

APPEAL NO. 1203-0230-AC
Q.B. NO. 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 200, 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")**

Between:

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

**APPELLANTS
(Respondent)**

- AND -

PUBLIC TRUSTEE OF ALBERTA

**RESPONDENT
(Applicant)**

- AND -

**SAWRIDGE FIRST NATION,
MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT,
ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY and MAURICE STONEY**

**INTERESTED PARTIES
(Interested Parties)**

**Appeal from the Order of
The Honourable Justice D.R. Thomas
Dated the 12th day of June, 2012
Filed the 20th day of September, 2012**



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**SAWRIDGE FIRST NATION,
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PART I - STATEMENT OF FACTS

i. Introduction

1. This appeal arises from an application brought by the Public Trustee within the Sawridge Trustee's main application to seek the advice and direction of the Court in relation the Sawridge 1985 Trust.
2. The main application seeks to establish who will qualify as a beneficiary of the Sawridge 1985 Trust. The interests of 31 identified, and some number of unidentified, minors are affected by that application.
3. The Public Trustee received notice of the main application and was invited to comment on whether it should act for any of the affected minors.¹
4. Justice Thomas accepted the Public Trustee's submissions that the overlapping roles and conflicts of interest made it inappropriate for the Sawridge Trustees, Chief and Council or any Sawridge Band member to represent the interests of the affected minors.²
5. The Public Trustee is the only neutral and objective entity that has indicated any willingness to represent the interests of the minors in this proceeding. The Sawridge Trustees have never proposed any reasonable alternative solution for the independent representation of the affected minors' interests.
6. The Public Trustee has been clear from the outset of its application that the costs of independent representation for the affected minors should be paid by the Sawridge Trust, particularly as their fiduciary duties suggest such representation should have been voluntarily sought out and secured by the Trustees.

¹ Appeal Record Digest, Reasons for Judgment of D.R.G. Thomas, J., page F-72, para. 4.

² Appeal Record Digest, Reasons for Judgment of D.R.G. Thomas, J., pages F-75-77 and F79, para. 23-29 and 42.

7. The Public Trustee will not accept an appointment as litigation representative unless it is fully protected from the costs of the proceeding by way of an advance costs order and an order exempting it from paying other parties' costs.
8. Should the appeal be granted and the order below overturned, the affected minors will have no independent representation and no protection from the potential for an unfair distribution of trust assets worth over \$70 million. The Respondent submits this Court cannot disregard the best interests of the affected minors and must uphold the order issued below.

ii.) Background to Bill C-31

9. For most of its history, the *Indian Act* based entitlement to Registered Indian status and band membership on descent through the male parent. This system of eligibility for Indian registration based on descent through the male line was in effect until *Bill C-31* was passed in 1985.³
10. Women who lost their Registered Indian status before 1985 for “marrying out” were restored to that status by *Bill C-31*.⁴ While *Bill C-31* allowed Bands to take control of their own membership lists, it also provided a major protection for the women who regained their Registered Indian status. Section 10(4) of the amended *Indian Act* provided that a Band membership code could not deny membership to an “acquired rights” individual.⁵ The provisions were designed to assure Band membership to the women who were regaining the Indian status they had lost upon marrying out.
11. Prior to the passage of *Bill C-31*, there was considerable controversy within many First Nations over, *inter alia*, questions of whether the women who had “married out” should be accepted back into the community and as Band members. After

³ Affidavit of Paul Bujold, dated September 12, 2011, Exhibit F, *An Act to amend the Indian Act*, S.C. 1985, c. 27- “*Bill C-31*” Appellant’s Extracts of Key Evidence, A0052-A0074.

⁴ *Indian Act*, R.S.C. 1985, c. I-5, s.6.

⁵ *Indian Act*, R.S.C. 1985, c. I-5, s. 10.

