hugessen.

14

15 THE COURT: And when was that before Justice Hugessen,
16 just so I can put it in a --

17

18 MR. KINDRAKE: It was around 2004 --

19

20 MS. HUTCHISON: Four --

21

22 THE COURT: -- My Lord.

23

24 THE COURT: Okay. So --

25

26 MS. BONORA: The question you also asked was, There's a
27 clear relationship between the trust and the First Nation, and I would suggest that they try
28 very hard to keep those two entities very separate; and, in fact, they are distinct legal
29 entities. The trust is its own entity. It operates with its own set of trustees. It has a
30 board of directors that manage its companies. Obviously, there's cross-over. The Chief is
31 on both. The Chief obviously runs the First Nation, and he's also a trustee.

32

33 But it's not as though they are always together and doing things together. They see
34 themselves as very separate, and they have their own administrator -- the trust has its own
35 administrator, and they do payments out not in relation to the First Nation; so I think it's
36 important to understand that they see themselves as very separate.

37

38 On the issue of can the trust benefit minors, the trustees, in fact, have sought a legal
39 opinion and they have, in fact, spoken to Donovan Waters about this; and they're -- the
40 opinion that they've received is that they can do so because the parents are the
41 beneficiaries. We absolutely agree. You can't -- trustees simply can't pay out money to

1 anyone who isn't a beneficiary, so that is not something we need to dispute. They -- the
2 payment has to be to a beneficiary, and so the parent is the beneficiary. What we're
3 saying is if a parent comes to the trustees and asks for payment for hockey fees or
4 payment to help with school fees, those payments are being made to the parents; and so
5 those would be the kinds of benefits a minor would get from the trust. Those payments
6 are being made, but through the parent as a beneficiary.

7
8 So there's nothing nefarious going on. The trustees are absolutely doing their duty, and
9 they have done so on, you know, probably the best of advice and certainly the most
10 well-known authority probably in trust in Canada.

11
12 The other thing I would mention just in respect of the membership issue, the 1986 trust,
13 which, of course, is before you as well, has membership as its definition; and so, you
14 know, to say that we should go through this and see if we should change this trust to that
15 and we should go on -- embark on this procedure that I suspect will take so much time
16 and so much effort to delve into these membership issues to -- only to get back to a
17 definition that not only is there another trust within Sawridge that has that definition, but
18 as Mr. Poretti said and we've said in our brief, there are many, many trusts that use
19 membership as its definition. And to say that you need to now go in to determine if
20 membership is functional here, I think that that would be a process that would take you a
21 review of every single individual application, looking and seeing what was done.

22
23 If an application, as Mr. Poretti said, was outstanding for 26 years, it could be that it
24 wasn't complete. We don't know. It may be did -- it wasn't ready to be reviewed. We
25 don't know that, but the only way you find that out is to actually go through an individual
26 review of each and every application and why it was rejected or not reviewed or
27 whatever. That's the only way you can come to those conclusions; and we're suggesting
28 that *Huzar* says that can't be done in this Court, and we're saying should not be done in
29 this simple process where we're asking this Court to review the definition, determine if
30 it's against social policy, public policy, and whether it should be changed to a mem -- to a
31 definition that is, in fact, used quite often.

32
33 Thank you so much for your indulgence in --

34
35 THE COURT: Okay.

36
37 MS. BONORA: -- listening to me once again.

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39 **Further Submissions by Ms. Hutchison**

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41 MS. HUTCHISON: My Lord, I --

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THE COURT:

Okay.

MS. HUTCHISON:

-- hate to ask for --

THE COURT:

One last word.

MS. HUTCHISON:

-- your indulgence, but I'm just going to respond very quickly on that last point.

I have to disagree with my friend that to determine functionality, you would have to engage in a -- such a detailed analysis. For instance, if we're able to determine that Chief and Council actually occasionally meets to review membership applications as opposed to they've never met to review membership applications, I would suggest that's a very large indicator of functionality that doesn't require you to go into assessing the merits of each individual application. And at least my current instructions, if we are acting, is not to go into the minutia of each membership application; it's to try and assess whether or not there's actually some function process.

THE COURT:

All right. Well, I am going to draw the proceeding to a close. Obviously, it is not a decision that gets made off the bench. I am cognizant of, you know, there is some dates reserved at the end of June for a consideration of the main issues, so I will do my best to turn out a decision, a written decision in a timely way; but I want you to know this is the third reserve I have picked up in a week of commercial duty, so I am not in a position to give any deadline as to when I might be able to get it done.

Mr. Poretti?

MR. PORETTI:

Thank you, Sir. Just give me one moment.

THE COURT:

Yes.

MR. PORETTI:

I'm trying to find the most recent procedural order; and so I acknowledge, of course, your comments, and I just bring it to your attention -- I just thought --

THE COURT:

Right.

