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 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")

Between:

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

APPELLANTS
(Respondents)

-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

APPEAL RECORD DIGEST
VOLUME 1 of 1

Part I – Pleadings (Pages P01 – P04 Inclusive)
Part II – Final Documents (Pages F01 – F96 Inclusive)

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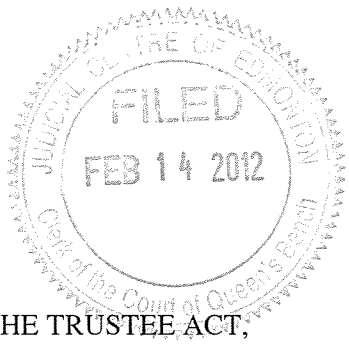
P01

Clerk's Stamp:



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

NOTICE TO RESPONDENTS

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

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

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

Date: March 6, 2012
Time: 10:00AM
Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2
Before: Justice in Chambers, Special Chambers

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

Remedy claimed or sought:

1. The minors affected by the application of the Sawridge Trustees in the within matter require representation to protect their interests. The Public Trustee seeks to be appointed as litigation representative for the affected minors, on appropriate and acceptable conditions.

2. The order establishing the conditions of the Public Trustee's appointment should require the Sawridge Trustees pay the legal fees associated with representation of the minors' interests out of the funds held by the 1985 Trust and exempt the Public Trustee from any obligation to pay costs in the within matter.

3. Based on the current definition change the Sawridge Trustees seek in relation to the 1985 Trust, there is a potential for a conflict of interest as between 2 groups of affected minors. If appointed as litigation representative, the Public Trustee seeks the advice and direction of the Court regarding whether it can properly act for all affected minors or whether a second litigation representative is required in this case.

4. The Public Trustee considers the Sawridge Band Membership criteria and process as relevant and material to the Sawridge Trustees' application. The issues relating to the Sawridge Band Membership criteria and process, and in particularly their impact on certainty of objects of the 1985 Trust, are also directly relevant to protecting the interests of affected and potentially affected minors. The Public Trustee seeks an advance ruling, for the purposes of questioning on affidavits in this matter, that information and evidence relating to the Sawridge Band Membership criteria and process is relevant and material to the main application.

5. Such further and other relief as this Court may deem appropriate.

Grounds for making this application:

6. The August 31, 2011 Order of Justice Thomas directed that the Public Trustee be notified of the main application. However, no litigation representative has actually been appointed to represent the minors affected, or potentially affected, by this proceeding.

7. Members of the Sawridge Band, even the parents of the affected minors, would not be appropriate litigation representatives as they themselves are beneficiaries of the Sawridge Trust and are in a potential conflict of interest. The Sawridge Trustees are in the same position, as they are also all beneficiaries of the Trust.

8. The issues raised by the Sawridge Trustees' application are potentially complex issues of trust and Aboriginal law. Further, the application affects access to trust property worth over $60,000,000.00. The acquisition, or loss, of beneficiary status will have significant financial and social ramifications for the affected, or potentially affected, minors for the rest of their lives.

9. The Public Trustee is equipped to represent the interests of minors in this matter and has identified issues that must be addressed to ensure the interests of the minors in question are protected. While the issues raised by the main application are important to the minors, they relate to issues within a very wealthy First Nation and a Trust with significant assets. As such, this is not an appropriate case for the Public Trustee to act in if the costs of protecting the interests of the affected, or potentially affected, minors were to be borne by the taxpayers of Alberta. Based on the specific facts of this case, the legal fees associated with representation of the minors should be paid by the Sawridge Trust itself and the Public Trustee should be exempted from liability for any costs in the proceeding.

P03

10. The minors affected by this application have not retained counsel and no other litigation representative has come forward. Given the very substantial assets of the Sawridge Band and the Trust, noted above, there is a profound imbalance of resources and thus ability to affect the outcomes in this matter, as between the minors whose rights are at issue and the Sawridge Band, current beneficiaries (Sawridge Band members) and the Trust. Further, there are special circumstances in this case that merit an order to have the legal fees associated with representation of the minors paid by the trust, including the fact that all Sawridge Band members, including the Sawridge Trustees, are incapable of effectively representing the interest of the minors due to a conflict of interest and the fact the main application raises complex issues that would make it extremely difficult, if not impossible, for an individual to effectively self represent in the proceeding.

11. Of the minors identified as definitely being affected by the within application, there appear to be two groups with potentially opposite interests. For one group, approval of the definition change proposed for the 1985 Trust will grant them beneficiary status. For another group, approval of the definition change will remove their beneficiary status. Given this potential conflict of interest between the two groups, the Public Trustee requests the advice and direction of the Court as to whether it can properly represent both groups or whether a second litigation representative is required.

12. The main application seeks, *inter alia*, an order to vary the definition of the 1985 Trust such that an individual's beneficiary status will depend entirely on whether the Sawridge Band determines the individual qualifies as a member of the Band. As such, the Public Trustee views aspects of the Sawridge Band's membership process and criteria to be relevant and material to the main application. In particular, there may be pending membership applications that affect the interest of minors. Aspects of the membership issues must also be explored to ascertain whether the terms of the Sawridge Trust can meet the key requirement of certainty of objects.

13. There is a great deal of uncertainty, and a lack of evidence currently before the Court, regarding how the Sawridge Band deals with membership applications. The Sawridge Band's membership criteria and process have been the subject of various pieces of litigation over the past 20 years. Even today, the criteria and process used to decide membership entitlements appear uncertain and lacking in transparency. There is evidence before the Court to indicate that individuals filing membership applications may not receive decisions on their membership status, and hence, their beneficiary status.

14. The Public Trustee takes the position that the Sawridge Band membership process and criteria must be explored by questioning on affidavits in order to determine the extent to which interests of minors may be affected by pending applications and to explore how the Sawridge membership process and criteria may impact the proposed definition change for the 1985 Trust.

Material or evidence to be relied upon:

15. The Affidavit of Affidavit of Paul Bujold, dated August 30, 2011
16. The Affidavit of Affidavit of Paul Bujold, dated September 12, 2011
17. The Affidavit of Affidavit of Paul Bujold, dated September 30, 2011
18. The Affidavit of Aline Elizabeth Huzar, dated December 5, 2011
19. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

20. *Alberta Rules of Court* 1.4, 2.11, 2.15, 2.16, 2.21, 5.1 and 5.2

Applicable Acts and regulation:

P04

21. *Public Trustee Act*, S.A. 2004, c. P-44.1

Any irregularity complained of or objection relied on:

22. N/A

How the application is proposed to be heard or considered:

23. The application is to be heard in Special Chambers before the presiding Justice, on March 6, 2012.

WARNING

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

F01

Action No.: 1103 14112
E-File No.: EVQ12SAWRIDGEI
Appeal No.: _____

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

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Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

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April 5, 2012	Morning Session
The Honourable	Court of Queen's Bench
Mr. Justice Thomas	of Alberta
J.L. Hutchison	For the Office of the Public Trustee
M.S. Poretti	For the Trustees of the 1985 Sawridge Trust
D.C.E. Bonora	For the Sawridge Trustees
E.H. Molstad, Q.C.	For the Sawridge First Nations
E.J. Kindrake	For the Minister of Aboriginal Affairs in Northern Development
A. Meads	Court Clerk

THE COURT: Good morning. Please be seated. Mr. Poretti.

Particulars

MR. PORETTI: Good morning, sir. There was one procedural matter that I would like to address with your permission before we commence with the application. And perhaps before I do that, I'd be pleased to introduce counsel to you. Of course, I've been before you in respect of this matter, and I appear on behalf of the trustees of the 1985 Sawridge Trust. My colleague Ms. Bonora will also be making representations on behalf of the Sawridge Trustees. Ms. Hutchison appears on behalf of the Office of the Public Trustee. She is with the firm of Chamberlain Hutchison. Also present in the courtroom are Ms. McAfee and Mr. Godfrey from the Public Trustee.

Representing the Sawridge First Nations is Mr. Molstad. Also present in the courtroom is Mr. Kligman from Parlee McLaws. From the Department of Justice representing the Minister of Aboriginal Affairs in Northern Development is Mr. Kindrake. And his student Mr. Pearson is also in the courtroom.

Ms. Kennedy from Davis and Company is not here today. She represents two individuals who have filed affidavits in this matter, June Kolosky and Aline Huzar. Ms. Kennedy advised us that she would not be present at the application today.

Also in the courtroom is Mr. Bujold who is the administrator of the 1985 Sawridge Trust.

And I believe I've covered everybody.

THE COURT: Okay.

MR. PORETTI: So that served the one procedural matter that I wished to address. You'll recall that when I first appeared before you on August 31st of last year, I obtained a procedural order at that time. And that procedural order dealt with, among other things, the service of documents and the provision of notice to beneficiaries and potential beneficiaries. And service was to be effected in different ways. There was a provision dealing with the mailing of notices by registered mail and e-mail. There were also provisions relating to the posting of documents onto a website. And those documents would be available for the beneficiaries and potential beneficiaries to observe. I can advise the court that, with one exception, the Sawridge Trustees have complied with the provisions of that order. And so, for example, notices have gone out to approximately 190 or so of those beneficiaries and potential beneficiaries. All of the materials that were to be posted on the website have been posted in a timely fashion. And the one exception is in relation to the most recent document that we were served with which is the reply brief of the Office of the Public Trustee. And, of course, just to backtrack, pursuant to paragraph 15 of that order, any documents that were actually filed and served on us, we would put onto the website so that it was available for viewing. When we received the reply from the Office of the Public Trustee on March 16th, I purported to e-mail that to our client on the following day, Saturday March 17th, with the instructions to place it on the website by March 23rd, which would have been the appropriate deadline. Yesterday it came to my attention that the e-mail that I sent on the Saturday was never received by our client because their server was down. And so when I became aware of that yesterday, we made sure to put that reply brief on the website yesterday. Of course, all counsel in the courtroom would have been served personally with that document. And -- and as I see there's no other individual present here today which may be effected by this oversight, I think it's appropriate -- it would be my respectful submission that we can proceed without more. But I thought I would bring that to your attention especially if someone had showed up, an individual had showed up, ready to make representations that had not seen that document for whatever reason.

THE COURT: Well, thank you for drawing that to my attention. And it's appropriate to put it on the record. And I don't see any problem in proceeding.

MR. PORETTI: Okay. Thank you very much, sir. And that's -- those are all my submissions.

I think Ms. Hutchison is prepared to go.

THE COURT: Thank you, Mr. Poretti.

Submissions by Ms. Hutchison

MS. HUTCHISON: Good morning, My Lord.

THE COURT: Good morning.

MS. HUTCHISON: My Lord, one other quick comment in terms of Ms. Kennedy. I believe she did want the Court to understand that she was not attending due to health issues and also advised that she does support the Public Trustee's application. And I believe that was copied to all counsel this morning.

MS. BONORA: Yes.

MS. HUTCHISON: Okay. Thank you.

My Lord, obviously you've had an opportunity to review the materials, but as much as anything to deal with some of the submissions from the respondents, I wanted to begin by clarifying what the purpose of the Public Trustee's application was. Clearly there was not a situation where the Public Trustee sought out this action. The Public Trustee was served with a copy of your August order. Pursuant to the terms of that order, when they received the order, they conducted what they felt was an appropriate due diligence process to assess whether there appeared to be issues that might affect the interests of the minors. Both those identified as the 23 by the Sawridge Trustees and then the unidentified minors who may be affected by any pending membership application, a topic that we don't have a great deal of information on at this point in time.

Certainly the Public Trustee's purpose in bringing this application was not an adversarial one. It was very much intended to say to the Court, We see no one else stepping forward to speak for the minors. We've identified with their potential issues for the minors. It's very unusual, in fact, I understand from consultation with my client, we think this may be one of the few instances where the Public Trustee has even considered stepping forward voluntarily to act where they have no statutory duty. But because of some of the complexity of the issues and the importance of the issues for the financial interests of these minors, the Public Trustee has stepped forward in this case on some fairly unique terms, My Lord. We'll certainly acknowledge that we're asking for some very specific conditions if indeed the Court find the Public Trustee should be appointed. And I think that leads me in quite well, My Lord, to why the Public Trustee has provided you with the background to Bill C-31 and to the Sawridge litigation. It is certainly not intended to be disrespectful to the First Nation or to the trustees. It is not intended to turn this

litigation, or this application I should say, into a controversial or adversarial process. It is simply recognizing that there is a very complicated, lengthy, and rich history to the membership issues in relation to this particular First Nation. I don't intend, unless the Court has questions, to take you through a lengthy overview of Bill C-31 history. Simply to comment that it was a very -- very unique piece of legislation that Bill C-31 tried to address. And Bill C-31 itself, of course, is a very unique piece of legislation. The very term Bill C-31 brings up issues around equality rights, discrimination, and of course self-government rights of First Nations. I say that, My Lord, not because that's why the Public Trustee is before you to raise those issues, but to identify that it is certainly a topic that has proved to be controversial and difficult within many First Nations communities. Within Alberta specifically, the history of Bill C-31 is that the First Nations in our province have been properly opposed to taking back the women who lost their status through the old enfranchisement provisions. And indeed, the late Walter Twin and the Sawridge First Nation have been something of a leader in that position, I guess, of Alberta First Nations to try to essentially protect their membership and membership resources from those returning individuals.

And, My Lord, that background is provided to you simply to make it clear that this membership issue and tieing beneficiary status to a membership status may not be quite as straightforward as it initially appears. There is a great deal of background and context that must be considered in that regard.

The other purpose, My Lord, in providing some of that background and context relates very much to whether or not there is a need for what we've referred to as an independent or objective or a third-party litigation representative in this matter. I've referred already to the concept that the Sawridge First Nation has taken a fairly -- a leadership position I would say in advancing some of these issues around Bill C-31 and indeed in challenging the constitutionality of Bill C-31.

So there's a long history that at least puts the Court on notice that there may still be issues within that community as to how the entire issue of Bill C-31 and Bill C-31 membership will be handled.