Bill C-31 came into effect, there were numerous challenges before the Courts regarding Band membership and the equality rights issues raised by the history of enfranchisement and the attempted solution of *Bill C-31*.⁶

iii.) *Sawridge Band's Reaction to Bill C-31*

12. The Sawridge Band is a wealthy First Nation located in Northern Alberta. The Sawridge Band was vigorously opposed to *Bill C-31* and the reinstatement to Band membership of women who married out.
13. Once *Bill C-31* came into effect, the Sawridge Band took control of its Band membership list.⁷ The Sawridge Band then became involved in litigation aimed primarily at excluding those individuals who regained registered Indian status and Band membership under *Bill C-31*, including those with “acquired rights”.⁸ That litigation continued for more than 20 years, eventually concluding in 2009.
14. While Sawridge attempted to deny the Band membership of those with “acquired rights”, Canada sought, and obtained, a mandatory interlocutory injunction requiring Sawridge to register the names of eleven “acquired rights” individuals on the Sawridge Band list.⁹ Prior to the Court’s Order, only 3 women had been reinstated to Sawridge membership, all being sisters to the late Chief Walter Twinn.¹⁰
15. There was never a ruling on the merits of the Sawridge Band’s challenge to *Bill C-31*, which was dismissed over procedural issues. Another *Bill C-31* case, *McIvor*, effectively eliminated any possibility of a successful constitutional

⁶ See for example, *McIvor v. Canada* [2007] B.C.J. No. 1259 (B.C.S.C.); varied [2009] B.C.J. No. 669 (B.C.C.A.).

⁷ *Indian Act*, R.S.C. 1985, c. I-5, s.10.

⁸ *Sawridge Band v. Canada* [2009] F.C.J. No. 465 (C.A.), [Tab 21, Respondent’s Authorities] leave to appeal refused [2009] S.C.C.A. No. 248 (S.C.C.) [Tab 20, Respondent’s Authorities].

⁹ *Sawridge Band v. Canada* [2003] F.C.J. No. 723 (T.D.) [Tab 24, Respondent’s Authorities]; aff’d *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (C.A.) at para. 34 [Tab 23, Respondent’s Authorities]; Appeal Record Digest, Reasons for Decision, para. 9, pg. F72.

¹⁰ *Sawridge Band v. Canada* [2003] F.C.J. No. 723 (T.D.) at para. 33 [Tab 24, Respondent’s Authorities].

challenge to the provisions restoring membership to the women who married out.¹¹ Regardless, similar disputes over Sawridge membership rights were still ongoing in other proceedings at the time of the decision below.¹²

iv.) Creation of the Trusts

16. Prior to *Bill C-31* coming into effect, the Sawridge Band established Trusts to hold significant portions of the Band's assets.¹³ The goal of the Trusts was to protect the Band assets from the individuals restored to Indian status and Band membership by *Bill C-31*. The 1985 Trust is the subject of the main application in this proceeding.
17. The Chief Executive Officer of the Sawridge Trusts, Paul Bujold, acknowledges that the Sawridge Band created the 1985 Trust as it became apparent that the government would be amending the *Indian Act* in a manner that was expected to increase the number of individuals included in the membership list of the Sawridge First Nation. In essence, the definition of beneficiary in the 1985 Trust included all persons who on April 15, 1982 would qualify as members of the Sawridge Band under the *Indian Act* as it stood at that time, and would exclude those who became Band members by reason of amendments to the *Indian Act* made after that time. Candidly, Mr. Bujold states that "The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*." The approximate value of the net assets of the 1985 Trust as at December 31, 2010 is over \$70 million.¹⁴

¹¹ *McIvor v. Canada* [2007] B.C.J. No. 1259 (B.C.S.C.) ; varied [2009] B.C.J. No. 669 (B.C.C.A.).

¹² *Poitras v. Sawridge Band* [2012] F.C.J 193 (C.A.) [Tab 14, Respondent's Authorities]; leave refused [2012] S.C.C.A. No. 152 (S.C.C.) [Tab 29, Respondent's Authorities].

¹³ The initial Trust, the 1982 Trust, had its assets rolled over into the 1985 Trust. A further- and separate trust- was established in 1986; Affidavit of Paul Bujold, dated August 30, 2011, para. 19-21, Appellant's Extracts of Key Evidence, pg. A0014.