MR. PORETTI:

-- I'd bring to --

THE COURT:

Yes.

1

2 MR. PORETTI: -- your attention the schedule, and the most
3 recent procedural order is dated February 24; and that was the procedural order that did
4 set down the date of the main application for June 26 and 27. It also had deadlines for
5 the filing of briefs for this application, and it's actually the previous order -- yes, it's
6 the -- there was a previous order of February 16th that dealt with some dates that I wish
7 to bring to your attention.

8

9 The first is any questioning on affidavits filed in respect of the main application is to be
10 done by April 30th. I'm going to be meeting with my friend Ms. Hutchison after today's
11 application. We've got some dates. It looks like we're into May already to try to do that,
12 but just to inform you that that's out there. Obviously, we await your decision in respect
13 of all the issues before you today before we're going to be able to proceed to any
14 questioning.

15

16 And from there -- well, the other dates deal with when the legal arguments are to be filed:
17 May 29th by the applicants, June 14th by any other person, and then any replies by the
18 applicant on June 22nd; and then the -- two days have been set aside in the subsequent
19 order of June 26th and 27th.

20

21 So I just thought I would --

22

23 THE COURT: Mm-hm.

24

25 MR. PORETTI: -- bring that to your attention --

26

27 THE COURT: Thanks.

28

29 MR. PORETTI: -- Sir. Thank you.

30

31 THE COURT: Thanks. Well, let me say this just so the
32 counsel involved know this matter just seems to have, you know, quite appropriately
33 fallen into the commercial list, if I can call it that. The next time I am on duty doing
34 commercial is the week of May 22nd, so I think what we could do is if we get really out
35 of line on the timetable that is approved by order, perhaps you could bring it back some
36 day that week and we will sort it out and see if we can hold on to those dates at the end
37 of June, okay?

38

39 MR. PORETTI: Thank you, Sir.

40

41 THE COURT: I mean, I do not want to interfere with

1 Mr. Molstad's golf because I know that -- that is a weekly -- it will probably rain that
2 week, so --

3
4 MR. MOLSTAD: It'll probably rain --

5
6 THE COURT: (INDISCERNIBLE)

7
8 MR. MOLSTAD: -- that's right, Sir.

9
10 THE COURT: All right. Good. Thanks, counsel.

11
12 MS. HUTCHISON: Thank you.

13
14 MR. MOLSTAD: Thank you, Sir.

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16 MS. BONORA: Thank you, Sir.

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19 PROCEEDINGS CONCLUDED

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1 Certificate of Record

2

3 I, Allison Meads, certify that this recording is the record made of the evidence in the
4 proceedings in the Court of Queen's Bench, held in Courtroom 516 at Edmonton, Alberta,
5 on the 5th day of April, 2012, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

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Tab 3

Case Name:
1985 Sawridge Trust v. Alberta (Public Trustee)

**IN THE MATTER OF the Trustee Act, R.S.A. 2000, c. T-8, as
amended;
AND IN THE MATTER OF The Sawridge Band Inter Vivos Settlement
Created by Chief Walter Patrick Twinn, of the Sawridge Indian
Band, No. 19, now known as the Sawridge Indian Band, on April
15, 1985 (the "1985 Sawridge Trust")
Between
Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha
L'Hirondelle, and Clara Midbo, As Trustees for the 1985
Sawridge Trust, Respondent, and
Public Trustee of Alberta, Applicant**

[2012] A.J. No. 621

2012 ABQB 365

217 A.C.W.S. (3d) 513

75 Alta. L.R. (5th) 188

543 A.R. 90

[2013] 3 C.N.L.R. 395

2012 CarswellAlta 1042

Docket: 1103 14112

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

D.R.G. Thomas J.

Heard: April 5, 2012.
Judgment: June 12, 2012.

(56 paras.)

Aboriginal law -- Communities and governance -- Status of community -- Indian bands and First Nations -- Application by Public Trustee to be named litigation representative for minors whose interests were potentially affected by respondents' application, advance costs on solicitor and client basis, and ruling that information and evidence relating to membership criteria and processes of Band was relevant material allowed -- Respondent trustees had applied to vary definition of beneficiaries that could result in some minors being excluded -- Public Trustee appointed, considering monetary value at issue and respondents' potential conflict of interest -- Membership and application processes and practices of the Band were relevant to establish whether beneficiary class could and had been adequately defined.