There is also a long history that at least puts the Court, and I would suggest, My Lord, the Sawridge Trustees on notice that there may be some issues about how the membership process is currently being handled. And I think the question or the query that needs to be both on the Court's mind and on the Sawridge Trustee's mind is, Is that membership process currently functional? Because if it's not, My Lord, we get into -- and I'll be dealing with this later in my submissions -- but we get into a whole issue of whether we're replacing a potentially invalid definition of beneficiary with another problematic definition. Maybe problematic for different reasons, but it may still be problematic.

The only other point I would make, My Lord, in terms of why that particular background has been put before the Court is simply this. It's undeniably a complex background to the Sawridge membership history or issue. And when the Public Trustee was first served with the initiating documents and looked at what was available on the Sawridge Trust website, what really stood out was the absence of information before the Court on that particular issue. A lack of full context. And -- and further, My Lord, a lack of evidence to demonstrate what the Sawridge Trustees have done to date in this process to inquire into the functionality of the Sawridge First Nation membership process. We'll certainly be submitting, My Lord, and we'll chat about this when we get to our position on the -- some of the other issues that we've raised in our application. We very much take the position that in order for the Sawridge Trustees to be able to identify the beneficiary class, there has to be a functional membership process. And they need to at least demonstrate to this Court that they've made some efforts to inquire into that. At the moment, that particular area appears to be quite a void in the evidence before the Court. And that is the purpose of our relevance application or our request to have some guidance on questioning.

Going then, My Lord, to really the central issue or the issue that may indeed deal with all the other issues in the application is the question of whether or not there is a requirement for a litigation representative for the minors in this particular matter. The Court -- the Court is obviously very well familiar with the Alberta rules of court that we've cited. We certainly do take the position that if the minors are to have -- it's clear that if the minors are to have any voice in this matter, they must have a litigation representative appointed. Again, something that struck the Public Trustee's Office on review of this matter is that under -- under Rule 215, and we've got that at Tab 1 of our authorities, My Lord, where a litigation representative is required and no interested person has applied, there is actually an onus on the party adverse to the individual in need of litigation representative to seek out and approach the Court to have a litigation representative appointed. Now, this is a rather unique application, My Lord. I mean, there are provisions in our Rules of Court that apply the rules in actions to the rules in applications. But this isn't strictly a judicial review, which does raise a bit of an interesting question of whether we have parties adverse in interest or not. But I would say, My Lord, that given -- given some of the positions my friends have taken in response, there certainly seems to be a lack of meeting of the minds as to what issues are important for the minors, what issues may affect their interests, and indeed the need for active representation of the minors. So it certainly struck the Public Trustee that there is some question as to why the Sawridge Trustee hadn't been proactive in seeking out a litigation representative for the minors to ensure that their interests were well protected. And indeed, the response submissions from my friends, as I read them, don't appear to address that particular issue beyond suggesting that if the parents haven't stepped forward, that can really be taken to mean that the

parents have done a fairly -- well, they've analyzed the situation, assessed how it affects their children's interests, and determined that no involvement is necessary. We're before the Court certainly today to question whether or not that's an appropriate assumption when we're dealing with protection of the interests of minors, My Lord.

Beyond the Court's obvious jurisdiction to appoint a litigation representative in this matter for the minors, should the Court find that appropriate, is the question of who that representative should be, of course, My Lord. We've suggested to you and particularly I'd refer you to paragraph 53 through to paragraph 70 of our initial submission. We've suggested to the Court that because of the unique fact situation, because of the fact that the Sawridge Trustees themselves, the parents of the affected minors are all beneficiaries and thus have certainly an apparent vested interest in keeping the numbers of beneficiaries low, it has a -- given a small number of individuals involved, My Lord, our very rough calculations indicate that if the 23 minors that will lose their beneficiary status actually maintained it or if other minors were recognized in addition to them, it has the potential impact of reducing the adults' shares and the other beneficiaries' shares by over 50 percent. And we recognize, My Lord, we're not dealing with a per capita distribution at this point in time, but it can't be ignored that by adding numbers to the list of beneficiaries, the effective value of the trust to each of the other beneficiaries is significantly impacted.

So we have a situation where representation of the minors within the community may at least be accompanied by a perception of a conflict of interest. I don't suggest to the Court that at this point in time we have enough evidence before the Court to say there is a clearcut explicit actual conflict of interest, but we'd suggest to the Court that's not necessarily the test in this case. We're dealing with a litigation representative that would have fiduciary duties. A perceived conflict of interest is a sufficient concern that the Court may agree it would not be appropriate to allow litigation representatives with that perceived conflict.

Complicating that situation, My Lord, we have no interested person stepping forward to say that they're willing to represent the minors in this matter. So if we -- if we had an actual parent or an adult within the community or had Sawridge Trustees proactively apply for this litigation representative, we might have had the ability to evaluate if this was truly a conflict of interest that would affect their ability to represent the minors. But, of course, we don't have the benefit of that.

And I would simply make a brief comment, My Lord. My friends' submissions on the concept of the Public Trustee potentially acting as litigation representative rather than their guardians or the parents of the affected minors suggested that that would constitute the Public Trustee usurping essentially the role of the parents and the guardians. We'd simply

point the Court to the authorities we've cited. And I'm looking at paragraph 18. Sorry, at paragraph 17 through to paragraph 19 of our reply submission with cites to *V.B. v. Alberta* and *Thomlinson v. Alberta* which are at Tab 7 of the Sawridge Trustee's authorities and Tab 22 of the Public Trustee's authorities respectively. In both those cases, we would suggest, My Lord, the courts have acknowledged that the general approach is appointment of the parent or guardian, but where there's a conflict of interest, it's absolutely acceptable to appoint either the Public Trustee or, in fact, perhaps even a stranger to the minor. If that's what's necessary to give the minor the objective neutral representation that they require from a litigation representative. *Thomlinson* also makes the comment that if there is nobody stepping forward, or the parent, I should say, is not interested in acting as litigation guardian, that may be adequate justification to appoint someone other than the guardian or the parent. And I would simply suggest, My Lord, that while my friends interpret the parents and guardian's silence as an endorsement of the Sawridge Trustee's main application, it could equally be interpreted as a lack of interest or equally interpreted as a support of the Public Trustee's application, that the reality is we just don't actually know what their positions are at this point in time.

My Lord, if the Court accepts that there is a need for an independent neutral third party litigation representative for the minors, as I've indicated, at this point in time at least the only entity before the Court or individual before the Court even -- even conditionally willing to play that role is the Public Trustee. And that brings us to a very unique statutory authority, as it were, that the Public Trustee has. And I would just take the Court to Tab 14 of our authorities, Section 6 of the *Public Trustee Act.* And this is also a provision, My Lord, that was commented on by the Court in the second *L.C.* decision which I believe is Tab 10, I'm sorry, My Lord, of our book of authorities.

So it's a very unique authority or ability that the Public Trustee has to decline to act, to decline to represent the interests of minors absent a statutory obligation to do so. And of course, in this particular case, we have no statutory obligation that would compel the Public Trustee to act in this matter. The Public Trustee is before the Court solely because they were made aware of the proceeding, and upon doing their review of the matter, identified that there were issues that they felt at least should be brought to the attention of the Court for the Court to determine whether or not that merited appointment of a litigation representative.

And I draw the Court's attention to Section 6, My Lord, primarily because while the terms that we're requesting of the appointment -- for an appointment of a Public Trustee here, I believe -- I'm paraphrasing my friends' submissions, but I would suggest my friends consider our conditions fairly onerous. They are indeed the only conditions I've been instructed to accept as terms of the appointment. And, My Lord, in terms of the policy reasons behind that, I'd invite the Court simply to imagine the position that the

Public Trustee's Office would be in if they had an obligation or had created a practice or a standard where they acted for all unrepresented minors in any case where they didn't have representation available to them at the cost of the Public Trustee's Office. Frankly, the resources that would be required there would, I suspect, far exceed the resources of the Youth Criminal Defence Office and simply do not reflect the reality of the Public Trustee's Office at this time, My Lord.

Just because I'm at that point in our brief, My Lord, we've identified starting at paragraph 71 of our original brief and going through to paragraph 78 that there might be a need for direction from the Court about a potential conflict of interest between the two groups of minors. My friend Mr. Poretti and my friend Ms. Bonora have clarified that in fact there -- it's not the case that there's a group of minors that will lose their beneficiary status and a different group of minors that will gain. We're only dealing with minors that will lose their beneficiary status. So indeed, our initial understanding of Mr. Bujold's evidence appears to be incorrect and we apologize to the Court for that. We haven't examined on the affidavit yet. And there had been some confusion on this point throughout. So I appreciate my friends' clarification. It does not appear that there is any imminent or apparent complicate of interest between any of the groups of minors that the Public Trustee has identified at this point in time.

Then beginning at paragraph 79 of our submissions, My Lord, we're dealing with the condition that the Public Trustee is requesting in relation to its appointment to be granted -- to be granted indemnity for its solicitor client costs for the entire proceeding. And my friends have responded to those submissions extensively and very thoroughly. And then we've responded -- I can just take you -- we've responded to those submissions, My Lord, in our reply brief starting at paragraph 48 of the brief and carrying through until paragraph 62 of the brief. And certainly, My Lord, I'm not standing before this Court to try and suggest that *Okanagan* is not the case on advance costs. It clearly is. It's the tripartite test that's applied in the vast -- well, the vast majority of cases. I would stand before this Court and suggest to you that we're dealing with a very unique situation. I've been unable to locate any authority where the court has been asked to consider an advance costs application or indemnity for solicitor client costs throughout the entire proceeding on the basis that the Court's parens patriae jurisdiction has been engaged. And so we certainly take that position with the Court that this -- and I apologize, My Lord, I'm getting ahead of myself. The *L.C.* case, and that's the first *L.C.* decision that you find at Tab 9 of our authorities, it does deal with the *Okanagan* case, My Lord. I was struck, quite frankly, that the Court didn't apply perhaps as stringent a standard of the *Okanagan* case as it does in some. And indeed, Justice Graesser comments on, in paragraph 75, that he does not require the same level of detail of impecuniosity as was required in the cases he cites. And that those are cases seeking (INDISCERNIBLE) bottom findings which apply a different test. And we don't -- we don't, unfortunately, have a great deal of detail

in *L.C.* as to what exactly the evidence before the Court was of impecuniosity, but clearly it was adequate to satisfy Justice Graesser. But I don't see anything in *L.C.*, My Lord, where anyone attempted to invite the Court or suggest to the Court that its parens patriae jurisdiction might put a whole different spin on an advance costs request or on an indemnity for solicitor client costs request, My Lord.

So we take the position that it is a distinguishable situation that we're dealing with at the moment.

And I would just draw the Court's attention to one other authority that we've cited. And that would be *Deans v. Thachuk*, which is at Tab 4 of our authorities. And in particular -- in particular, My Lord, I'm referring to paragraph 43 where the court does recognize that it's actually quite common in cases where trustees are seeking guidance from the Court as to construction or administration of a trust or something to do with a difficulty in construction of a trust where cost of all parties will be paid from the trust fund. So certainly in terms of the request that the trust fund itself be responsible for the Public Trustee's costs to represent the minors, that's not particularly unusual. In fact, it's very much, we would submit, in step with other trust cases.

And, My Lord, we'd simply highlight for the Court, I don't plan to read the points to you, but in paragraph 84 of our original brief, we've set out again some of the unique facts of this case that we suggest are particularly compelling or important in terms of why minors will need to have some independent representation. And furthermore, My Lord, why the Court's parens patriae jurisdiction is engaged to protect those interests given that there is no one else stepping forward at this point in time to play that role.

A further condition that the Public Trustee as requested in its application, My Lord, is found at -- from paragraph 86 through to paragraph 88 of our original submission which is a request for exemption from liability for costs. And, My Lord, we'd simply note -- I apologize. Tab 1 of our authorities includes Rule 10.47 of the Alberta Rules of Court. And as My Lord will be aware, the essence of that rule is to indicate that where a litigation representative is acting for a defendant, they in fact will not be liable to pay for costs. And so we would submit, My Lord, that there are some parallels here. We recognize that it's not a pure action. We maintain that this is not an adversarial matter, but just as we -- just as we have situations where rules for actions must apply to strict judicial reviews or to judicial reviews, My Lord, we would submit that they can also apply to an application of this nature, one for advice and direction by the trustees particularly, My Lord, when -- as I take the tenor of some of my friends' submissions, there does seem to be an issue in dispute as between the Sawridge Trustee and the Sawridge First Nation and -- well, at least the minors if the Public Trustee were representing them. The Public Trustee has raised a number of issues particularly

relevance of membership process which the respondents appear to take considerable issue with. So we'd suggest to you, My Lord, simply that Rule 10.47 as well as the authorities we've cited to you in paragraph 87 support exemption from costs in a situation like this and it's not a particularly extraordinary request. We're not asking the Court to step into some unique territory as we are with the parens patriae argument on indemnification for solicitor client costs.

THE COURT: Did you ever look at the surrogate court rules on this subject? I mean, that's probably the closest analog. I imagine Ms. Bonora's probably the --

MS. HUTCHISON: The expert.

THE COURT: -- most familiar with this --

MS. HUTCHISON: I would -- I suspect she's extremely familiar with them, My Lord. We did not cite to those rules, My Lord.

THE COURT: Okay.

MS. HUTCHISON: But I have them with me. I can certainly take a look and comment on that in response.

THE COURT: Because it's certainly common in estate litigation at least on the cost aspect, if the costs come out of the estate. Or at least the potential is there to make that type of award.

MS. HUTCHISON: Yes. And indeed, I believe we've cited -- I'll just find. I believe we've cited one estate case to the Court, My Lord. And I'm sorry, I'm struggling to find it. It may just be -- I think it's in my reply, My Lord.