¹⁴ Affidavit of Paul Bujold, dated September 12, 2011, paras. 15, 17-18, 27, 29-31, Appellant's Extracts of Key Evidence, pg. A0013-14, A0015-16.

v.) *The Main Application and Need for Minors' Litigation Representative*

18. In 2011, the Trustees of the 1985 Sawridge Trust filed an application for advice and directions. The application sought, *inter alia*, to: i.) vary the definition of beneficiary in the 1985 Trust to that of the 1986 Trust; ii.) seek the Court's advice on identification of beneficiaries; and iii.) to regularize the transfer of assets from the 1982 Trust to the 1985 Trust.
19. The Trustees had determined that maintaining the definition of beneficiaries in the 1985 Trust was potentially discriminatory because it allowed non-members of the Sawridge Band to be beneficiaries but excluded from beneficiary status members of the Sawridge Band who acquired membership by reason of *Bill C-31*. The Trustees wished to amend the definition in the 1985 Trust "such that a beneficiary is defined as a member of the Nation, which is consistent with the definition of "Beneficiaries" in the 1986 Trust."¹⁵
20. The variance of the definition of beneficiary would make all Sawridge Band members the only beneficiaries of the 1985 Trust. The proposed definition change would remove beneficiary status from some minors who were already beneficiaries, while newly conferring beneficiary status on others.¹⁶
21. Decisions about who would be a member of the Sawridge Band, and thus a beneficiary of the Trusts, was left to Chief and Council on the basis of extremely broad discretion. Chief and Council, as Band members, are also beneficiaries of the Trusts.¹⁷

¹⁵ Affidavit of Paul Bujold, dated September 12, 2011, paras.2(a), 29, 31-33 and Exhibit K,. Appellant's Extracts of Key Evidence, pg. A0015-16 and A0101-109.

¹⁶ Affidavit of Paul Bujold, dated September 30, 2011, para. 4; Appellant's Extracts of Key Evidence, pg. A0116.

¹⁷ Affidavit of Elizabeth Poitras, dated December 7, 2011, para. 7-14, Exhibit C + D, Appellants Extracts of Key Evidence, pgs. A0119-120, A0122-132.

22. The current trustees of the 1985 Trust are Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland C. Twinn and Walter Felix Twin. Ms. Twinn was legal counsel for Sawridge in the membership litigation. Roland Twinn, Ms. L'Hirondelle and Ms. Midbo were witnesses to be called in support of Sawridge's position in that litigation. Several of the Trustees have sat, or currently sit, on the Sawridge Band Council. The Sawridge Trustees are themselves Band members and beneficiaries.¹⁸
23. The parents of the affected minors are also beneficiaries of the Trusts. Logically, the greater the number of Band members, the more diluted the interest in the Trust of any one beneficiary.
24. In submissions to Justice Thomas, the Public Trustee highlighted these overlapping roles and potential for conflicts of interest and the resulting need for the appointment of a neutral and objective litigation representative for the affected minors.
25. Justice Thomas indicated that neither the Trustees nor the parents could objectively represent the interests of the minors in the within proceeding.¹⁹ He concluded their conflicts of interest were a sufficient basis to require appointment of a litigation representative for the affected minors.
26. The Sawridge Trustees have never attempted to secure independent representation for the minors or address these conflicts of interest. The Public Trustee was the only entity willing to act as the litigation representative to represent the interests of the minors.

¹⁸ Affidavit of Paul Bujold, dated September 12, 2011, para.3 Extracts of Key Evidence of the Appellants pg A0010 ; *Sawridge v. Canada* [2005] F.C.J. No. 1857 (F.C.) pg.99 [Tab 22, Respondent's Authorities]; Affidavit of Elizabeth Poitras, dated December 7, 2011, para. 11 Extracts of Key Evidence of the Appellants pg A0120.

¹⁹ Appeal Record Digest, Reasons for Judgment, para. 23-29, pages F75-77.

27. The Public Trustee has been consistent in its position that it would only consent to act as the minors' litigation representative if the terms of its appointment indemnified it for costs and exempted it from liability for other parties' costs.²⁰
28. The Sawridge Trustees have not attempted to address the issues around conflict of interest. While not appearing to seriously dispute Justice Thomas' findings on that topic, the Sawridge Trustees have, at no time, offered a reasonable alternative that would ensure the interests of the affected minors are represented by a neutral and objective party.

PART II - ISSUES

- A. What is the standard of review applicable to this Appeal?
- B. Did Justice Thomas err in concluding the minors required an independent and objective litigation representative?
- C. If an independent and objective representative is required, did Justice Thomas err by ordering terms of appointment on costs that would secure the Public Trustee's consent to act as litigation representative?