Wills, estates and trusts law -- Trusts -- Express trusts -- Termination, revocation and variation -- Variation of trusts -- The beneficiary -- Application by Public Trustee to be named litigation representative for minors whose interests were potentially affected by respondents' application, advance costs on solicitor and client basis, and ruling that information and evidence relating to membership criteria and processes of Band was relevant material allowed -- Respondent trustees had applied to vary definition of beneficiaries that could result in some minors being excluded -- Public Trustee appointed, considering monetary value at issue and respondents' potential conflict of interest -- Membership and application processes and practices of the Band were relevant to establish whether beneficiary class could and had been adequately defined.

Application by the Public Trustee to be named as the litigation representative for minors whose interests were potentially affected by the application for advice and directions by the respondents, for advance costs on a solicitor and client basis, and a ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band was relevant material. The Sawridge Band created a trust in 1985 to hold some Band property on behalf of its then members. The trust now held approximate \$1.75 million shares. The trust was created in the expectation that persons who had been excluded from Band membership by gender would be entitled to join the Band as a consequence of legislative amendments. The trust was administered by the respondents. The respondents had applied to amend the definition of the term "beneficiaries" in the trust as the present members of the Band. The proposed amendments would result in certain children who were presently entitled to a share in the benefits of the trust being excluded.

HELD: Application allowed. The Public Trustee was appointed as a litigation representative. A litigation representative was appropriate and required because of the substantial monetary interests involved in this case and the potential for a conflict of interest. A decision on who fell inside or outside of the class of beneficiaries under the trust would significantly affect the potential share of those inside the trust. The key players in both the administration of the trust and of the Band overlapped and these persons were currently entitled to shares of the Trust property. There was thus a logical basis for a concern of a potential for an unfair distribution of the trust assets. The Public Trustee should be appointed as the litigation representative not only of minors who were children of current Band members, but also the children of applicants for Band membership who were also minors. In these circumstances, the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the trust and all costs of such representation should be borne by the trust. The Public Trustee could make inquiries into the membership and ap-

plication processes and practices of the Band. These issues were relevant to establish whether the beneficiary class could and had been adequately defined.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta Reg. 124/2010, Rule 2.11(a), Rule 2.15

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,
Indian Act, R.S.C. 1985, c. I-5,

Trustee Act, RSA 2000, c. T-8, s. 10, s. 12(4), s. 41

Counsel:

Ms. Janet L. Hutchison, for the Public Trustee/Applicants.

Ms. Doris Bonora, Mr. Marco S. Poretti, for the Sawridge Trustees/Respondents.

Mr. Edward H. Molstad, Q.C., for the Sawridge Band/Respondents.

- I. Introduction
- II. The History of the 1985 Sawridge Trust
- III. Application by the Public Trustee
- IV. Should the Public Trustee be Appointed as a Litigation Representative?
 - A. Is a litigation representative necessary?
 - B. Which minors should the Public Trustee represent?
- V. The Costs of the Public Trustee
- VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes
 - A. In this proceeding are the Band membership rules and application processes relevant?
 - B. Exclusive jurisdiction of the Federal Court of Canada
- VII. Conclusion

Reasons for Judgment

D.R.G. THOMAS J.:--

I. Introduction

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

been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, R.S.C. 1985, c. I-5 which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [the "*Charter*"].

2 The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

3 At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

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

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

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

II. The History of the 1985 Sawridge Trust

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

8 In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. At the present time the value of assets held by the 1985 Sawridge Trust is approximately \$70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

9 In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: *Sawridge Band v. Canada*, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. Canada*, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: *Poitras v. Sawridge Band*, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

10 At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

11 At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

12 The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

13 This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

III. Application by the Public Trustee

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

1. to determine which minors should be represented by it;
2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and

3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

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

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

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

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

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

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

A. Is a litigation representative necessary?

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

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

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

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

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

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

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

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

23 In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 148, [2011] 2 S.C.R. 175. It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 [*"Waters' Law of Trusts"*]). Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23 minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately \$1.1 million in assets of the Sawridge Trust.

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

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

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

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

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

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

27 The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

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

29 This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band member-

ship and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

B. Which minors should the Public Trustee represent?

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

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

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

33 The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

V. The Costs of the Public Trustee

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

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

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

36 Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require in-

dependent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

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

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

39 Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The *Little Sisters* criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.* (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

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

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4th) 489 .

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

41 The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from

a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

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

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

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

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

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

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

45 The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985

Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

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

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

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

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

B. Exclusive jurisdiction of the Federal Court of Canada

50 The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief

and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

51 As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, 322 D.L.R. (4th) 56, the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, 365 N.R. 62 indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

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

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

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

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

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

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

VII. Conclusion

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

D.R.G. THOMAS J.

cp/e/qlcct/qllmr/qlgpr/qljac/qlcas/qljac

Tab 4

Undertaking 33

RE: INQUIRE OF SAWRIDGE FIRST NATION AS TO NUMBER OF APPLICATIONS THEY RECEIVED BETWEEN 1985 AND 1993, HOW MANY WERE RECEIVED, HOW MANY WERE PROCESSED, AND WHAT THE OUTCOME OF THOSE MEMBERSHIP APPLICATIONS WERE FROM 1985 TO 1993.