THE COURT: Okay. Well, that's --

MS. HUTCHISON: But I concur with your comments. It's a very standard practice dealing with estates. I hadn't included the actual surrogate court rules on that point.

THE COURT: Okay.

MS. HUTCHISON: My Lord, moving on, then, to the relevance of the membership issues, and again, I don't -- I don't intend to take the Court through the

entire history of the membership issue and, although I'm certainly more than happy to answer any questions the Court may have on that. It's a fairly lengthy background. But I think that the written submissions are more than adequate to give that flavor. The key -- a few key points from the question of whether or not these matters would be relevant for the purpose of questioning, my friends' submissions have a tenor essentially, well, in some respects specifically suggesting that were the Public Trustee appointed as litigation representative, the intention here is to ask this Court to make decision about individual membership entitlements. And that's not our purpose, My Lord. We understand the Federal Court has a particular jurisdiction. We understand that this Court has a particular jurisdiction. But simply because a declaration of membership entitlement may be the jurisdiction in another court doesn't mean that the issue of membership is completely irrelevant to this application. And that's where I certainly take a broader view of relevance and materiality in this application than my friends do. And where I think the most obvious point to look at, My Lord, in terms of why it's critical to have access to at least some of this information, it deals with the -- deals with the trustee's obligations to identify all of the beneficiaries in their class to ensure that before they proceed with the distribution, which of course is the fairly clearly contemplated end result of their application for advice and direction, that they actually know who the beneficiaries are. And if we're dealing with a functional membership process, My Lord, that may indeed be a fairly simple issue. It could be. It depends a bit on how that process would run. But if we're dealing with a membership process that is not functioning or is functioning in such a way that people are waiting 10 or 15 or 20 years to get responses on their membership applications or is functioning in such a way that nobody could look at the membership process and reasonably predict who might ultimately qualify as a member, it begins to raise some grave issues not only for certainty of objects but for administration of the trust. Because if the trustees are granted their application for the new definition and then they go to deal with a distribution but they're unable to meet their obligation to definitively identify that class of beneficiaries, they're essentially hamstrung. And as I understand one of the purposes of the Sawridge Trustees in this matter, it's to unstring themselves, to finally be allowed to deal with these resources for the benefit of the community. But if we take one dysfunctional definition and replace it with another one that creates equally serious administrative problems, we really haven't -- we really haven't gotten anywhere, My Lord. And friends have raised sort of the specter of if we go down this road, would the trust become invalid because of certainty of objects issues. And that's certainly not the Public Trustee's wish. At the same time, My Lord, is it in the interests of the minors to adopt a definition that will ultimately invalidate the entire trust, whether that's because of an issue around certainty of objects or whether it's because the trustees can no longer meet their fundamental duties as trustees to identify who that beneficiary class is? And the hope, My Lord, would be that in the course of questioning we discover that we've got a functional membership process, that despite some of the past history, despite some of the issues that have gone on in the community in the past, we now have a functional

membership process and chief and council is moving through membership applications in an orderly, appropriate way, that the Sawridge Trustees can genuinely look at that, do their due diligence, and say we know -- we know that individuals who are qualified for membership are going to be recognized as members at some point over the course of this process. Versus trying to avoid what may indeed be a bit of an awkward issue, because of the history of the membership disputes in the Sawridge community, and then end up back in a situation where the trust cannot function because of some of the administrative problems that could arise.

And, My Lord, it's, I think appropriate to direct the Court's attention at this point to the order of the relief we're seeking in this regard. And I -- we've dealt with that on page 31 of our original brief. We're hoping to be permitted to ask for information around the number of pending Sawridge membership applications, including sufficient particulars to determine whether the pending applications affect the interests of any minors. That's, of course, of paramount concern to the Public Trustee if it is indeed appointed as litigation representative. We don't know what the current status is, but we know in the past there have been possibly hundreds of applications that are outstanding. It stands to reason that we likely have minors who are affected by those applications. The Public Trustee would need to be able to examine that to determine what in fact -- what group they were in fact representing, My Lord.

Secondly, the details of the current Sawridge band membership criteria and process including who makes membership decisions and normal timeframes for making membership decisions. Those matters, My Lord, are not -- not being delved into to try and launch a Constitutional challenge, not being delved into to try and launch individual membership entitlement claims. They would be delved into, My Lord, to determine whether or not we've got certainty of objects is being dealt with and whether or not the Sawridge Trustees under this proposed new definition could meet their obligations to identify and determine all members of the class before they conduct any form of distribution from the trust.

And then the third point, My Lord, is to be able to inquire what steps (INDISCERNIBLE) been taken to date by the Sawridge Trustees to look into those matters in order -- in other words, is it currently functional for the Sawridge Trustees with this proposed definition to meet their duties, to identify -- to identify the entire class of beneficiaries, My Lord?

My Lord, I'm just -- I'd just refer the Court to our reply submission where we respond to some of our friends' comments on relevance of questions on membership. And that portion of our brief runs from paragraph 62 through to paragraph 78. Turning to paragraph 72 of that submission, My Lord, we certainly noted that in paragraph 123 of the Sawridge Trustees' brief they appear to acknowledge and accept that there is some duty to

make the sorts of inquiries we've suggested would be pertinent. That then raises the question of why would we not examine now, My Lord, prior to implementation of a new definition, whether or not that new definition would allow the Sawridge Trustees to meet their -- to meet their duty to make diligent inquiry and identify the entire beneficiary class. Why would we implement the new definition and then deal with the problems as they later arose, My Lord? It just -- and my friends, I believe, are suggesting that because their application, or at least the order that emerged from the ex parte application, no longer specifically requests guidance from the Court on identification of beneficiaries, that somehow the Court may no longer have the ability to examine those issues. And, My Lord, we certainly don't agree with that position. It's very much our view that on an application for advice and directions particularly when dealing with administration of a trust if an issue of this nature is brought to the Court's attention, you have full jurisdiction to identify it, raise it for the parties, ask the trustees in this case to address it and deal with it. You're not limited by -- you're not limited by the issues that the Sawridge Trustees have brought to you if -- if another issue that affects the administration of the trust or the interests of the minors is brought to your attention.

And one -- one final point on the relevance question, My Lord, and I've responded to this in our reply, that as I understood my friends to be suggesting that paragraph 3 of this Court's original order effectively decided this issue already, and certainly, My Lord, you're in the best position to advise us if that is correct. But our reading of that provision of your order is very much -- very much something where the Court was trying to ensure that notice to a particular individual wasn't taken by that individual to give him some sort of entitlement, some sort of right that may or may not exist. Even if, My Lord, and I wasn't present obviously for that application, but even if Mr. Poretti had asked you for some sort of an advanced ruling on relevance or materiality, we certainly make note of the fact it was an ex parte application. I would suggest to the Court that today we have all the parties here. Everyone's had notice. Everyone's had an opportunity to review materials. And if in some way the Court's order could be read to have determined this issue, I would suggest it's within the jurisdiction of the Court to revisit that given that it was done in the context of an ex parte proceeding.

And, My Lord, subject to your questions and subject to, potentially, responses I would have to my friends, those would be my submissions.

THE COURT: Okay. What I'll do is I'll hear submissions, and then I'll come back to you again if anything's raised that you feel needs to be further responded to or again just to confirm exactly where the Public Trustee is, especially on this membership issue, that the scope of --

MS. HUTCHISON: Of what we'd like to --

THE COURT: -- of involvement of the Public Trustee.

MS. HUTCHISON: Understandable, My Lord.

THE COURT: Okay.

MS. HUTCHISON: Thank you.

THE COURT: Well, do you want to take -- let's take just a 10-minute break before you get started.

So I'll be back in 10.

(ADJOURNMENT)

Submissions by Ms. Bonora

MS. BONORA: My Lord, Mr. Poretti and I have decided to divide the issues.

THE COURT: All right.

MS. BONORA: So I'm going to deal with the issues of the litigation representative and costs or advance of costs. And then Mr. Poretti will deal with the membership issue which will segue nicely into Mr. Molstad who also will be dealing with membership.

We agree that this is not meant to be an adversarial application and not today or in the main application, that this is really an application being brought by the trustees because they see that there is a problem perhaps with the definition of beneficiaries, and they are coming to this Court to say, What should we do about this problem. Ultimately, this is, you know, a really good news story. There's lots of stories of bands and First Nations dissipating and squandering payouts. And here we don't have that. We have quite a stellar example of a prudent, careful, conservative thinking chief and council that set aside money for the future to provide for future generations. And you know we're here 25 years later after this trust was set up needing a little tune-up of the definition of beneficiary. The trustees have come here voluntarily. They haven't sat back and waited for someone to bring them here to deal with the problems or potential problems in the definition. They've come here and said, we've looked at this definition; it was done 25 years ago in the midst of new legislation coming in and in the constitution and we set

aside this money, and now we need to know how we should deal with it because however the Court decides to change the definition or not change the definition, there are groups that are going to be affected. And ultimately, the Court will have a very difficult decision in terms of changing the definition of the beneficiary. It may be needed to change to correct the long-standing discrimination that has happened against those women who were brought back in through Bill C-31. And that is -- that is the opinions that the trustees got that this definition may be discriminatory against those women and that they should be brought back in. And of course doing that potentially affects, then, the children. Although, you, I think, have seen some arguments that perhaps they can be grandfathered. But that -- all of those arguments in fact will be before the Court. The trustees have an obligation to have a very fiduciary duty to bring this before the Court, to put those arguments forward.

So it is our submission that while it will be a very difficult decision for the Court to decide which group will be affected, how should that definition be changed, ultimately, it is not a very difficult issue in the sense that we know what the definition is, we know the groups that are impacted by the definition, and we know that the trustees have a fiduciary duty to the current beneficiaries who are those 23 children, to other beneficiaries. There are thousands of First Nation men who are also impacted by a change in the definition. And the Bill C-31 women. All of those people, however this definition is changed, could be impacted. But again, that evidence will be before you. That information will be before you or before this Court. And as I said, while the decision to change it is difficult because people will be impacted, the issues themselves are not difficult.

We want to say that we have, of course, the utmost respect for the Public Trustee and we know that all of their submissions and the positions they're taking are noble and in respect of the children. But we have to say that the most difficult issue for the trustees is the issue of costs. And the fact that they have a fiduciary duty to protect the trust and to protect the costs. And they do find it difficult that they have a government department coming to them to be funded to argue for beneficiaries of the trust. It's usually, in all of these cases that have been cited, the other way around. Individuals are coming to the government. But here you have the government saying to these trustees, You should pay us to represent these children. And they find that a very difficult position. So that is why we are here today and we are defending that and saying that that is, in fact, an inappropriate thing for the trust to have to do to pay the government to be involved.

The -- as I said, we would expect that as the trustees, as council for the trustees, will be coming to the Court in the main application to lay out all of the problems with the definition, to lay out the possible changes to the definition, the problems with those changes, lay out potential solutions. And so we believe that the arguments on behalf of the children, that we have an obligation, the fiduciary duty of the trustees, they have an

obligation to present all of those arguments before the Court. So this is not a situation where there will be no representation of those children, because those 23 children are in fact beneficiaries of the trust currently. So it's really not a situation where -- where we're asking to add them so that in fact the trust would be diluted. They are currently beneficiaries of the trust. And so as beneficiaries, the trustees have an obligation to represent them and put their arguments forward. As they will with all of the affected groups: The Bill C-31s and the wives of First Nations men who also will be removed from the definition. So we expect that all of those arguments will be there.

In respect of the other people who may be putting arguments forward, we do also have Sawridge band, Sawridge First Nation, who will be at the table and has a very unique and good perspective and insight. And they will also be presenting arguments in respect of the various impacts of the change in definition.

We also have the Federal Crown who we understand will be involved in the application throughout. The Federal Crown, in fact, has jurisdiction over children who live on reserves. And so -- and we know that the Federal Crown, from all the cases that have been put forward, have been involved with Sawridge throughout all of the applications that have been, or -- and all of the litigation that has been before the Court. So they have a unique perspective. They have unique knowledge. And they will also be here.

Lots has been said about the parents. We have noticed in the cases that have been cited by the Public Trustee that those -- that in most cases the parents were there and asking the Public Trustee to be involved. We don't know if parents will be here. I think it's fair to say that maybe we would have heard from them by now if they would have been here, if they intended to be involved. And we've heard from none of them. And I take Ms. Hutchison's position that perhaps their silence is that they are happy to have the Public Trustee involved. We don't know that. Perhaps their silence is that they don't want to pay to have the Public Trustee involved. But I do think that the parents are still an important factor and they should be given that opportunity to come forward.

And finally, the Court has its own parens patriae power. And it can exercise it. And it certainly does. And we can see from the cases cited, the sterilization case and others, that the Court does exercise that power and is asked to exercise that power. And that power is to not just sit and listen but to say, I need to understand and make sure that children are not going to be impacted negatively and make sure that the power is exercised. So it is our submission that there are already, even without the Public Trustee, several people at the table who will be putting forward arguments on behalf of the children and -- and so those arguments will be before the Court. It's not as though those arguments will not be before the Court.

Certainly we would say that the Public Trustee do a very fine job of making those arguments as well. And if they wish to be here voluntarily, we wouldn't have difficulties. But we don't think there's a need necessarily for a litigation representative. When my friend has said we had an obligation because when there's an adversarial process, there's an obligation. We absolutely take the position that that is not adversarial, that we are coming here for an advice and direction application. We expect to be fully open with respect to all the groups that are going to be affected, all the solutions that are possible, and certainly as I said, there will be other parties who will make those submissions as well.

The trustees aren't here to win in the main application. They're here to seek direction. And I think that's a very important distinction.

I would agree that we perhaps have been a bit more aggressive in this preliminary application. But that's because the trustees feel very obligated to protect the trust assets. And so the main concern we have is the direction that we would have to pay costs to the Public Trustees. These assets belong to the beneficiary. They hope to use these assets for many years to come, for children and seniors and many programs. And they do find it astounding that they would want -- that they would have to pay the government to be involved. Especially when no one, no one has asked the Public Trustee to be involved.