PART III – SUBMISSIONS OF LAW

29. The Appellant's submissions fail to recognize the overall context in which Justice Thomas's decision was issued. The decision below included consideration of the following matters:
 - i. The individuals requiring representation are minors and the *parens patriae* jurisdiction of the Court entitles it to act to address the minors' best

²⁰ Appeal Record Digest, Application by the Public Trustee, page P01-03; Reasons for Judgment, page 78, para. 34.

interests. [Appeal Record Digest, Reasons for Judgment, page F75, para. 20.]

- ii. The facts before the Court supported the conclusion that the interests of the minors could not be effectively and objectively represented by any individual or entity representing the Sawridge Band, the Sawridge Trustees or by Sawridge Band members. [Appeal Record Digest, Reasons for Judgment, page F75-77, para. 23-29]
- iii. Despite their fiduciary duties to the affected minors, the Sawridge Trustees have taken no proactive steps to secure independent representation for affected minors and have never proposed a reasonable alternative to the Public Trustee as an independent representative of the affected minors. [Appeal Record Digest, Reasons for Judgment, page F79, para. 40 and 42]
- iv. Had the Sawridge Trustees proactively applied for the appointment of a litigation representative for the affected minors, the associated costs would have been paid by the Sawridge Trustees. It is not appropriate to shift the burden of the costs of the minors' representation to the Alberta taxpayers. [Appeal Digest Record, page F75 and F78, para. 23 and 36]
- v. The 1985 Trust has access to over \$70 million in assets. There is a massive imbalance of resources between the Trust on the one hand, and any minor beneficiary or potential beneficiary on the other. Further, the conflicts of interest provide a logical basis for the Court to be concerned about the potential for an unfair distribution of the Trust assets. [Appeal Record Digest, page F76, para. 25]
- vi. The issues raised by the main application are complex and involve significant financial interests. Beneficiary status for a minor could have life changing financial impacts.

vii. The Public Trustee was the sole independent and objective entity willing to consider representing the minors. The Public Trustee would not act, and had no obligation to do so, unless it received advance costs and exemption from liability for the costs of other parties. [Appeal Record Digest, page F73, F77, F78; para. 14, 28, 34]

30. Justice Thomas' decision ultimately focused on what was required to protect the interests of the minors in light of the Sawridge Trustees' conflict of interest and their failure to propose appropriate alternate independent representation for the affected minors. The Court's decision was both correct and reasonable, and could, if necessary, be justified on the basis of the Court's *parens patriae* jurisdiction alone.

A. Standard of Review

31. The Respondent does not take issue with the general principles the Appellant refers to in relation to applicable standard of review. It is well accepted that errors of law will be reviewed on a standard of correctness, while findings of fact must contain palpable and overriding errors to justify appellate intervention. Questions of mixed fact and law will generally attract the higher level of deference, unless a pure question of law can be extracted for review.

Housen v. Nikolaisen [2002] SCC 33 [Tab 3, Appellant's Authorities]

32. The decision under appeal dealt with both an exercise of the Court's *parens patriae* jurisdiction and a costs award. Both decisions are highly discretionary and, as such, should not be lightly interfered with on appeal.

British Columbia (Minister of Forests) v Okanagan Indian Band [2003] SCC 71 at para 42-44 [Tab 2, Appellant's Authorities]

E.(Mrs.) v. Eve, [1986] S.C.J. No. 60 (S.C.C.) at paras. 34-35 [Tab 7, Respondent's Authorities]

33. Justice Thomas' decision was based, to a significant degree, on his findings regarding the Sawridge Trustees' conflict of interest, the associated need for independent representation for affected minors and the lack of an alternative independent litigation representative. The Appellant's do not appear to dispute these key findings in this appeal.
34. When Justice Thomas' costs order is considered in the context of these key findings, it is submitted that the decision below survives scrutiny on any applicable standard.

B. Objective and Independent Litigation Representative Required for Minors

35. Justice Thomas' starting point was to examine whether the Court had jurisdiction to appoint a litigation representative to represent the minors affected and whether the minors required independent representation. [Appeal Record Digest, Reasons for Judgment, pages F74-77, para. 16-29]
36. The Court's authority to appoint a litigation representative is clear and undisputed.