LIST OF MEMBERSHIP APPLICATIONS COMPLETED			
No.	Date Received	Last Action	Action Date
1.	24 July 91	Accepted	15 Sept 93
2.	12 Feb 01	Accepted	09 April 02
3.	12 Feb 01	Accepted	09 April 02
4.	14 March 03	Accepted	09 April 02
5.	14 March 03	Accepted	09 April 02
6.	14 March 03	Accepted	09 April 02
7.	14 March 03	Accepted	09 April 02
8.	14 March 03	Accepted	09 April 02
9.	13 Oct 99	Denied	13 May 04
10.	13 Aug 01	Accepted	10 April 08
11.	18 June 03	Accepted	10 April 08
12.	19 Dec 03	Accepted	10 April 08
13.	29 March 04	Denied	14 Jan 09
14.	06 Dec 04	Denied	14 Jan 09
15.	24 Feb 10	Denied	22 Nov 11
16.	24 Feb 10	Denied	22 Nov 11
17.	24 Feb 10	Denied	22 Nov 11
18.	24 Feb 10	Denied	22 Nov 11
19.	24 Feb 10	Denied	22 Nov 11

20.	24 Feb 10	Denied	22 Nov 11
21.	24 Feb 10	Denied	22 Nov 11
22.	24 Feb 10	Denied	22 Nov 11
23.	14 May 10	Denied	22 Nov 11
24.	25 Jan 11	Letter – Re already applied	22 Nov 11
25.	18 Sept 09	Appeal denied	21 April 12
26.	03 Mar 10	Appeal denied	21 April 12
27.	25 June 10	Appeal denied	21 April 12
28.	31 Jan 08	Accepted	22 Aug 12
29.	31 Jan 08	Accepted	22 Aug 12
30.	01 Oct 08	Accepted	22 Aug 12
31.	01 Oct 08	Accepted	22 Aug 12
32.	3 March 10	Denied	22 Aug 12
33.	3 March 10	Denied	22 Aug 12
34.	3 March 10	Denied	22 Aug 12
35.	3 March 10	Denied	22 Aug 12
36.	3 March 10	Denied	22 Aug 12
37.	29 March 10	Appeal Denied	01 Dec 12
38.	15 Apr 04	Appeal Denied	09 March 13
39.	06 Jan 05	Appeal Denied	05 Jan 13
40.	01 March 10	Denied	22 Oct 12
41.	12 Sept 11	Denied	09 Dec 13

LIST OF MEMBERSHIP APPLICATIONS PENDING			
No.	Date Received	Last Action	Action Date
1.	06 Sept 06	Letter – Re missing info	14 March 12
2.	08 July 08	Letter – Re missing info	14 Jan 09
3.	27 Feb 09	Updated application received	24 Jan 14
4.	01 March 10	Letter – Re missing info	22 Nov 11
5.	23 June 10	Letter – Re missing info	22 Nov 11
6.	23 June 10	Letter – Re missing info	22 Nov 11
7.	23 June 10	Letter – Re missing info	22 Nov 11
8.	27 July 10	Letter – Re missing info	14 March 12
9.	27 July 10	Letter – Re missing info	14 March 12
10.	11 Feb 11	Letter – Re missing info	22 Nov 11
11.	03 May 11	Letter – Re missing info	14 March 12
12.	28 Sept 11	To Committee	28 Sept 11
13.	01 Oct 11	To Committee	01 Oct 11
14.	01 Oct 11	To Committee	01 Oct 11
15.	01 Oct 11	To Committee	01 Oct 11
16.	10 Jan 12	Letter – Re missing info	12 Dec 12
17.	23 Jan 12	Letter – Re missing info	12 Dec 12
18.	23 Jan 12	Letter – Re missing info	12 Dec 12
19.	24 Feb 12	To Committee	24 Feb 12
20.	10 May 12	To Committee	10 May 12
21.	15 June 12	To Committee	15 June 12
22.	18 July 12	To Committee	18 July 12

23.	08 Aug 12	Letter – Re missing info	12 Dec 12
24.	25 Sept 12	To Committee	25 Sept 12
25.	05 Oct 12	To Committee	05 Oct 12
26.	09 Oct 12	To Committee	09 Oct 12
27.	07 Jan 13	To Committee	07 Jan 13
28.	15 March 13	To Committee	15 March 13
29.	21 May 13	To Committee	21 May 13
30.	03 June 13	To Committee	03 June 13
31.	25 Oct 13	To Committee	25 Oct 13
32.	19 Feb 14	To Committee	19 Feb 14
33.	25 April 14	To Committee	25 April 14