THE COURT: Just a minute. I've got a couple of questions that have piled up here.

MS. BONORA: Yes.

THE COURT: Now, you, just a few minutes ago, you referred to the government asking to be paid, I think were the words you used. Are you saying as a matter of law that the Government of Alberta and the Public Trustee are one and the same or?

MS. BONORA: Well, I suppose it is a -- you know, it is the Office of the Public Trustee. It is part of the Government of Alberta. And so it's definitely a government department. I certainly haven't investigated their links to the government, but --

THE COURT: Well, I think you'll find in the legislation it's a pretty independent office, if I can -- it's a statutory office. And I'm sure counsel for the Public Trustee will sort of guide me to the provisions in the *Act* which make that quite clear. And I'm raising it because we hear this all the time in many of these other cases that, in fact, you're referring the Court to or that counsel are referring the Court to. All

of these past proceedings involving children who have been taken into care and then because they're taken into care, the Public Trustee has jurisdiction over them and has certain obligations to them. So we do hear this argument a lot, that the government and the Public Trustee are one and the same. But I think that this court's made it quite clear the Public Trustee is an independent party.

MS. BONORA: Right.

THE COURT: Are an independent person.

MS. BONORA: I absolutely acknowledge that. Of course, they are funded by the government. So, you know, they're different --

THE COURT: Or not --

MS. BONORA: Pardon me?

THE COURT: Or not as the case may be.

MS. BONORA: Right.

The -- and I think the issue is that there's a public body that's seeking costs as opposed to an individual, right? Very different, and I'm going to get into this in a bit more detail later, but certainly different than many of the cases cited when we look at the *Okanagan* case or the *Little Sisters* case where you had individuals who couldn't proceed. Here, I think the Public Trustee certainly has the ability to proceed. Certainly has the resources to proceed. It may be that they are awarded costs at the end of the day. And that's something we're not going to decide today. And I would certainly agree that may well be the case, that at the end of the day after the Court has heard their arguments, they may decide that they were essential to be here and that they may be awarded costs at that time. We're suggesting that they don't get into the cases and into the test that is required for advance costs.

THE COURT: Okay. And here's the other question I had. You know, you talked about the parens patriae jurisdiction of the court. And I certainly take your point that there are going to -- whether the Public Trustee is here or not, there are going to be many participants in this, or a number of participants, who can raise arguments. But one of the concerns I'd have, certainly you can raise arguments and deal with legal issues, but who's to go out and get the evidence? I mean, that's one of the problems the court's always faced with is getting the evidence. I mean, we -- the court has no independent ability to get that. We depend on parties to bring evidence forward.

So that -- I mean, that's one role the Public Trustee can perhaps bring forward. Some information or some evidence that may be helpful to the Court in making a decision.

MS. BONORA: Absolutely. I think that is a very good point. What I think, though, in this case is there's very little evidence that still needs to be gathered. Aside from the membership issue which obviously is a very different issue and, in fact, the Public Trustee is saying we don't have any information; we need to go and examine on it. So I'm not going to deal with that issue in particular because there obviously -- if you determine that that's a relevant issue, there may need to be some pursuit of that. But on the issue of just whether the children are going to be beneficiaries, whether we're going to change that definition, I don't think there's any other evidence that could come forward that would be necessary for this Court. As I said, while I think the decision is difficult, I don't think that the issue in and of itself is a very difficult issue. We know the definition; we know the people who are impacted. Now the question is, you know, from a legal perspective, from an issue of discrimination, what is the best way to change that definition? Or maybe leave it alone? It's possible that you could say, No, we're just going to leave the definition as is. But I don't think there's any other evidence that can come forward on those issues that really will assist the Court.

THE COURT: Okay.

MS. BONORA: It -- it seemed very odd to the trustees that the Public Trustee has spoken quite eloquently about the need to be involved, the need to represent children, but have been very clear that if they are not paid the advance costs, they would not be representing the children. And we can only assume then, because we know that they think hard about these issues and think carefully about representing children, that they believe that children -- the children will be adequately represented by the other people at the table. Because otherwise I don't believe they would simply abandon the children and not represent them. Because that is their mandate.

THE COURT: Okay. Can I just -- again I want to stop you. There's this identified group of children. And I take it they're still minors? They're all still minors?

MS. BONORA: There are 23 that are minors.

THE COURT: They are still -- that are minors.

MS. BONORA: If we take a snapshot of the trust at this point in time, there are 23 minors who are currently beneficiaries of the trust.

THE COURT: And then, of course, there are people who were minors but have become -- since become adults who are beneficiaries of the trust. That's another group.

MS. BONORA: Yes. So, I mean, there are people who -- because we're looking at the definition in the legislation before Bill C-31, we always have to look back to that legislation to determine who is a beneficiary. So it doesn't relate to membership in the First Nation. It relates to that definition at the time. So that's why we say the Bill C-31 women are excluded because at that time if they married a non-native male, they were excluded. So there's a group of those Bill C-31s who are excluded from this trust.

THE COURT: Let me ask you this. If those 23 -- just using this as a question about evidence, really. Of those 23 minors, do you know if any of those 23 minors are children in care?

MS. BONORA: I don't believe any of them are. I think we have the complete list, and yeah, they are -- they're not.

THE COURT: Okay.

MS. BONORA: They're all with their parents.

THE COURT: Or at any time were in care? I think -- okay. I'm getting a shaking head from the administrator. I mean, the reason I raise that, I mean, that's an obligation. If they'd ever been taken into care --

MS. BONORA: Right.

THE COURT: -- they would have fallen into the Public Trustee's bailiwick.

MS. BONORA: Right. Right.

So at this point, looking at the list of those 23, they are all with their parents and (INDISCERNIBLE) the administrator's report, they have never been in the care as far as he knows.

THE COURT: Okay.

MS. BONORA: Thank you.

We have, in our brief, set out the rights of parents and have said that in the Supreme Court of Canada in *B.(R.) v. Children's Aid Society*, which is on page 12 of our brief, that the common law has long recognized that parents are in the best position to take care of their children and make decisions necessary to ensure their well being. And in recent years, the courts have expressed a reluctance to interfere with parental rights and stayed intervention has been tolerated only when necessity was demonstrated. And we are suggesting that if the parents have taken a silent position, that should be -- that should be respected. And if not, they should be able to come forward on their own. And it isn't necessary to have necessarily the Public Trustee. There isn't necessarily an issue to have a litigation representative.

I don't think there are any cases before you where the Public Trustee was in fact appointed where the parent wasn't involved. So the cases that have been cited by the Public Trustee, the parents have in fact been involved. The only other case that was suggested or was referred was the *Thomlinson* case where those all dealt with children who were in care. And so obviously they didn't have parents who could in fact represent them.

In the *C.H.S.* case, which is at Tab 8 of our brief, and of course you'll be familiar with this case because it is one that you heard and decided. So in paragraph 22 of that decision, you say that it is significant that -- that there was no evidence from parents on the appointment of a next friend. And here, we would say that the Office of the Public Trustee in fact did not provide any evidence of a parent of a child asking them to get involved. They have come here voluntarily. They haven't consulted parents of the children. They haven't provided any evidence to you that, in fact, parents are asking them to be involved. And I think that is significant. The only evidence that the Office of the Public Trustee has put before you is the issue of membership. And they have put together an affidavit on the problems that they see or that their deponent sees with the membership application process. But no evidence with respect to whether parents should want them involved. And I think that that could in fact have been done. And I think that, and I would submit that, it is a failing here by the Office of the Public Trustee not to have sought that evidence and come to court with evidence of parents saying yes, we want you involved, you should be involved on our behalf.

In respect of the costs issue and the awarding of costs in advance, it is our submission that the *Little Sisters*, the Okanagan test is the one that must be applied and that in each and every case cited, the three parts of that test have never been ignored. So there must be impecuniosity. There must be a prima facie meritorious case that will be forfeited. And it must transcend the individual interests. And it is our submission that this case fails on all three aspects of the test. If we're looking at impecuniosity, obviously there's

no evidence before you. I'm not sure if you're prepared to take judicial notice that the Public Trustee's Office is not impecunious, but it doesn't matter because there is no evidence before you of any impecuniosity. And when we look at Tab 13 of our brief, there is an excerpt from Orkin on *The Law of Costs.* And if we look at the third paragraph on that case, it says: The test is strictly applied and an applicant must meet a high standard of proof in order to demonstrate impecuniosity.

And then going up in the last portion of the second paragraph, it says: In practice, this would require some examination into the claimant's assets and expenses as well as the possibility of obtaining funding elsewhere. This requirement was not met in the case where although the claimant's expenses exceeded his modest income, he took an annual vacation, drove a rented car, and had not applied for legal aid or sought funding from a community based group.

If that recitation is in fact the test, clearly there's nothing before you that would satisfy even the first aspect of the test.

We have said very clearly that this case will be argued before you regardless. So it's not the case that we have with *Little Sisters* or with *Okanagan* or *Caron*, any of those cases where they said, If you don't give us costs, we cannot move forward and we will not be able to argue. This case will be argued in front of you. And all the evidence and all the arguments will be presented. We would suggest that it also doesn't transcend the individual interests, that it deals with a small group. It doesn't affect a larger group. But in any event, for sure we would say that it doesn't meet the first two aspects of the test.

The other issue that I think is important to note, if we look at the *Little Sisters* case, which is at Tab 11 of our brief, and this may be something we need to deal with later, but on page 2, in looking at the summary and if we look at the last portion of the second paragraph, so where it says, Per Bastarache, LeBel, and Deschamps. The last paragraph, it says:

> If advance costs are granted, the litigant must relinquish some manner of control over how the litigation proceeds. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed. Accordingly, courts should set limits on the rates and hours of legal work chargeable and cap advance costs award at an appropriate global amount.

So I think that in the event that you find that it has to be done, then we need to move to that next level in terms of setting those limits.

If we look at the *Caron* case, which is at Tab 12 of our brief, and at page 31, the court there said that the question that was to be asked was, was the cost intervention essential to enable to the provincial court to administer justice fully and effectively. And that's in the paragraph just following the quote at the top of the page. And we would submit that again this doesn't fit in this category. Here, it's not essential to administer justice because justice will continue. The case will be heard. The children's interests will be argued.

We -- I think we can imagine the passion which cases like *Little Sisters* or *Okanagan* were argued, because they didn't have resources. They wouldn't continue with important litigation. And I would say that here that same passion doesn't exist because there's no evidence of there being no money. It's a very clear case that will continue with a full hearing. And so I just don't think it is the kind of case that will proceed.

I think we can all assume that if the Public Trustee decides to voluntarily be here, they will be able to fund the litigation as it goes, and then address costs at the end of the day, which is what we think is the appropriate way to proceed.

You had asked about the surrogate rules, and I think both you and Ms. Hutchison said it is the normal course that costs are paid out of the estate. But, in fact, that is not the new way that courts look at it. And in estate cases, the courts have said we now need to assess it as a normal litigation case. And at the end of the day, we will say, Was this appropriate. I absolutely admit that in trust cases, in estate cases, where it's in issue that had to come forward where the parties have acted appropriately, then at the end of the day often the courts will say that costs can come -- the reasonable costs can come. But it's done at the end, not in advance. And that's why I think the Supreme Court has been so clear that the advance costs are an extraordinary remedy and you have to meet these tests, that the normal course is that you assess it at the end of the day.

THE COURT: But isn't -- you know, everybody going into estate litigation, and I don't know if you'll agree with this, but I mean, for years it's -- as long as the parties are litigating in good faith and it's not just the extremely disgruntled child who was never around to help mom anyway but wants a big chunk of the estate, everybody going in, if it's a good faith kind of dispute over interpretation of a Will, it's a pretty safe assumption that at the end of the day the costs would come out of the estate.

MS. BONORA: With respect, I would say that the new trend is that that is not the case. And, in fact, there have been a few decisions that have been very clear saying that litigants in estate matters should not make that assumption anymore, that at the end of the day litigation costs will be assessed as they normally have. And there in fact have been, in my opinion, some astounding decisions where executors have had to personally pay some of the costs, where in litigation that wasn't -- which the court

at the end of the day determined was not appropriate. And so I think that the new trend in estate litigation is that it is now normal litigation and that you will look at how the parties, at how they litigated, you will look at what the issues were, whether the issues were necessary, and then determine the costs.

It is our submission on the -- I don't know if you have any other costs or questions about the issue of costs. I think --

THE COURT: Well, one thing. You say there's some recent cases. Can you -- is that -- can you tell me any in the Court of Queen's Bench of Alberta or? I'm not going to put you on the spot.

MS. BONORA: I can certainly --

THE COURT: Maybe you can identify them and send them along to me.

MS. BONORA: I certainly can, and I'll certainly send them to everyone.

THE COURT: Okay.

MS. BONORA: I think Justice Moen has written a couple of decisions about it, but I can certainly --

THE COURT: I'm sure she has.

MS. BONORA: -- get them. And Justice Veit. And I think Justice Graesser. But I will certainly let you --

THE COURT: Okay.

MS. BONORA: -- give you some names of cases that you can look at to see what I believe and what I would submit is the newest trend in estate litigation.

THE COURT: Okay.

MS. BONORA: I'm going to move on to the exemption from liability for costs. Again, I think that it's premature to exempt the Public Trustee from costs at this stage. No one expects them to act badly. They should not be worried about

that exemption. I think that, and I would submit that, if in fact, though, there has been poor behaviour, if in fact the litigation is stretched out or anything, the Court has very few remedies to deal with that. And the Court should hold on to that remedy until the end of the day. And if they act properly, they will be exempt. So it doesn't -- they don't need an exemption in advance, and it is our submission that that would be inappropriate at this stage.

I'd like to just make -- do some responses to the briefs of the Office of the Public Trustee. The -- I'm going to start with their response brief. In paragraph 8, they say that the trustee has not -- the trustees have not explained why they haven't taken steps to secure appropriate representation. And it is our submission that we don't think it's needed. We believe that all the arguments will be presented.