Alberta Rules of Court, Alta Reg 124/2010, Rule 2.11, Rule 2.15, 2.16
[Tab 1, Respondent's Authorities]

37. The Public Trustee was the only neutral individual or entity that indicated even a conditional willingness to represent the affected minors. The Public Trustee was also well qualified to act in a matter concerning minors' interests in trust property.

Public Trustee Act, S.A. 2004, c. P-44.1, sections 21 and 22 [Tab 16, Respondent's Authorities]

38. The Court's key findings on the need for an independent litigation representative included:

"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 interest 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." [Appeal Record Digest, page F75-76, para. 23]

"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 giving notice, nor have any been nominated by the Respondents. The Sawridge Trustees and adult members of the Sawridge Band (including Chief and Council) are in a potential conflict of interest between their personal interests and their duties as fiduciaries." [Appeal Record Digest, page F77, para. 28]

39. The Court also considered the substantial monetary interests in play, the potential for the Trust being liquidated and distributed and the Trustee's and Band Member's conflict of interest creating the potential for an unfair distribution. [Appeal Record Digest, pages F75-76, paras. 23-25]
40. The Appellant does not appear to suggest in the within appeal that the Court below erred in its findings that a litigation representative was required. The Appellant's factum does not appear to suggest Justice Thomas erred in finding Sawridge Band members could not bring the necessary level of objectivity to the role of litigation representative or in concluding it would not be appropriate for the Court to consider appointment of the parents, an adult Sawridge Band

member, or the Sawridge Trustees to represent the interests of the affected minors.

41. The Public Trustee had the discretion to act and was in a position to provide neutral and objective representation. However, the Public Trustee had no obligation to act and could refuse an appointment to act, if not issued on acceptable terms and conditions.

Public Trustee Act, S.A. 2004, P-44.1, s.5, 6 and 20 [Tab 16, Respondent's Authorities]

L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10) [2011] A.J. No. 396 (Q.B.) at para.8-10 and 12-15 [Tab 9, Respondent's Authorities]

C. Did the Court Commit Any Error in Establishing the Terms of the Litigation Representative's Appointment?

42. The Public Trustee's application, and submissions to the Court, made it clear the Public Trustee would not consent to an appointment as litigation representative for the affected minors unless it was entirely insulated from the costs associated with that representation. Specifically, the Public Trustee required that its solicitor-client costs be paid on an ongoing, or advance, basis and that it be exempted from any liability for the costs of other parties in the proceeding. [Appeal Record Digest, Application, page P01-03; Reasons for Judgment, page F78, para. 34]
43. The Court has extremely broad discretion to impose terms and conditions on the appointment of a litigation representative.

Alberta Rules of Court, Alta Reg 124/2010, Rule 2.21(c) [Tab 1, Respondent's Authorities]

44. Rule 2.21(c) does not specify any particular limits on the nature of terms and conditions the Court may impose. This authority, taken in context of the Court's authority under Division 2 and 10 of the Rules, certainly extends to conditions requiring payment of costs, advance costs and exemption of liability for costs. In the case of litigation representatives for minors, the Court's *parens patriae* jurisdiction is also operative. Under that broad jurisdiction, the Court was entitled to impose such terms as were required to protect the interests of the affected minors.

Alberta Rules of Court, Alta Reg 124/2010, Rule 2.21(c) and 10.31 [Tab 1, Respondent's Authorities]

E.(Mrs.) v. Eve, [1986] S.C.J. No. 60 (S.C.C.) at paras. 34-35 [Tab 7, Respondent's Authorities]

D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director) [2012] A.J. No. 958 (C.A.) at para. 4 [Tab 6, Respondent's Authorities]

i.) Solicitor Client Costs Paid by Trust / The Estate

45. In matters involving the Public Trustee, the Court has discretion not only to award costs but to order that costs be paid out of the estate in issue in the proceeding. Further, a number of provisions in the *Public Trustee Act* suggest the Public Trustee is not intended to act at the expense of the taxpayer when the estate in question can pay those costs. The relevant provisions of the *Public Trustee Act* support an approach where the Public Trustee should not bear the direct expense of representation in such cases.