Tab 5

Undertaking 45

RE: INQUIRE OF SAWRIDGE FIRST NATION TO PRODUCE COPIES OF ANY LETTERS, EMAILS, OR OTHER DOCUMENTS RELATING TO COMPLAINTS OF CONFLICT OF INTEREST IN RELATION TO ANY ELEMENT OF THE MEMBERSHIP PROCESS, WHETHER IT IS MEMBERSHIP APPLICATION, MEMBERSHIP APPEAL COMMITTEE HEARING, MEMBERSHIP ISSUES BEFORE COUNCIL, OR INTERVIEWS THAT ARE HELD OCCASIONALLY FOR MEMBERS' ADMISSION AS PROVIDED FOR UNDER SECTION 5 OF *GOVERNANCE ACT*.

Sawridge First Nation reports that there have been no formal complaints filed under Section 5 of the *Governance Act*. Aline Huzar, June Kolosky and Maurice Stoney, whose membership application was denied, appealed and rejected, appealed to the Federal Court (T-922-12 and T-932-12 [E6393143] and rejected, have now filed a complaint with the Canadian Human Rights Commission. No details are currently available on this complaint.

Undertaking 46

RE: INQUIRE OF SAWRIDGE FIRST NATION TO PRODUCE COPIES OF ANY LETTERS, EMAILS OR OTHER DOCUMENTS RELATING TO COMPLAINTS OF CONFLICT OF INTEREST IN RELATION TO ANY ELEMENT OF THE MEMBERSHIP PROCESS, WHETHER IT IS MEMBERSHIP APPLICATION, MEMBERSHIP APPEAL COMMITTEE HEARING, MEMBERSHIP ISSUES BEFORE COUNCIL, OR INTERVIEWS THAT ARE HELD OCCASIONALLY FOR MEMBERS' ADMISSION AS PROVIDED FOR UNDER ARTICLE 17, SUBSECTION (8) OF THE *CONSTITUTION ACT*.

Sawridge First Nation reports that there have been no formal complaints filed under Article 17, Subsection (8) of the *Constitution Act* thus no letters, emails or other documents exist.

Tab 6

Marco S. Poretti

From: Marco S. Poretti
Sent: Monday, April 27, 2015 2:21 PM
To: 'Nancy Cumming'; Karen Platten; Janet Hutchison
Cc: Bonora, Doris
Subject: RE: meeting with Karen Platten- 51433 JLH

We have the following comments:

1. We act for the trustees of the Sawridge Trusts, including Catherine Twinn. Obviously, it would be improper for Ms. Hutchison to meet directly with our client, without our consent. Ms. Hutchison proposes to meet with Ms. Platten, who acts for Catherine Twinn. Our concern is that through such a meeting, Ms. Hutchison is accomplishing indirectly what she cannot do directly.
2. To the extent that, as a result of any such meeting, Ms. Hutchison is in receipt of any relevant confidential information that is prejudicial to our client, it may be that Ms. Hutchison could no longer act against our client. The definition of "confidential information" in our Code is quite broad, and would include information covered by solicitor/client privilege and litigation privilege.

We have requested that we be in attendance at any such meeting, and repeat that request at this time.

Marco

 BARRISTERS SOLICITORS	Reynolds Mirth Richards & Farmer	 100 years Celebrating a Century	Marco S. Poretti Partner 3200 Manulife Place 10180 - 101 Street Edmonton AB Canada T5J 3P1 Direct: 780.497.3325 Fax: 780.429.3044 Toll Free: 1.800.661.7673 mporetti@rmrf.com www.rmrf.com
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Tab 7

Editor's Note: Erratum released on November 8, 2013. Original judgment has been corrected with text of erratum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bronson v. Hewitt*,
2013 BCCA 367

Date: 20130814

Dockets: CA037941; CA037947; CA038299

Docket CA037941

Between:

**Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,
Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis, Sr.**

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
Respondent by Cross Appeal
(Defendant)

And

A. Eugene Lewis

Respondent by Cross Appeal
(Defendant)

And

**Jennifer Lewis Browning, Julie Lewis Hendrickson, William David Tompkins,
Trustee of the Graham River Trust, Graham River Outfitters Ltd.,
Margaret H. Mason, Bull, Housser & Tupper and Bull, Housser & Tupper LLP**

(Defendants)

- and -

Docket: CA037947

Between:

**Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,
Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.**

Respondents
(Appellants by Cross Appeal)

And

A. Eugene Lewis

Appellant
(Respondent by Cross Appeal)

And

**Howard H. Hewitt, Jennifer Lewis Browning, Julie Lewis Hendrickson,
William David Tompkins, in his capacity as Trustee of the Graham River Trust,
Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper,
and Bull, Housser & Tupper LLP**