There is a great deal of argument made with respect to the conflicts that everyone is in: The parents, the trustees, the trustees as beneficiaries and as parents. And it is our submission that that's quite common that there would be, in estate cases and in trustee cases, that there would be conflicts. But we don't believe that that has any impact on what's going to happen here. The trustees are putting on their trustee hat and coming to this Court and saying, We will do our fiduciary duty to present all the arguments and ask you to help us to change this definition, or not change it. And we don't think that these issues of conflict are going to have an issue.

I do think that when the Office of the Public Trustee argues that the parents would not want their children as beneficiaries because then there would be more money for the parents, I would submit that most parents want their children to be successful and would not want to say I want to keep you out because then there's more money for me. I don't think that that is an appropriate argument and that we should give parents, certainly these parents, a lot more credit than that.

We said in our brief that we thought it was somewhat anachronistic that the Public Trustee has come in and said we need to be here and we need to make these arguments. And it is our submission that those parents maybe don't want them, and they should be canvassed before the Public Trustee simply steps in.

In paragraph 16 of the reply brief, they make reference to the *Mrs. E.* case, which is the sterilization case. And if we -- it's at paragraph -- pardon me, I think it's at Tab 16. Sorry. Tab 2 of the reply brief. And if we look at paragraph 73 of that case, it talks about that parens patriae jurisdiction and the need to act for the protection of those who cannot care for themselves. And so I think that that again is the issue that the court is also involved in this. In our case, that would be used. The same principles would be used to protect these children.

In paragraphs 25 to 34 of their brief, they raise these concerns about the minors losing their rights and the fact that these issues need to be addressed. And I would submit that absolutely those are going to be the main issues addressed. Obviously that's a significant issue for these minors to lose their rights in -- as beneficiaries. It's also significant that the Bill C-31 women are discriminated against, and what will be the solution to do this. And it is our submission that at the end of the day there is going to probably be one group that will be unhappy in terms of being taken out as beneficiaries of this trust, but the one solution that has been put forward and the one solution that will be before you is that if we change the definition to make members beneficiaries, then everybody is put on equal footing in the sense that everyone then can apply to be a member and then can obtain benefits from the trust. And so while they may be discriminated against, maybe they'll be taken out as beneficiaries, it's not as though they don't have the opportunity to get back in. So it's not a final determination. Because if they have a connection to the band, if they fit the membership criteria, then they will get in. I'm not suggesting for a minute that it still isn't a difficult and hard issue or decision to say, Yes, but I'm going to take away your rights as a beneficiary and then just give you the opportunity. But it's also a very difficult decision to say, Well, we're just going to keep discriminating against the Bill C-31 women. So I would suggest that while it's not a complex argument, it certainly will be before the Court.

I'd like to address paragraph 57 of the reply brief because there are, in my submission, some troubling submissions made. So first it says that, in the second sentence:The Court is faced with a situation where there is no party willing to represent the interests of minors in relation to an application that will have significant financial and social impacts. And I would say that's not true because the trustees have an obligation to put their arguments forward. And I apologize for being repetitious, but I do want to address the arguments that have been made. And certainly, as I said, all the other parties will also be involved.

It goes on to say that: The Public Trustee does not have a budget to fund representation of minors. They have no statutory duty to represent. But I would say that there is no evidence of that, and certainly I think it was incumbent on the Office of the Public Trustee to put that in evidence and not just put it into an argument. Certainly if that had been put into an affidavit, there would have been some opportunity to explore this further and determine if, in fact, you know, in the fiscal year there is no budget to represent these kind of minors in this kind of litigation. But obviously the Public Trustee has a mandate and a budget to represent minors. That is obviously the case. That is their mandate. So I don't think that simple statement can be relied on without evidence.

The -- in addition, it says in paragraph 57 that minors can be assumed to have no

resources, have no significant financial resources. And again, I don't know that the Court can take judicial notice of that fact. It's potentially true, but we don't know that. And so I think that again it was incumbent on the Public Trustee to seek that evidence on this issue and put it before the Court if, in fact, it was an issue.

And then finally in paragraph 57, they say that if there's no litigation representative, the issues identified by the Office of the Public Trustee will not be addressed. And as you know, I have said over and over that that, in fact, is not the case.

The final thing that it says is that indeed only active parties to this proceeding vigorously oppose consideration -- sorry, indeed the only active parties to this proceeding vigorously oppose consideration of the issues raised by the Public Trustee. And I'm not sure exactly where that came from because we certainly don't oppose those issues. We will, in fact, address all of those issues with the exception of membership which, you know from our brief, we believe is irrelevant and that we are not the proper parties to deal with that.

When we were researching the issue of advance costs, I have to say I fully expected to find some case where the Public Trustee didn't have to deal with the tripartite test in *Okanagan* and they got their costs. But in fact, there are no such cases. And the Public Trustee hasn't brought them forward, we certainly haven't found any, and so I don't -- I know that my friend in her submissions said this is an unusual case and it can be distinguished, but she didn't, at least I didn't hear her, pursue that in terms of saying why it was distinguishable. If she would, I would like to address it. But I don't think that there is any law before you that would allow in this particular case an advance award of costs.

In paragraph 48 of the main brief of the Public Trustee, again, this is the issue of that normally the party adverse to the individual in need of a litigation representative must apply for direction, but we don't see ourselves, the Public Trustees don't see themselves as adverse in interest to the beneficiaries. This is an issue of direction with respect to a definition. And so there are many people who are going to be affected. We are not adverse in interest. This isn't confrontational litigation.

Again, in paragraphs 54 and 55 of the new brief, they deal with the whole issue of an alleged bias on behalf of everyone and suggests that no one who's a beneficiary can be objective even if they are a parent.

THE COURT: So you're back in the original brief?

MS. BONORA: Yes. I'm sorry.

THE COURT: Okay.

MS. BONORA: Paragraph 54 and 55.

And I would say that this argument also ignores the whole nature of the trust. If this chief and council or this group of trustees were self-interested, they probably would have paid the money out long ago and done a distribution, but they haven't. They've been very noble. They've had -- they've thought about and had consideration for future generations. They've tried to have businesses and tried to create employment. And I think it's a bit unfair to make these allegations that -- that they are being in a conflict and they won't be able to represent them. And, you know, as I said, I think it is a bit anachronistic to say that someone else needs to be here to represent them.

At paragraph 82 of the main brief, there's a reference to the *Deans* case, which is a Court of Appeal case cited at Tab 4. And I think it's important to note that in the *Deans* case, the Court of Appeal of Alberta said you have to apply the three-part Okanagan test to have an award of costs. My friend took you to the *Deans* case and asked you to look at the *Buckton* case which said costs can be awarded in trust. And -- but when you look at where that case -- where the *Buckton* case is referred to, it's only referred to under the special circumstances portion of that case. So the Court of Appeal applies the three-part test, it looks at impecuniosity, it looks at whether the case will be advanced, and finally, when it looks at the third part of the test and the special circumstances, it refers to *Buckton.* So you can't just take the *Buckton* case out as by itself and say, Oh, yes, the trusts are different because the Court of Appeal only referred to this in the special circumstances. And so I think, in the *Deans* for sure, that you're still stuck with the tripartite test.

In the -- there's also the case that's referred to there which is the *Taylor* case. And in that case, again, the case does go on to refer to *Buckton* and provides costs, but in that case, the three -- while not entirely obvious, the court definitely looks and determines that the plaintiff is impecunious and that the litigation will not proceed. And on making those determinations, then goes to *Buckton* and said the cost then could be awarded in that case.

So I think over and over again we see that there isn't any case law before the Court, and certainly if we're going to follow the Court of Appeal and the Supreme Court of Canada, they have said the three-part test needs to be followed.

At paragraph 85 of the Public Trustee's main brief, they refer to the *Myran* case *v. Long Plain Indian Band.* And I think that that is a significant case in the sense that the costs in that case were awarded at the end of the litigation, not in advance. And we would suggest that is, in fact, the case that should be followed.

Where we look at the *L.C.* case which is also referred to at paragraph 85, which is a decision of Mr. Justice Graesser, it's also referred to at Tab 9 where the costs are awarded, and then they were -- it was reversed at Tab 10. So I think it's important when we look at the *L.C.* case, in paragraph 85 it refers you to Tab 9, but it's important to then go to Tab 10 to see that basically that case has been overturned.

I'm just going to take a few minutes to address some of the oral arguments my friend made, and then I'll be finished. And I don't want to be repetitious.

With respect to the *Thomlinson* case, my friend made reference to the *Thomlinson* case which is the case in which there was an application made to have a case go forward and represent a number of children who were taken into care. And the interesting thing about the *Thomlinson* case, which we had said in our brief, is that first of all -- first of all, this is dealing with children who were wards of the court and thus parents weren't involved, but ultimately there was no costs award in the *Thomlinson* case. The court said they could apply, but that case never went forward. And I think that is telling in the sense that the court said you still have to meet the test. You have to come back and apply.

THE COURT: Which tab is *Thomlinson* at? Just refresh my memory.

MS. BONORA: 22 of the Public Trustee's.

THE COURT: Public Trustee. Yes.

MS. BONORA: Thank you.

THE COURT: Just let me -- I just want to look at it again.

I just wanted to look at the name of the applicant again. There's sort of a common string in a lot of these cases.

MS. BONORA: Oh, yes. It is.

So those, I think I now have addressed anything I wanted to in respect to the oral arguments. And so it is our conclusion that, obviously, that we don't think there's necessarily a need for a litigation representative, but certainly we don't think the Public Trustee meets the test for advance costs. And thus, if they intend to be involved, then costs can be addressed at the end of the day. And certainly the arguments on behalf of children we believe will be ably made during the course of the main application.

Thank you.

THE COURT: Thank you very much.

Submissions by Mr. Poretti

MR. PORETTI: Thank you, sir. I'm going to start off at paragraph 110 of our brief. And there you'll see that we refer to the *Rozak (Estate)* case for the proposition that when addressing the relevance of questioning on an affidavit, the questioning must be relevant and material having regard to the issues in the underlying application. And we would submit that that is well accepted law. Now, I heard my friend, Ms. Hutchison, at the end of her submissions, as I understood her submission, she indicated that what is relevant is not limited to issues necessarily raised by us, if another issue is brought to your attention. And our submission would be that with respect to an application for advice and directions, the framework necessarily has to be the issues that are put before the Court by the applicant. Another party cannot simply come before the Court and decide to raise a number of different issues that are not related in any way to the issues raised. So our submission is that there may be some related matters that arise that -- that the Court will be interested in and must address when deciding the underlying application, but surely one must look at the initial underlying application when addressing whether -- whether an issue is relevant or not. And so with that, what I intend to do is take us first to the procedural order which sets out what is to be determined in the application. I will ultimately address the different issues that my friend has raised and argues are relevant, but I think again we have to start with the underlying application. And we set out in paragraph 112 of our brief the paragraph from the August 31st procedural order which -- which outlines what the application is to be in respect of. And you'll see paragraph -- subparagraph 'A' deals with the first issue, and that's to seek direction with respect to the definition of beneficiaries contained in the 1985 Sawridge Trust, and if necessary, to vary the 1985 Sawridge Trust to clarify the definition of beneficiaries. 'B', to seek direction with respect to the transfer of assets to the 1985 Sawridge Trust. I think I can deal with 'B' quite quickly. I don't think anyone today is suggesting that that aspect of the advice and directions application touches upon any of the issues that are being put before you today. But it's subparagraph 'A' that I think the parties have a bit of a different interpretation on.

Our submission is that subparagraph 'A', there are really two key aspects ultimately that the Court will have to address in June at the application. The first deals with whether the definition of beneficiaries is contrary to public policy, whether it's discriminatory or not. And I think you've had put before you today, sir, the fact that the definition in the 1985 Trust basically identifies the beneficiary as an individual who qualifies as a member under

the, what I'll call, the old Indian Act, under the -- under the *Indian Act* as it existed in 1982. Sometimes referred to as the 1970 *Indian Act.* And of course, that *Indian Act* was prior Bill C-31. And that *Indian Act*, of course, would have removed membership from an Indian woman who married a non-Indian. And of course, you know that Bill C-31 then came in 1985 to attempt to rectify that situation. So the definition of beneficiary in the 1985 Trust basically froze the definition to the 1982 *Indian Act* definition of member.

So the first -- the first issue will be whether that definition may or may not be discriminatory. That -- the Court will have to address that in the main application.

I think the second aspect to the main application would then be whether that definition should be changed and potentially what should it be changed to. There, as my colleague has indicated, our submissions before you at the main application, we will attempt to put all of the evidence before you and all of the arguments before you. But certainly one option that the Court will be considering is should that definition be changed to equate beneficiary with member, with a current member of the Nation. Which, of course, would effectively, I think, remove the discriminatory effects of the previous definition.

So those are the two -- our submission is those are the two aspects we think that the Court will have to address down the road. And so I'm going to -- before I get to the Public Trustee's submissions, I'm going to just spend a little bit of time to address those two aspects to determine or to address what type of arguments may be made and what type of evidence may be relevant in respect of those two aspects.

So dealing first with whether the definition is discriminatory, I think that's for the most part, sir, that's going to be a legal argument. And whether it's contrary to public policy. Obviously you'd need some background information in relation to the definition. But our submission is that that's all before you. You have in the evidence before you the history of how this trust came about. Obviously you have the trustee before you. And you have some background on the whole issue of C-31 and what was taking place back in 1985. So our submission would be that -- that with respect to the determination of whether this definition is contrary to public policy, the type of evidence that you will require is before you. And for the most part, we submit this is going to be a legal issue.