Public Trustee Act, S.A. 2004, P-44.1, s.10, 12(4) and 41 [Tab 16, Respondent's Authorities]

46. In matters involving non-adversarial applications to interpret or vary terms of a trust or a bequest, the general rule on costs provides that all parties' costs will be paid by the Estate or the Trust. Adversarial applications will be subject to the usual rules on costs.

Deans v. Thachuk [2005] ABCA 368 at para. 43-45 and 51 [Tab 4, Appellant's Authorities]

Tataryn v. Tataryn Estate [1994] SCJ No. 65 at para. 38 [Tab 26, Respondent's Authorities]

Nazarewycz v. Dool [2009] ABCA 70, at para. 89 [Tab 12, Respondent's Authorities]

Taylor v. Alberta Teacher's Association [2002] A.J. No. 1571 (Q.B.) at para. 13, 18-25 [Tab 27, Respondent's Authorities]

47. Contrary to the Appellant's submissions, there is extensive authority to support the award of costs being paid on a solicitor-client basis by the Estate or Trust in the context of a non-adversarial proceeding. The general approach in these cases does not involve consideration of the *Jackson v. Trimac* line of authority.

Public Trustee Act, S.A. 2004, c. P-44.1, s. 41(b) [Tab 16, Respondent's Authorities]

Primo Polaniato Grandchildren's Trust (Trustee of) v. Browne [2012] O.J. No. 5772 (C.A.) at para. 112 [Tab 15, Respondent's Authorities]

Canada Trust Co. v. Ontario Human Rights Commission [1990] O.J. No. 615 (C.A.) at pg. 17 [Tab 4, Respondent's Authorities]

Sadlemeyer v. Royal Trust Corp. of Canada [2012] A.J. No. 387 (Q.B.) at para. 77 [Tab 19, Respondent's Authorities]

Rufenack v. Hope Mission [2006] A.J. No. 172 (C.A.) para. 24 [Tab 18, Respondent's Authorities]

Sloan v. Fox Estate [2011] O.J. No. 3624 (S.C.J.) at para. 8 [Tab 25, Respondent's Authorities]

48. The decision below to award solicitor-client costs was a discretionary decision, amply supported by authority. There is no basis to interfere with this element of Justice Thomas' order.

ii.) Exemption from Costs

49. There is also considerable authority to support an exemption from costs in relation to a respondent's, or defendant's, litigation representative.
50. The default approach for a defendant's litigation representatives is to shield them from liability for costs. While this proceeding is an application, the Court has the discretion to apply the rules for an action to any proceeding commenced by originating notice.

Alberta Rules of Court, Alta Reg 124/2010, Rule 3.12 and 10.47 [Tab 1, Respondent's Authorities]

51. Where a minor requires a litigation representative and the person or entity appointed is essentially a stranger to the minor, there is a strong case to exempt the litigation representative from liability for costs. Such terms of appointment may be important for reasons of public policy. Exemption from costs ensures there is no disincentive to appropriate representatives stepping in to represent the interests of minors. These considerations were clearly operative in the Public Trustee's application.

L.C. v. Alberta (Métis Settlements Child & Family Services, Region 10) [2011] A.J. No. 84 (Q.B.) para 29-30, 53-55 [Tab 10, Respondent's Authorities]

Thomlinson v. Alberta (Child Services) [2003] A.J. No. 716 para 117-119
[Tab 28, Respondent's Authorities]

Penney Estate v. Resetar [2011] O.J. No. 49 (S.C.J.) at para. 15-20 [Tab
13, Respondent's Authorities]

52. Justice Thomas' findings of fact around conflicts of interest dictated the appointment of a neutral and objective litigation representative to protect the interests of the affected minors. The only way to secure that representation in this case was to grant, *inter alia*, an exemption from costs. The decision on this point was consistent with the Alberta Rules of Court and applicable authorities and should be upheld.

iii.) Advance Costs

53. The Appellant takes the position that Justice Thomas erred by failing to consider, or failing to strictly apply the *Okanagan / Little Sisters* criteria for granting advance costs.
54. Justice Thomas was aware that there was precedent for awarding advance costs, even under the strict criteria, in other cases involving minors' interests.