(Defendants)

- and -

Docket: CA038299

Between:

**Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,
Virginia C. Shaffer, H. Davis Lewis Jr., and Harold D. Lewis Sr.**

Respondents
(Plaintiffs)

And

Howard H. Hewitt

Appellant
(Defendant)

And

**A. Eugene Lewis, Jennifer Lewis Browning, Julie Lewis Hendrickson,
William David Tompkins, Trustee of the Graham River Trust,
Graham River Outfitters Ltd., Margaret H. Mason, Bull, Housser & Tupper,
and Bull, Housser & Tupper LLP**

(Defendants)

Corrected Judgment on November 6, 2013: J.G. Dives, Q.C. is Counsel for the Respondent by Cross Appeal, A.E. Lewis (Page 3); at para. 48 the citation for *Armitage v. Nurse* is corrected to read [1998] Ch. 241 (C.A.); and at para. 114, the amounts listed should be as follows:

Tommy	\$198,000
Lee	\$66,000
Virginia	\$66,000
Davis	\$66,000

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice A. MacKenzie

On Appeal from the Supreme Court of British Columbia (*Bronson v. Hewitt*)
February 8, 2010, 2010 BCSC 169 (Main Reasons)
June 21, 2010, 2010 BCSC 871
November 19, 2010, 2010 BCSC 1638
January 28, 2011, 2011 BCSC 102
April 15, 2011, 2011 BCSC 482
August 17, 2011, 2011 BCSC 1115
(Vancouver Registry L052583)

Counsel for the Appellant
H. Hewitt:

W.G. MacLeod
S. Field

Counsel for the Respondent by
Cross Appeal, A.E. Lewis:

J.G. Dives, Q.C

Counsel for the Respondents:

R.R.E. DeFilippi
C. Kim

Place and Date of Hearing:

Vancouver, British Columbia
June 10, 11 & 12, 2013

Place and Date of Judgment:

Vancouver, British Columbia
August 14, 2013

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Chiasson
The Honourable Madam Justice A. MacKenzie

Summary:

Appeal from a long trial judgment and various later judgments regarding a trust established by two brothers, "Harold" and "Eugene", who lived (and practised law) in Florida. They settled the trust in 1978 for the benefit of their children and transferred to it their shares in a company ("Big Nine") that owned and operated a guide outfitting business in northern BC. The Trust Agreement stated that in certain events (which came to pass in 2002), the two brothers would be the trustees. In 1980, each brother signed a "revocation letter" in which each stated that if he was unable to be a trustee, the defendant Hewitt ("Howard") should be the trustee in his place. Howard was a friend of the family and had lent money to Eugene at different times. Another friend was the plaintiff Bronson ("Tommy"), who had also lent money to Harold's family and provided assistance to his ex-wife and children.

Harold became a recluse, leaving Florida to live in northern BC at a place that did not have mail delivery or phones. The two brothers became estranged.

When the surviving trustee of the trust became ill in 2002, Eugene contacted a lawyer, who provided somewhat incomplete and misleading advice re the succession of the trusteeship. In particular she told Eugene that Harold had the right to become a trustee if he "stepped up". She did not inform Harold of this and neither did Eugene. He himself disclaimed his trusteeship and in accordance with the revocation letter he had signed, appointed Howard to act in his place. Howard accepted the role in order to help the family out.

TJ made various findings of a "subterfuge" engaged in by Eugene and Howard to conceal Harold's right from him, and found that Eugene deliberately failed to provide copies of the trust documents to Tommy, who was acting informally as advisor to Harold's children and as Harold's contact with the outside world. (Tommy had also acquired a share in the trust.) TJ also found that Harold forgot he was entitled to be a trustee, and that Howard "must have known" Harold had not given up this "right".

In 2003, Howard and Tommy discussed the possible sale by the trust of its shares in Big Nine. They agreed the time was right. Some efforts by Howard to engage a professional evaluator were unsuccessful. However, Tommy had had extensive experience in buying and selling businesses. He did not voice any opposition on behalf of Harold, even though Harold was "upset" that a sale was being contemplated. Eventually, Howard agreed to sell the shares from the trust to "TRL", a company owned by the then manager of the business. Howard decided to distribute the proceeds to the beneficiaries and wind up the trust, given the enmity between the two sides of the family. The sale was closed in Florida in early 2004.