The second aspect, however, I think of the main application, will be to determine whether -- if the definition is contrary to public policy, whether the definition should be varied and in what way. So taking the one option to change the definition so that beneficiary equates to a membership, current membership, the evidence before you in respect of that particular issue, again there's background information in respect of what was taking place back in 1985. You have before you the current Sawridge membership code which outlines the criteria and -- that's required to become a current member of the

Sawridge Band. You know that Sawridge currently controls its own membership in accordance with the provisions of Bill C-31 and has done so for the last 27 years. Of course, under the *Indian Act*, for a nation to take over control of its membership, the Minister under Section 10, 7, of the *Indian Act* would have had to have approved the membership code at the time. So I think you can certainly take it that that's taken place as well. We've put evidence before you that currently there are 41 members. And I should say that that was as of the date of the affidavit. My understanding is one member has passed away since then. But there were 41 members of the Nation when the affidavit was sworn. The evidence before you is that there are 31 minor dependents of these 41 members. And of those 31 minor dependents, there are 23 minors that currently qualify as beneficiaries under the 1985 Trust. However, if the definition were to be changed to equate beneficiary to membership, those 23 minors would lose their status.

So that's the type of evidence that's currently before you and that we would submit will be relevant ultimately in the main application. And what I propose to do now, sir, is to address the areas that the Public Trustee wishes to delve into.

And I believe my friend referred you to page 31 of her brief where there was a summary in paragraph 102C of her brief of the type of evidence that they wish to question on. And I can -- I think it can be summarized as they wish to get into the Sawridge membership criteria. They wish to ask questions of the Sawridge membership process and whether it's functioning properly or not. They wish to ask questions in relation to the pending membership applications, whether there are pending applications, how many, and any affect that there may -- those pending applications may have on a minor. And they also wish to take, to question, the witness in respect of any steps the trustees have taken in addressing any of these issues including any steps the trustees have taken in identifying the members of the class of minor beneficiaries. So those are the areas that they propose to question in respect of.

And there are two reasons that the Public Trustee puts forth as to why these areas would be relevant. The first is that the trustees have an obligation, a duty, to identify the beneficiaries of the trust, and accordingly, they say that because they have that duty, all of these areas of questioning are relevant. And secondly, they argue that if you are to consider varying the definition in the main application, you have to be -- you have to be convinced that or satisfied that prior to doing that there's not going to be an issue with the requirement of certainty of objects.

So what I propose to do, sir, is to deal then with these two -- these two areas. And I would ask you to turn to paragraph 118 of our brief. And you'll note, sir, that there we have a summary of the *Garden River Band* case. And I think it's fair to say that the Public Trustee relies very heavily on this case for advancing these two areas of relevance

that they have. And I'll just briefly review the facts with you of that case because I think they're important and I think they're quite distinguishable from the scenario you have before you. *Garden River* was a situation where the *Garden River Band* settled a land claim, and arising out of that, they declared a per capita distribution of $1 million. And they passed a band council resolution to that effect in September of 1987. Subsequent to that, they had a meeting and they decided that they were going to distribute these moneys to the membership in December of 1987. And at the time of the distribution, there were a number of children of band members who were not yet members of the band. These children were children of what I will call C-31 members. And of course these would have been children of Indian women who lost their membership, and of course the children themselves would not have had any membership. The requirement at that time was for the first generation to become a member of a band, they had to first get their status back, their Indian status back. And with respect to this particular band, they had a membership code that required the children then to apply for membership, and then they would become members. The problem was that there was a backlog with the federal government with respect to getting the Indian status back. And as such, at the time of the distribution in December, these children were not yet members even though the chief and council at the time knew that ultimately they would become members. And in fact, they did become members subsequent to the date of the distribution.

The Ontario Court of Appeal there determined that in those circumstances the trustees had a duty -- well, first of all, they found that the chief and council, by declaring a per capita distribution, that resulted in a trust and that they were now holding these funds in trust for the members of the band. The Ontario Court of Appeal then found that as trustees there was an obligation on the trustees to ascertain the beneficiaries. And the court found that when the band distributed the funds, they did so by choosing an arbitrary deadline. And it was that decision to arbitrarily decide that these funds would be distributed in December that caused the court some great concern. And ultimately, the court found that the trustees did not meet their obligation and that these minor -- these children were entitled to their proceeds.

Now, the Public Trustee in this matter argues that trustees have a duty to make reasonable inquiries into the existence of beneficiaries and to identify and locate these beneficiaries. And in principle, we don't take issue with the fact that a trustee has that obligation when it -- when it purports to act and to distribute funds. Our concern, however, is that that issue is not before this Court. There is no distribution before this Court that is being -- that is being addressed, unlike the case in *Garden River*. *Garden River*, there was -- there was actually a distribution, and then after the fact, the parties came to court and addressed whether the trustees met their obligations at that time. Here, to go back to our advice and directions application, we're coming to court simply to determine whether the definition of beneficiary is contrary to public policy or not. And if so, should it be changed? It has

nothing to do whatsoever with any distribution. And as such, my duty that may arise down the road, whether it be a year from now or 10 years from now or a hundred years from now, that the trustees may have in -- when making distribution is simply not before the court, we submit.

Secondly, even when that duty may arise down the road, our submission is that this is a discretionary trust. And if a beneficiary comes to the trustees and asks, for example, for some funding for education, the trustees at that time would have the obligation to determine, number 1, whether this individual is in fact a beneficiary or not, and number 2, whether they're entitled to receive some funding for that education. Our submission, though, is that the trustees would be entitled to simply determine whether that individual was a member or not, assuming that the definition has been changed now to equate to membership.

The -- beyond that, there is no obligation on the trustee to take steps to determine whether this individual perhaps was denied membership. This individual maybe applied for membership and was denied. Or this individual has applied for membership and the application was still pending. And the analogy we draw, sir, in paragraph 124 of our brief is that -- is that of a typical fund established for scholarships or bursaries for first-year art students. The trustees of that fund, when approached by an individual for some -- an advancement of trust funds, the trustee only needs to determine at that stage whether that individual qualifies as a first-year art student or not. The trustee doesn't have an obligation to go beyond that. If the student has a concern with the arts faculty or with the university and claims that, you know, the application has been pending or I was wrongly denied, the trustees don't have an obligation to go beyond that. It's up to the individual student to address that through whatever process is in place to deal with that.

And so our submission is the trustees of the 1985 Sawridge Trust simply have no legal right to get involved in the membership process. They have no legal right to be involved in that. This is -- that is totally outside of their jurisdiction, and that is completely the jurisdiction of the Sawridge chief and council.

Secondly, if an individual is concerned that his or her membership has been either ignored or denied, it's clear that their -- their remedy in that case is to -- is to address the matter directly with the band through the provisions of the membership code. And if that fails, they have the remedy to go to court for judicial review. And at paragraph 126 of our brief, we have the *Huzar* case which was a case of the Federal Court of Appeal from approximately ten years. And that was a situation where the court found that if an individual has a concern with respect to its status as a member, as a member of a nation, and Ms. Huzar, of course, is one of the affiants in these proceedings, and Ms. Kennedy acts for Ms. Huzar in these proceedings. Well, Ms. Huzar was told 12 years ago that if

she had a concern, the appropriate forum for her was the Federal Court and by way of judicial review of the decision or lack of decision of the First Nation. And so our submission is that that's the appropriate -- that's the appropriate method of proceeding if an individual has a concern. In that manner, you will have obviously the proper parties before the Court. The parties can then put the appropriate evidence before the Court. And the individual circumstances of that particular case can be addressed by the Court. And it's also our respectful submission that the Federal Court has the exclusive jurisdiction in respect of such an application.

Now, I'll deal a little bit more with this duty to identify beneficiaries later. But suffice to say for now that it's our submission that, number 1, that -- the duty to ascertain beneficiaries is simply not before this Court. What the main application will deal with is a definition of beneficiaries. And to the extent that it arises down the road, that's something that the Sawridge Trustees will have to deal with down the road. And there are methods of dealing with that.

The second area that the Public Trustee raises, and it's obviously related to the first, is this concern of that any proposed change in definition satisfies the need for certainty of objects. And I think it's fair to say, sir, that in the main application, if Your Lordship feels that there has to be a change in the definition, then that's something that probably the Court should put their mind to. That it cannot just blindly go forward and change the provisions of a trustee without at least considering this.

The -- interestingly, this issue was touched upon in the *Garden River* case. And we include at paragraph 130 of our submission an excerpt from that case where what the Court does is it considers the issue of certainty of objects. And you'll see at the end of the excerpt, we've bold typed their conclusion on this point. And what the Court concludes is that yes, you have to have certainty of objects. But in this case -- and, of course, in the *Garden River* case, it was a situation where the beneficiaries were the members. By the circumstances of that case, the beneficiaries for the members of the band. And what the Ontario Court of Appeal confirmed and concluded in that case was that there was no issue that the object of the distribution was the membership of the band. So there was no concern in that case with the requirement of certainty of objects. The question that arose was whether the band could pick a date that it did to ascertain the membership of the band. And so it was that aspect of the actions of the trustees in that case that the Court was concerned about. There were certainty of objects there, but did the trustees meet their obligation? Did they meet the obligation of identifying the beneficiaries? We knew who the beneficiaries were. The beneficiaries were the members of the band. But did they take the appropriate steps in that case? And in that case, the Court said, No, you didn't. You can't just pick an arbitrary date. You've set aside moneys. And in this case, you knew these individuals were going to be members

ultimately. And as such, we're not going to let you shut them out effectively.

And we -- we state at paragraph 132 of our brief, there are numerous cases, sir, where trusts have been upheld that have been established for the benefit of members of First Nations. It's never been an issue in respect of certainty of objects, even though I think it's fair to say that there are often membership disputes when dealing with First Nations. But that doesn't go to the certainty of objects requirement of the -- of the trust.

Similarly, the fact that there may be pending membership applications or that certain individuals may have had their membership applications denied doesn't go to whether the trust itself is valid. And we would caution the Court to be careful in drawing any conclusions in the matter before you with respect to any pending applications. I think I heard my friend this morning say that, you know, maybe there are hundreds of pending applications outstanding. Well, there's no -- there's very little evidence before the Court in relation to pending applications. Certainly there's no evidence before the Court that there are hundreds outstanding. And we dealt at paragraph 105 through 107 of our brief with the whole concept of the fact that you can't take judicial notice of facts that are proved in another proceeding.

In any event, the fact that you have a pending application doesn't say anything in relation to whether the membership process per se is functioning properly or not. There may be a good reason why there are pending applications, or there may be a good reason why applications have been denied. And by analogy, if you take the situation where you have, say, six individuals who have submitted claims to the WCB and these six individuals have had their claims denied, that doesn't necessarily mean that WCB is acting improperly or that the WCB -- the process is faulty or it's not functioning. Each of these individuals are individuals. They all have different circumstances. They have different issues. They have different doctor reports. And you can't draw any conclusions, it's respectfully submitted, from that. And the same goes with, we submit, membership applications. And my friend commented about, is the process functional? We need to know, before the Court even considers changing the definition to equate the membership, we need to know whether the membership process is functional. And that begs the question, what does that mean exactly? We know that there's -- that the Sawridge First Nation has control of its membership, that there is a membership code, that the Minister of Indian Affairs would have approved that some 27 years ago. So we know there's a process there. We know there's a criteria there. The fact that you may have 5 or 50 or 500 pending applications, we submit, doesn't go to the process or whether it's functioning or not. The fact that someone may have applied 20 years ago and suggests that their application has not been dealt with doesn't go, we submit, to the functioning of the process. One has to ask, why hasn't that individual pursued it? Why hasn't that individual gone through the -- gone through the process in the membership code? Why hasn't that individual gone to Federal

Court to seek judicial review? There are remedies there to address these things. But the point is that when you talk about functionality, is the process functioning, I mean, unless you're going to get into specifics of each and every application to determine whether -- whether it's functioning and whether it's fair, our submission -- and our submission, of course, is that that's -- the proper venue for that is judicial review, not in this application. Our submission is that that's a real problem.

A judicial review has the proper parties before it. It's in the proper forum. It's has the proper evidence before it. You can deal individually with any issues. And it's our submission that it's not for the Public Trustee to try to identify any issues with pending applications at all. It's for these individuals to address that in a different forum.

THE COURT: Well, I just want to ask you a question while it occurs to me. Can minors apply for membership?

UNIDENTIFIED SPEAKER: Technically, yes.

MR. PORETTI: I think if you look at the membership code, the answer is yes. I just wanted to confirm.

THE COURT: Okay.

MR. PORETTI: Yes.

And just to deal with the 23 minors that were -- I think the 23 minors -- there's a couple of different issues here I think. There's the 23 minors that we know are currently beneficiaries. And they will, if the definition is changed, they will lose their status as beneficiaries. And that's obviously an issue that will have to be dealt with in the main application. Some have suggested grandfathering and so on. We'll have to deal with that. But that's before the Court. The Court -- the Court has that information before it, and we can deal with that later. The fact that these minors, you know, they are treated -- whether they're beneficiaries or not, they still get the same benefits as a minor as long as, you know, until they turn 18. The evidence of Mr. Bujold is all minor dependents are treated as beneficiaries. They are eligible for all of these benefits. So, you know, our submission is that these 23 minors, even though they lose their status as beneficiary, their formal status, while they're minors, it doesn't impact on them. Now, clearly, like when they turn 18, now they are in a situation where they're an adult. They can no longer access these benefits. And if they wish to access benefits, they have to be a member. So they would have to apply. And as I've just submitted, they can apply currently if they wish.

The second issue, I think, though, is what about these others that may be out there, these others that may have pending applications or that their parents may have pending applications? And our submission is that simply that's -- that is simply not before the Court. Any concern that any individual may have in relation to a pending application, they have -- there's a process in place that they can address that. And whether it's an application that's been out there for 20 years or 2 months, that's up to the individual to pursue. And the Sawridge Trustees have absolutely no jurisdiction over that.

So I think, sir, those are all of my submissions, unless you had any further questions.

THE COURT: No. I see, you know, you were following along in your brief, and it was well amplified, so thanks. I'm okay.

MR. PORETTI: Thank you.