Myran et al. v. The Long Plain Indian Band et. al. [2002] MBQB No. 48
(Q.B.) at para. 40-42 [Tab 11, Respondent's Authorities]

L.C. v. Alberta (Métis Settlements Child & Family Services, Region 10)
[2011] A.J. No. 84 (Q.B.) para. 79-82 [Tab 10, Respondent's Authorities]

55. Justice Thomas was not unaware of the *Okanagan/ Little Sisters* tripartite test. He did not fail to consider it nor did he misapply it. He was, however, faced with unique facts. The interests of the Public Trustee in this proceeding were, quite fairly, distinguished from the interests of the applicants for advance costs in the cases cited by the Sawridge Trustees. The Public Trustee has no direct, beneficial

or independent interest in this proceeding. Indeed, it is the Public Trustee's neutrality and lack of connection to the issues that make it suited to act as the litigation representative in this case.

56. The decision below concluded that the *Okanagan* test applies to applications for advance or interim costs by litigants with an independent interest but does not strictly apply to applications by parties with a more neutral role, particularly where appointed by the Court.
57. The Respondent does not dispute the applicable criteria under the *Okanagan* test. The Respondent takes the position that on the particular facts of this case, the Court below was justified in distinguishing the application from an *Okanagan/Little Sisters* situation.
58. Justice Thomas drew on parallel concepts in the court's treatment of receiver's costs and noted that his order was consistent with several authorities relating to other Aboriginal Trusts. His reasons did not misstate the law as contained in these decisions.

Horse Lake First Nation v. Horseman [2003] A.J. No. 179 (Q.B) [Tab 8, Respondent's Authorities]

Re Blueberry Interim Trust [2012] B.C.J. No. 343 [Tab 2, Respondent's Authorities]

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd. [1972] M.J. No. 31 (C.A.) [Tab 3, Respondent's Authorities]

Re Residential Home Warranty Co. of Canada Inc. [2006] A.J. No. 1304 (C.A.) [Tab 17, Respondent's Authorities]

59. Justice Thomas' decision is further supported by the Court's *parens patriae* jurisdiction that was clearly operative in his decision. [Appeal Record Digest, Reasons for Judgment, page F74, para. 16].

60. This broad inherent jurisdiction of the Court may be invoked whenever the best interests of the child are at stake. The jurisdiction will support action by the Court in novel situations.

E.(Mrs.) v. Eve, [1986] S.C.J. No. 60 (S.C.C.) at paras. 34-35 [Tab 7, Respondent's Authorities]

D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director) [2012] A.J. No. 958 (C.A.) at para. 4 [Tab 6, Respondent's Authorities]

61. Any suggestion that *parens patriae* jurisdiction could not extend to allowing a Court to ordering advance costs or exemption from costs if that was required to preserve the best interests of the child is simply unsupportable. The Court's powers within this jurisdiction are extraordinarily broad and will extend as far as is necessary to protect the interests of the child:

"...the courts will continue to use the *parens patriae* jurisdiction to deal with un contemplated situations where it appears necessary to do so for the protection of those who fall within its ambit...the situations in which the courts can act where it is necessary to do so for the protection of ...children have never been, and indeed cannot, be defined.... 'It is impossible to say what are the limits of that jurisdiction; every case must depend on its own circumstances.' "

E.(Mrs.) v. Eve, [1986] S.C.J. No. 60 (S.C.C.) at paras. 42-43, see also para. 34-35, 44-45 and 72-77 [Tab 7, Respondent's Authorities]

62. The interrelationship of the Court's discretion to award advance costs and its broad *parens patriae* jurisdiction to protect the interests of minors has not, to the Respondent's knowledge, been previously considered in Canada. As such, Justice Thomas cannot be said to have erred in his application of existing law. He was dealing with a novel situation.

63. All costs decisions will depend on their unique circumstances of the case. Costs decisions must also remain “animated by the broad concern to ensure that the justice system works fairly and efficiently.”