Howard wrote to the beneficiaries, many of whom were now adults or near adults, and asked them to sign a release/indemnification agreement in his favour as a condition of receiving their shares of the proceeds. Eugene's children did so – and received their money – but the others did not. Eventually the litigation began, and blossomed into a breach of trust case, the children of Harold, Tommy, and Harold

himself alleging that Eugene and Howard had unlawfully concealed from him his right to be a trustee, that Howard had sold the shares without authority and improvidently, and that Howard had had no right to demand a release from the beneficiaries in return for their shares of the trust corpus. The plaintiffs sought an accounting, equitable compensation for the undervaluing of the Big Nine shares, or damages, as well as the distribution of the remaining proceeds of sale received by the trust but not paid out to them.

The TJ made many findings of fact that are discussed briefly by the CA, but most importantly, found that Howard and Eugene had “colluded” in not informing Harold of his right to be a trustee; and that Howard had breached the trust by acting without telling Harold that he (Harold) was entitled to be a trustee, by selling the shares without exposing them to the market, and by requesting the releases from the beneficiaries as a condition of their receipt of the sale proceeds.

Howard relied on an exoneration clause in the Trust Agreement that required that a trustee be excused from loss occasioned to the trust provided he had acted in good faith. The TJ ruled that although Howard had carried out the share sale in good faith and believing it to be in the interests of the beneficiaries, he was not entitled to be excused from liability in respect of the “improvident” sale because his collusion with Eugene was not in good faith. “But for” this collusion, the TJ said, he would have applied the exoneration clause. Eugene’s conduct was found to constitute “knowing assistance” and he was liable jointly and severally with Howard for the difference between the sale price of the shares and the fair market value found by the Court – the “Damage Award”.

Howard was also ordered to pay the remaining sale proceeds (the “Proceeds Award”) to Harold’s children and to Tommy – a liability not challenged by Howard on appeal.

Some time after the TJ issued his reasons, the defendants sought to re-open the case because they had found fresh evidence that showed that in fact Eugene had sent the trust documents to Tommy in October 2002 as requested. The TJ declined to allow this evidence to be adduced even though he accepted it proved the documents had been sent. He remained of the view that because Howard and Eugene had not told Harold of his right to be a trustee, the sending of the documents changed nothing.

The TJ also issued various judgments post-trial dealing with remedy questions, the continuation of the trust in future, the currency of the awards to the plaintiffs, the appointment of a new trustee, costs, etc.

On Appeal: The appeals of Howard and Eugene were allowed. The TJ had erred in conflating the “subterfuge” and the question of the improvident sale in analyzing the exoneration clause. The breach of trust found by the Court with respect to Harold’s “right to be” a trustee had not caused the damages suffered by reason of

the improvident sale. In Equity as elsewhere in the law, there must be a causal connection between the breach and the damage or loss for damages to be awarded: Canson Enterprises (SCC), Target Holdings (HL). The sale itself had been carried out in good faith according to the Court's findings; hence Howard was entitled to the benefit of the exoneration clause. It also followed that Eugene was not liable for the Damage Award on the basis of "knowing assistance". There was no authority for the proposition that he was under some duty to tell Harold that he was entitled to be trustee. On the other hand, in acting without the consent of his co-trustee Howard had failed in his obligations as a trustee. He should have immediately familiarized himself with the terms of the trust and not just taken Eugene's word that he was (sole) trustee.

The TJ had also erred in law in assuming that Harold had the "right to be" a trustee, when in fact he became a trustee upon the retirement of the former trustee, and thus had a responsibility to assert his position or to inquire as to the trusteeship – assuming the TJ was right in finding he did not remember he was a trustee. Harold had been aware of Howard's taking on the role and of the sale but had done nothing. The TJ should have considered whether Harold had in fact effectively renounced his trusteeship. The CA expressed the view that many of the TJ's findings of fact rested on shaky foundations, but that it was not necessary, given the errors of law, to decide if such factual findings or inferences met the Housen standard of "clearly and palpably" wrong.

Howard remained bound to distribute the undistributed proceeds of sale to the plaintiffs and the Foreign Money Claims Act applied thereto, given that the distribution to Eugene's children had been in US funds. CA did not interfere with the TJ's costs and related orders, and declined to rule that the "Proceeds Award" should be paid to the trust rather than to the plaintiff beneficiaries directly. Other ancillary rulings not found to be erroneous.

existence of a potential income tax liability with respect to the sale of the Big Nine shares and other matters, did not require the continuation of the Trust: it was open to the Minister of National Revenue under the *Income Tax Act* to collect unpaid tax from a trustee in Howard's position. (Para. 782.) Further, payment to the beneficiaries directly would avoid the "interminable legal squabbles" among the parties. Such squabbles had already consumed more than 145 days in court and legal costs in excess of \$3 million. (Para. 73.)