MR. MOLSTAD: Do you want to continue, My Lord, or --

THE COURT: Well, I just wondered how long you thought you'd be, Mr. Molstad.

MR. MOLSTAD: Well, I don't think I'll be very long, but I expect that my friend will have some reply.

THE COURT: All right. Well, look, we'll take a break. We've got all afternoon. So we'll take a break. But it may -- I've got a phone call, a conference call, about quarter to 2. So I might be a little late getting back to the courtroom depending on how long that matter takes to resolve.

So why don't I just say we'll come back at 2:15. All right.

PROCEEDINGS ADJOURNED UNTIL 2:15 PM

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Certificate of Record

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

Certificate of Transcript

I, Candice LaTrace, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

April 5, 2012	Afternoon Session
The Honourable Justice Thomas	Court of Queen's Bench of Alberta
J.L. Hutchison	For the Office of the Public Trustee
M.S. Poretti	For the Trustees of the 1985 Sawridge Trust
D.C.E Bonora	For the Sawridge Trustees
E.H. Molstad, Q.C.	For the Sawridge First Nation
E.J. Kindrake	For the Minister of Aboriginal Affairs in Northern Development
A. Meads	Court Clerk

Discussion

THE COURT: Afternoon.

MR. MOLSTAD: Afternoon, My Lord.

MS. HUTCHISON: Good afternoon, My Lord.

Submissions by Ms. Molstad

MR. MOLSTAD: I will be brief, My Lord; and one of the reasons why I can be brief is that, on behalf of the Sawridge First Nation, we concur and adopt the written submissions made by counsel on behalf of the Sawridge trustees except for one matter which I will address in my submissions.

The position of the Sawridge First Nation is fairly clear and simple. We submit that the questioning proposed by the Public Trustee in relation to Sawridge membership will not assist in determining any issue that is raised in the main motion and certainly will not significantly help determine any issues.

We submit further that even if the Public Trustee, which we submit we haven't seen, were to frame this motion by setting out specific questions that all of the general areas that the Public Trustee has described whether you propose to go, in our submission, on a fishing trip are irrelevant and would provide no assistance to the Court.

There has been reference to Bill C31, and that, of course, is referred to in the Public Trustee's submissions; and they have described to you what they say is the history of that litigation. With the greatest of respect, that doesn't describe the history of the litigation that the Sawridge First Nation was involved in; and it's not necessary that you hear a lot about that, but we will speak to it briefly.

The -- if you go to Tab 16 of the Public Trustee's Volume 2, you will find one of the many decisions of the Federal Court that dealt with a matter in issue that was part of the Sawridge litigation related to Bill C-31; and it was the decision of Mr. Justice Hugessen in relation to the motion for the interlocutory injunction essentially compelling Sawridge to recognize the acquired members as members of the First Nation, but the part of this decision that I'd like to take you to is found on page 12 and paragraph 28 where Justice Hugessen refers to the debate in the House of Commons; and he states:

> The debate in the House of the Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows:
>
> > Today, I am asking Honourable Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by government of membership in Indian communities.

The *Indian Act*, as you may or may not be aware, continues to be, what I would submit, is a racist and discriminatory piece of legislation today; however, in 1985, the Government of Canada decided that one of the wrongs that it would correct was the government control of membership in First Nation communities.

Bill C-31 recognized the long-accepted view in other countries like the United States of America that the right to control membership is an aspect of residual sovereignty retained by First Nations. And my friend on behalf of the Public Trustee has made some submissions in relation to the C-31 litigation advanced by Sawridge; and with respect, we submit that she has mischaracterized that litigation. She has described it as the position being advanced by Walter Twinn, the former Chief of Sawridge First Nation, in opposing taking back of women.

The Bill C-31 litigation on behalf of Sawridge was a claim in which Sawridge challenged the constitutionality of Bill C-31. It was argued that Bill C-31 infringed its Aboriginal

rights, which was fundamental to every First Nation, to determine and decide who belonged to that First Nation.

That case ultimately went to trial once before Mr. Justice Muldoon in the Federal Court, following which the Federal Court of Appeal found that his conduct during the course of the trial was demonstrative of a reasonable apprehension of bias, set aside that decision, and it was ordered that there be a new trial. That new trial took place over the course of a number of years in terms of the preparation. We became involved as counsel late in the day in relation to that new trial; and ultimately, there was no trial that dealt with the actual issue.

The trial judge, for reasons that would take too long to explain, struck all of the evidence of the Sawridge and Tsuu T'ina First Nation. They decided at that point to close their case and to go to the Federal Court of Appeal. The Federal Court of Appeal dismissed their appeal. So there's been no determination of the issue on the merits in terms of the constitutionality of Bill C-31.

In any event, that's some of the background. The Sawridge First Nation after the enactment of Bill C-31, notwithstanding their constitutional challenge to that statutory provision, moved quickly to establish their own membership rules which they did and which they had approved by the Minister of Aboriginal Affairs.

THE COURT: Sorry. That was before the liti -- in parallel with the litigation?

MR. MOLSTAD: Well, it was -- it was -- I don't remember the date now when that litigation was commenced. I just don't recall the date of the commencement of that litigation. I'd have to do some searching --

THE COURT: Okay.

MR. MOLSTAD: -- back.

MR. PORETTI: It was 1986.

MR. MOLSTAD: Was it 1986? Yeah.

THE COURT: So shortly after the --

MR. MOLSTAD: Shortly after. Yeah.

THE COURT: Okay then.

MR. MOLSTAD: But they did move quickly under the legislation to establish their own membership rules and have those membership rules approved by the Minister of Aboriginal Affairs, and they have since of July of 1985 controlled their own membership in accordance with those rules.

Now, one point that we wish to make as well is that -- and I believe Mr. Poretti on behalf of the Sawridge Trustees mentioned that, we note the terms of your order and we submit that you should have regard to that. It should not be determinative, but you should have regard to that in terms of that it shall not be used to determine or help determine whether a person shall be admitted as a member of the Sawridge First Nation.

One of the points that we wish to make as well is that, in our submission, there's no relevant admissible evidence before you today, nor there should be in a main motion, in relation to the membership process. There is innuendo and inferences that are made on behalf of the Public Trustee, but there is no evidence. And, in fact, in paragraph 25 of the Public Trustee's brief, the Public Trustee makes reference to the observations of the Court of Appeal, that's the Federal Court of Appeal, in relation to, quote:

> Onerous application requirements.

Unquote. I think that's an error because the only paragraph in their decision, that is the Federal Court of Appeal, that makes reference to that is just a restating of what Justice Hugessen said at the level below in paragraph 3 of the Court -- 33, sorry, of the Court of Appeal decision where they refer to his comment. And in Justice Hugessen's decision, which is at Tab 16 of the Public Trustee's brief, he does make a comment in paragraph 12 in relation to the onerous application requirements; and what he's talking about there is evidence that was in front of him in relation to the nature of the written application that the Sawridge First Nation requested of those who wished to apply to become a member of their First Nation.

Our submission in relation to -- reference to those comments is that, first of all, they're obiter; and secondly, they were made by the Court. We --

THE COURT: You are talking about Hugessen --

MR. MOLSTAD: That's right.

THE COURT: -- at this stage?

MR. MOLSTAD: Yeah. They were obiter, and they were made by the Court without the benefit of evidence in relation to the history, the culture, and the natural laws of the Sawridge First Nation. Our submission is that they are both irrelevant and, again in addition to that, that no weight should be attributed to them.

In paragraph 30 of the Public Trustee's brief, the Public Trustee, with the greatest of respect, demonstrates that it is equally uninformed about the history, the culture, and the natural laws of the Sawridge First Nation. They take it upon themselves to express an opinion in paragraph 40 of their brief about the Sawridge First Nation membership application. We submit that it is, as well, irrelevant, and it should be given no weight.

To help in terms of considering a question like this and to put it into perspective even if it were relevant, we would submit that in Euro-Canadian society, if someone was applying to become a member of your family, we would submit that you might have a few questions that you would want to put to that person.

My friend has referred you the *Huzar* decision, and I believe that Mr. Poretti has dealt with this adequately. I would encourage you to read paragraphs 3 and 5 of that decision. It's also found at Tab 4 of the Sawridge First Nation brief.

THE COURT: Sorry, what were those paragraphs again?

MR. MOLSTAD: Paragraphs 3 and 5.

THE COURT: Okay.

MR. MOLSTAD: And I'm not sure what evidence is in front of you, and it's not my job to put evidence in front of you, but it's unfortunate that Ms. Kennedy is not here because she would be able to tell you that her client has made an application for membership and that application's been denied; and an appeal hearing has been set because in accordance with the membership rules, there is not only a process for application, there's also a process for an appeal in relation to a decision of the Chief and Council in regard to that.

We also submit, Sir, that --

THE COURT: Okay. Just for my interest, where is the appeal to?

MR. MOLSTAD: It's going to be taking place on the 21st.

THE COURT: Sorry, does it go to the --

MR. MOLSTAD: To the electors as a whole.

THE COURT: Oh, I see. It goes back --

MR. MOLSTAD: Yeah.

THE COURT: -- to them.

MR. MOLSTAD: Yeah.

THE COURT: Oh, man.

MR. MOLSTAD: It's going to take place in a matter of couple of weeks.

Section 18(1)(a) of the *Federal Court Act*, which we've provided a copy of in our brief at Tab 5, very specifically provides the Federal Court has exclusive original jurisdiction in order -- to order declaratory relief against, in this case, it would be the Sam -- Sawridge First Nation Chief and Council.

We submit, Sir, that membership issues are properly dealt with by the Federal Court, but they're properly dealt with only when there is relevant, admissible evidence before the Federal Court to consider. The one --

THE COURT: Do you think the group of trustees are a Federal board? I guess maybe that is not a fair question to ask you. You are just here for the --

MR. MOLSTAD: Yeah. No.

THE COURT: -- First Nation, but --

MR. MOLSTAD: Yeah. Well, I was going to deal with the issue of how this money comes to be entrusted to the trustees and perhaps explain --

THE COURT: Mm-hm.

MR. MOLSTAD: -- some background because earlier you'd questioned one of the Council about whether this is similar to an estate and the administration of an estate, and I'm not sure that it is; but I'll deal with that momentarily

if I could?

THE COURT: All right. Sure.

MR. MOLSTAD: I just wanted to say where the Sawridge Trust and the Sawridge First Nation divide slightly in terms of the written submissions, and that is where my friends on behalf of the Sawridge Trustees in their written brief refer to the good intentions of the Public Trustee. We're not attributing malice, but we do not adopt that submission; and there's a reason why we don't.

In this case, the Public Trustee's submissions to this Court, we submit, are condescending and disrespectful to the parents of these First Nations children. The Public Trustee advances a position which suggests that these parents cannot be trusted, or alternatively there is the perception that they cannot be trusted, to make decisions in the best interests of their children. The Public Trustee, in its brief, advances a position that it wishes to protect and help these First Nation children, but only if these First Nation children pay for the legal fees on a solicitor/client basis of their counsel. We submit that if the Public Trustee has it their way, these legal fees will be for work that will include, what we suggest, is a public enquiry in relation to the membership process of the Sawridge First Nation.

The Public Trustee in its motion not only asks that these First Nation children pay their legal fees, but they ask that they pay it in advance. And, of course, notwithstanding how many irrelevant questions the Public Trustee may ask, the Public Trustee requests that they should be exempt in relation to costs. Our submission is that the Public Trustee's request that it be allowed to embark upon this public enquiry into the Sawridge First Nation membership simply be denied.

I do want to touch, however, on where this money comes from, and I think that goes back to your question about estate litigation. And what happens on First Nation's reserve lands is that where there's a prospect of oil and gas discovery, the Crown, that is the Federal Crown, takes a surrender of the oil and gas rights in relation to the reserve land in trust. The Federal Crown then grants oil and gas leases to oil and gas companies with terms which include, in most cases, the reservation of a royalty interest; and this is all pursuant to the *Indian Act* and the *Indian Oil and Gas Act* .

When that oil and gas is produced, the producer pays the royalty to the Crown in trust for the First Nation which the Crown then treats as capital monies pursuant to the provisions of the *Indian Act* dealing with Indian monies. The Crown holds that money in the consolidated revenue fund and pays interest on that money based upon a long term of government bondery (phonetic) which can be, as it is now, very low. There were times

historically where it was not that bad; but in most cases when a First Nation has a large sum of money, the Crown essentially has decided they're going to invest all of that money in one investment.

To his credit, Chief Walter Twinn, at the time, obviously decided that this First Nation's money would be better off invested in a more diversified type of portfolio involving real estate. He was far ahead of his time in that regard; and as a result, he would have gone to the Crown pursuant to the provisions of 64(1)(a) of the *Indian Act* with a band council resolution requesting withdrawal of capital money to invest in whatever the investment was at that time.

So that's how you end up -- and once it was determined, I think -- and I think you've got the evidence before you, once these properties were in the names of individuals, how they then became transferred to the trust for the benefit of the First Nation. So that's a brief description of essentially how the monies get to the trustee.

Those are our submissions, My Lord, unless you have any questions.

THE COURT: This is a question I should have put to you right at the beginning. I mean, clearly there is a relationship between the trustees and the Sawridge First Nation; but just looking at this as a piece of litigation, as an action that is before the Court, I mean, it is an application that is --

MR. MOLSTAD: Yeah.

THE COURT: -- before the Court, should the Sawridge First Nation be made a party, added as a party? I mean, you have come and made submissions, so clearly I do not think there would ever be any doubt about the standing of --

MR. MOLSTAD: Yeah.

THE COURT: -- Sawridge First Nation to, you know, come and take a position, but in moving it up the more formal level --

MR. MOLSTAD: But I --

THE COURT: -- should you be a party or your client --

MR. MOLSTAD: I'm --

THE COURT: -- be a party?

MR. MOLSTAD: -- you know what, I was asking that same question of Mr. Poretti in terms of main application, and our in-house counsel is not in the city right now in terms of instructions in that regard --

THE COURT: Mm-hm.