British Columbia (Minister of Forests) v. Okanagan Indian Band [2003]
S.C.J. No. 76 at para. 26 [Tab 2, Appellant’s Authorities]

64. Justice Thomas was faced with a situation where the Sawridge Trustees, despite a clear conflict of interest, failed to take any steps to appoint, and thus take financial responsibility for, an independent and objective litigation representative for the affected minors. The only available and appropriate litigation representative would not act without, *inter alia*, an advance costs order.
65. Had Justice Thomas refused to grant the requested order, the affected minors were left with absolutely had no protection against the risk of an unfair distribution.
66. Considered in the full factual context of the application, Justice Thomas granted the order required to address the need for independent representation of the affected minors given the conflicts of interest of the Sawridge Trustees and other adult Band members and to protect the interests of the affected minors. The Respondent asks this Court to uphold Justice Thomas’ decision.
67. The Respondent does not take issue, in principle, that there must be checks and balances in relation to advance costs awards (*Caron*). In fairness to the Court below, issues such as hourly rates, caps on total fees and other limiting mechanisms were not raised or otherwise argued before him. While the Respondent fully expects that such issues could be successfully addressed in Case Management, should this Court find it necessary or appropriate to vary the order below to reflect appropriate checks and balances, the Public Trustee would not oppose reasonable terms in that regard.

PART IV – RELIEF REQUESTED

1. On the basis of the foregoing, the Public Trustee seeks an order:
 - a.) Dismissing the appeal;
 - b.) In the alternative, varying the order below to provide for the appropriate checks and balances in relation to the advance costs award;
 - c.) Ordering solicitor-client costs of the within appeal payable to the Public Trustee by the Sawridge Trustees; and
 - d.) Such further and other relief as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 14th day of February, 2013.

CHAMBERLAIN HUTCHISON

Per:

JANET L. HUTCHISON

Solicitors for the Public Trustee of Alberta

Estimation of time for Oral Argument: 45 minutes

V. LIST OF AUTHORITIES

Tab

1. *Alberta Rules of Court*, Alta Reg. 124/2010
2. *Blueberry Interim Trust (Re)* [2012] B.C.J. No. 343 (B.C.S.C.)
3. *Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.* [1972] M.J. No. 31 (C.A.)
4. *Canada Trust Co. v. Ontario Human Rights Commission* [1990] O.J. No. 615 (C.A.)
5. *D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)* [2012] S.C.C.A. No. 364 (S.C.C.)
6. *D.L. v. Alberta (Child, Youth and Family Enhancement Act, Director)* [2012] A.J. No. 958 (C.A.)
7. *E. (Mrs.) v. Eve* [1986] S.C.J. No. 60 (S.C.C.)
8. *Horse Lake First Nation v. Horseman* [2003] A.J. No. 179 (Q.B.)
9. *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. 396 (Q.B.)
10. *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)* [2011] A.J. No. 84 (Q.B.)
11. *Myran et al. v. The Long Plain Indian Band et. al.* [2002] MBQB No. 48 (Q.B.)
12. *Nazarewycz v. Dool* [2009] A.J. No. 189 (C.A.)
13. *Penney Estate v. Resetar* [2011] O.J. No. 490 (O.N.S.C.)
14. *Poitras v. Sawridge Band* [2012] F.C.J. No. 193 (C.A.)
15. *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne* [2012] O.J. No. 5772 (C.A.)
16. *Public Trustee Act*, S.A. 2004, c. P-44.1
17. *Residential Warranty Co. of Canada Inc. (Re)* [2006] A.J. No. 1304 (C.A.)
18. *Rufenack v. Hope Mission* [2006] A.J. No. 172 (C.A.)

19. *Sadlemyer v. Royal Trust Corp. of Canada* [2012] A.J. No. 387 (Q.B.)
20. *Sawridge Band v. Canada* [2009] S.C.C.A. No. 248 (S.C.C.)
21. *Sawridge Band v. Canada* [2009] F.C.J. No. 465 (C.A.)
22. *Sawridge Band v. Canada* [2005] F.C.J. No. 1857 (F.C.)
23. *Sawridge Band v. Canada* [2004] F.C.J. No. 77 (F.C.C.)
24. *Sawridge Band v. Canada* [2003] F.C.J. No. 723 (C.A.)
25. *Sloan v. Fox Estate* [2011] O.J. No. 3624 (O.N.S.C.)
26. *Tataryn v. Tataryn Estate* [1994] S.C.J. No. 65 (S.C.C.)
27. *Taylor v. Alberta Teachers' Assn.* [2002] A.J. No. 1571 (Q.B.)
28. *Thomlinson v. Alberta (Child Services)* [2003] A.J. No. 716 (Q.B.)
29. *Twinn v. Poitras* [2012] S.C.C.A. No. 152 (S.C.C.)