Further Supplementary Reasons: 2011 BCSC 1115

[69] The trial judge's final supplementary reasons of August 17, 2011 addressed whether the Trust still existed, or should still exist, and who the trustee(s) thereof should be. The plaintiffs sought Howard's removal as a trustee, an order that he pass his accounts, and an order that Harold and Tommy be "confirmed" as trustees. (Since Howard had been absent from British Columbia for 12 months, it was said that Harold was entitled to appoint Tommy as an additional trustee pursuant to s. 27(1) of the *Trustee Act*.) The defendants opposed these orders, submitting that because the assets of the Trust had been distributed, there was no trust remaining. In the alternative, if the Trust still existed, they argued that none of the parties to the litigation should be appointed as a trustee. (Para. 26.)

Existence of Trust

[70] The trial judge noted – correctly – that a trust is not a separate legal entity but a "relationship". He cited the following passage from *Waters, supra*:

A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out. As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by law. But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed. [At 1173-74.]

(See also Underhill and Hayton, *supra*, at 385-6 and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed., 2005) at 85: “A trust cannot exist without trust property ...”.)

[71] The trial judge reasoned that once Jennifer and Julie had received their share of the Big Nine share proceeds, the remaining proceeds were then held not under the Trust but on a bare trust in favour of the plaintiffs. That bare trust was subsequently “enforced” by the Proceeds Award. He continued:

As of March 2004 the Trust was without property. This was some 21 months before Harold first indicated an intention to step up and act as trustee. As noted in the passage in Gillese a trust cannot exist without property. By November 2005 the BNT no longer existed. There was no trust for Harold to administer and in the circumstances Harold never became trustee. As Harold never became trustee, his purported appointment of Tommy as co-trustee pursuant to s. 27 of the TA is of no force and effect. I need not decide whether the Revocation Letters ousted Harold’s right to appoint a trustee. [At para. 37; emphasis added.]

[72] Nor did the trial judge accept the plaintiffs’ argument that a new trustee was necessary for their pursuit of their action in the Supreme Court of British Columbia against TRL. He noted that it was open to beneficiaries to pursue a proprietary claim to trust property or its proceeds or to sue a third party who knowingly participated in a breach of trust. Further questions regarding the TRL action would have to await the trial thereof.

[73] Finally, the Court dealt with certain ‘housekeeping’ matters. Howard was ordered to pass his accounts as trustee, but the order was stayed until 90 days following the exhaustion of all appeals or other agreement of the parties. (Para. 53.)

On Appeal: Substantive Issues

[74] In this part of my reasons, I propose to deal with the substantive issues raised on the appeals of Howard and Eugene and the plaintiffs’ cross appeal, leaving to one side non-substantive issues relating to currency and costs.

[75] In his factum on appeal, Howard asserts that the trial judge failed to consider his liability “having regard to the terms of the mandatory exoneration clause under

Tab 8

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

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II. THE NATURE OF THE TRUST

The trust is not easy to define because this common law concept has its roots in the Middle Ages, and has grown gradually over the centuries, adapting with marked flexibility to the demands that the needs of society have made upon it. Its adaptability was one of the features which prompted Maitland to consider it the greatest achievement of Equity.² Most definitions consequently suffer from the fact that they are really an attempt either to find the essence of a trust, which all too often means emphasizing one kind of trust, or to contain within a sentence all the facets of an institution that has grown pragmatically.

In broad terms, the contemporary tax-planner might say that the trust is a means of managing wealth for the benefit of one or a number of persons. So far as it goes, that summary is correct, at least for the kind of family provision by way of a trust which is usually found in practice. But it does not reflect the various ways in which a trust may come into existence, and it fails to mention the possibly surprising fact that one person can be settlor, trustee, and a beneficiary of the same trust.

The essential features of a common law trust, explained further later in this chapter, are a segregated fund comprising an asset or a number of assets, a person or purpose as the object of the trust with exclusive right to the enjoyment of the fund or its dedication, and a person holding title to the asset or assets held in the trust and in some instances administering or managing the fund. The word, "fund", emphasizes that the original asset or assets held in the trust may be disposed of and others acquired in their place. The "fund" is the on-going asset holding at any one time subject to trust terms. As will be seen as the reader moves through this text, the one element that predominates in the common law idea of a trust is segregated property.

However, the relationship between the trustee, having duties and powers, and the beneficiary or purpose, having rights to compel performance of the trusts (or obligations upon which terms the trustee holds), is the traditional way in which the "trust" has been analysed. And among common lawyers the following definition is generally regarded as being one of the best:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.'

² F.W. Maitland, *Selected Essays* (1936): "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."

³ G.W. Keeton and L.A. Sheridan, *The Law of Trusts*, 10th ed. (London: Barry Rose Law Publishers, 1993) at 3. A beneficiary may disclaim his interest at any time before he receives benefits under the trust: *Montreal Trust Co. v. Matthews*, [1979] 3 W.W.R. 621 (B.C. S.C.).