MR. MOLSTAD: -- so I can't answer if they wish to be added as a party. I can get those instructions though.

THE COURT: Maybe you could get those and just let me know? I mean, I suppose it is always in my power just to make you a --

MR. MOLSTAD: Yeah.

THE COURT: -- party, but --

MR. MOLSTAD: Yeah.

THE COURT: -- there is no problem with you being made a party.

MR. MOLSTAD: Yeah. I just don't know. I don't have any --

THE COURT: Okay.

MR. MOLSTAD: -- instructions.

THE COURT: Okay. So if you would not mind getting those instructions, you can just write a letter to me.

MR. MOLSTAD: Certainly, yeah.

THE COURT: Okay.

MR. MOLSTAD: Thank you.

THE COURT: Thank you.

Further Submissions by Ms. Hutchison

MS. HUTCHISON: Thank you, My Lord. I will also endeavour to be as brief as possible given the time of day.

One observation having listened to the excellent submissions of my friends, I think it is clear that the topic of membership is a fraught topic. I would also submit to the Court that to try to suggest that when the Sawridge trustees are before this Court asking for a change, a variance to the beneficiary definition, it will tie all rights as beneficiaries to that fraught issue of membership. It does the Court a bit of a disservice not to give you full access to the information you may need to assess the practical impacts of that change in definition, and that's just an initial observation, My Lord.

Just to try and reply to a few of the points that my friends have raised, I won't reply to all of them, but there are a few that I'd like to deal with directly. If I understood Ms. Bonora's submissions, the suggestion is that the Public Trustee's submission to this Court is that we need to be here and that we need to make these arguments; and I'd like to ensure the Court is not left with any misunderstanding about what my client's actual position is. And I should just note the submission was also that no one asked the Public Trustee to be involved.

The Public Trustee was served with notice of this order on this Court's direction, My Lord. At that point, the Public Trustee felt it had some obligation of due diligence to at least evaluate what the issues in the action were; so I would submit it's -- to the extent there's any characterization that this -- the Public Trustee has gone off on a bit of a lark and decided to become involved in this action, that's not a correct characterization of the Public Trustee's position.

Furthermore, it's not correct to try and suggest that the Public Trustee is saying, We are the end all and be all and we are the only entity that could possibly assist the Court on these issues and that could possibly address the interest of the minors. But unfortunately, and I can tell you my client wishes it were otherwise in some respects, we're the only entity here that is willing to deal with these issues; and I will speak to my friend's submissions that it's adequate to have the Sawridge trustees deal with that and deal with those issues. But good, bad, or indifferent, the Public Trustee is the only party that has come before you to say, We're willing to act, admittedly on conditions, but we are willing to act and give this Court and the minors the benefit of active representation, not silence.

I move on the my friend's submission, as I understood it essentially, and I say this with the greatest of respect that I summarize the approach as essentially, the Court can trust us, the Sawridge trustees or perhaps even the Sawridge First Nation. We have duties to the minors, and we will raise all of these issues; however, what I heard in those submissions,

My Lord, was a very conditional basis on which those issues would be raised. They will only be raised if they don't tread into the territory of membership.

They will also be raised in the manner that the Sawridge trustees determine to be appropriate; and again with the greatest of respect, there is sufficient information before this Court to at least raise the question of a perceived conflict of interest. And I want -- I hope I've been clear, we are in no way trying to suggest that any of the individual trustees are misbehaving or behaving inappropriately. What we are referring to, My Lord, and I won't read you the quotes, but the Court summarizes the concepts very well in *H.M.L.K. Estate*, which we've included at Tab 3 of our reply.

The obligations on a trustee, as I'm sure this Court appreciates, are not just to avoid a conflict of interest, but to avoid any perception of a conflict of interest. It's not this good faith that's utmost good faith; and so, as I listened to some of the submissions around -- I think the concept that was being proffered was that there really isn't a conflict of interest or it's not serious enough for this Court to be concerned, I was having a great deal of difficulty tying that into the stringent standard of conduct that applies to all trustees; and if anything, My Lord, I would suggest it may have reinforced the fact that there may be a need for an independent litigation representative for these minors. And I must say, My Lord, if there's an option that's more appropriate than the Public Trustee and that can be an independent and objective litigation representative, I don't think you'd hear my client oppose that appointment; but we haven't had such a option presented at this point.

And in relation to the suggestion that -- I heard different terms used, but some of it was offensive or condescending to suggest that the impact on a $2 million share, and perhaps a great deal more than $2 million, we're not quite sure, could not possibly affect the judgment of either a trustee or a parent or someone else who's currently a beneficiary. I would suggest it's not offensive, My Lord. It's realistic.

Human beings are human beings. It doesn't constitute a judgment of a parent or of a trustee as being an immoral person. The reality is when we're dealing with these kinds of figures being split between, at the moment, 41 individuals, I would suggest it would be naive to suggest that there's no risk of that impacting decisions and judgments about how the minors' interest might be accommodated in all of this.

And in that regard, while the Sawridge trustees are offering a very interesting concept of, you know, We'll take away beneficiary status but, it's okay, we'll pay them the same benefits they would have gotten until they were 18 anyway, I -- actually Mr. Godfrey was reminding me of an excellent quote, and I think it was, Trust but verify. There's no obligation on the Sawridge trustees to do that; and in fact, if you examine that trust instrument carefully, My Lord, I'm not even sure there's a right to take the corpus of the

trust and use it for the benefit of any individual who's not entitled to be a beneficiary.

So it's a lovely concept, but it may not be a legal one; and that's a whole other issue that would have be examined in the main application. But I make that --

THE COURT: So just --

MS. HUTCHISON: Yeah.

THE COURT: -- so I am making sure I capture that point; so basically, under the trustee, unless the person in question is recognized as a beneficiary within the definition of beneficiary under the trust --

MS. HUTCHISON: I --

THE COURT: -- the trustees are not in a position to --

MS. HUTCHISON: I question how --

THE COURT: Okay.

MS. HUTCHISON: -- it would be, My Lord. I've -- now, I've looked at the trust instrument. As I read it, it's very much crafted solely to benefit beneficiaries. I did not find provisions in that trust document that suggested there's some residual discretion to benefit whomever the trustees choose to benefit.

THE COURT: So your position is they probably cannot unilaterally benefit minors during, what I would call, the gap years?

MS. HUTCHISON: I think there's a real issue to be --

THE COURT: Mm-hm.

MS. HUTCHISON: -- examined there, yes, My Lord, and, you know, it raises the -- again, it raises the question of do the minors need to have somebody independent of all the other issues? I mean, I think there's a real desire within the community to start to use these funds, understandably, and for very admirable purposes. We're not suggesting otherwise, but it still has to be legal. It still has to comply with the requirements of the trust, and anyway, I sort of got -- I'm getting a little off track, My Lord, so I'll go --

THE COURT: Yes. Just --

MS. HUTCHISON: -- back to my points here.

THE COURT: Yes. Just while I am at this point in my notes, tell me again where the trustee is in all this.

MS. HUTCHISON: Where the?

THE COURT: The trustee, the original --

MS. BONORA: It's attached to the affidavit --

MS. HUTCHISON: Oh, the trustee --

MS. BONORA: -- of Paul Bujold.

THE COURT: Oh, right. It is in the --

MS. HUTCHISON: Of Paul Bujold.

THE COURT: Yes.

MS. HUTCHISON: Yes.

THE COURT: Yes.

MS. HUTCHISON: That's right, My Lord.

I heard, at least I hope I'm characterizing this correctly, that to some extent, the Sawridge trustees are saying some of the issues that are being raised by the Public Trustee are important and we'll raise them, we the Sawridge trustees will raise them before this Court. They will be argued. You don't need the Public Trustee before you to raise those issues.

I heard that essentially as an acknowledgement that some of those issues need to be raised, but that left me with the question, My Lord, if the Sawridge trustees recognize that those issues may need to be raised and they're not comfortable paying a government entity to do so, there's a clear mechanism under the rules that they could have exercised to choose a litigation representative that they felt was appropriate, put that individual before the Court, and I have to say, My Lord, also protect themselves from any future allegations of a perceived conflict of interest if they were to try to represent the interest of

the minors while they have the dual roles we've described in some of our materials. So just a --

THE COURT: So you are saying a sort of still future litigation --

MS. HUTCHISON: Well --

THE COURT: -- now?

MS. HUTCHISON: -- I'm saying really is a lack of comfort with paying a government entity a reason not to provide the minors with independent objective representation? There's been a long lead-up to this application; and if that were the only concern, if that was the only barrier to providing the minors with independent and objective representation, I'm simply submitting that the Sawridge trustees had some very clear options to access that independent objective representation and pay another entity or another individual or a lawyer that could be appointed as next friend of their choice, quite frankly. I mean, the Court would have had to be -- had to have been satisfied that the individual was appropriate.

For whatever reason, they've chosen not to do that; and that's part of why the Court is left, at this point in time anyway, with effectively one entity before you that could potentially be objective and independent in representing the minors.

My friends made the -- I'm sorry, my friend Ms. Bonora made a few submissions about the Public Trustee's mandate being to represent minors, and it was presented essentially as a general duty; and again -- and a comment was sort of made about if we've identified issues, how can we abandon the minors? And I don't mean to be insensitive on this point, My Lord, but Section 6 gives us exactly that mandate, that -- exactly that discretion. It's crystal clear that the Public Trustee has a discretion to refuse to act unless they've got a statutory obligation to do so.

It's actually -- I can only provide the Court with my assurance of this. It's actually fairly extraordinary that the Public Trustee came forward to act on any terms in this particular case.

THE COURT: Well, I certainly acknowledge that since in one of those cases, I tried to offload the problem back onto the Public Trustee and they just sent it right back to me and said, We are not doing it, so --

MS. HUTCHISON: It's an --

THE COURT: -- you know.

MS. HUTCHISON: It's an extraordinary provision.

THE COURT: Yes.

MS. HUTCHISON: There's no doubt.

THE COURT: They were very polite about it.

MS. HUTCHISON: I have no doubt that they were.

THE COURT: I think it is the C.L. whatever, I forgot.

MS. HUTCHISON: No.

THE COURT: I cannot remember which one of the alphabet soup pieces of litigation it was.

MS. HUTCHISON: And, My Lord, I -- on my friend's submission that we had not distinguished the Okanagan cases, I just wanted to be clear, and we did cover this in our submission, but it's our position that if the Court does see a need here for an independent objective litigation representative and you're satisfied that, at least at this point in time, the Public Trustee is your only option, it's really a question of whether, given consideration for Section 6, that rather extraordinary provision and the Court's parens patriae jurisdiction, is that enough to make Okanagan a case that's not determinative in this case? Is it enough to effectively trump Okanagan to some degree in this case?

My friend is correct, I found no precedent where that precise issue has been put before the Court. I think it's quite a unique set of facts and quite a unique situation, and we've referred the Court to case law just on a general jurisdiction on parens patriae and the principles surrounding that jurisdiction and responsibility.

As I understood some of Mr. Poretti's comments, he really seemed to be -- if I understood him correctly, he's saying that the Sawridge trustees have no ability to deal with membership issues, and so that means effectively that the Court cannot look at all at this question of membership or how the membership process functions. And, My Lord, if we were dealing with a valid trust and a valid trust definition and there was no variant of that definition being sought in the main application, I would tend to lean towards agreeing

with Mr. Porreti's characterization of where the Court might be left; but that's not our situation.

This party will be coming to you on the main application asking for you to endorse a proposed new definition, and to suggest that the Court cannot examine how that new definition will function in reality and in practice and, in particular, cannot examine whether or not the new definition makes it difficult or almost impossible for the Sawridge trustees to meet their obligation to identify the class of beneficiaries, I would suggest is not a valid position and not a sustainable one, My Lord. It's -- if the Court is going to be asked to endorse the definition, it has to be allowed to examine how it will operate in reality. And I won't take you to them, I'll just give you the references, but there are a few comments on those points on paragraph 40 and 41 of our reply brief as well as paragraph 50.

In part of those submi -- part of my friend's submissions, as I recall them, were to ask -- or to suggest that we're trying to evaluate whether or not the membership process is functional, and I believe I heard him say that the amount of time that a membership application has been outstanding is irrelevant to whether the process is functional; and I would tend to disagree, My Lord. Because of the membership applications being outstanding for 20 years, I suggest to the Court that it's indicative of a dysfunctional or non-functioning membership process.

But more to the point, my friend appeared to be saying to the Court that as long as an individual can go to the Courts to get their remedy on membership, the membership process is functional. I would suggest to the Court that if you're being asked to implement a definition in this trust instrument that essentially leaves all new beneficiaries with their only option being to litigate to establish whether or not they're beneficiaries, I would suggest to the Court that is the epitome of a dysfunctional definition and a dysfunctional process.

We're not trying to in any way suggest that a membership process can't deny a membership application. You won't hear that submission from us if we're involved in this matter at a later point, My Lord, but to suggest that it's irrelevant to the functionality of the definition that you're being asked to endorse to examine whether or not there's even a process that's operating to determine membership, I would suggest is not a fair characterization of the job that this Court is being asked to take on when it decides on the variance of the definition.

My Lord, a very brief comment. Mr. Molstad suggested that you have no evidence before you on the membership process, and I believe what he was referring to is that our brief refers to quite a few previous Court decisions. It's not correct, however, that there's no

evidence before you in this application, and I'd just refer you to the affidavit of Aline Huzar, paragraph 13 and essentially the entire affidavit of Elizabeth Poitras (phonetic). Does not provide the detail on numbers, but it certainly -- both of those affidavits refer to the concept that it does not appear that membership applications are being dealt with.

And, My Lord, I think we covered our comments on relevance adequately in our first round of submissions; so subject to the Court's questions, those are our submissions.

THE COURT: Okay. Thank you. I do not have any questions.

MS. HUTCHISON: Thank you.

THE COURT: All right.

Submissions by Mr. Kindrake

MR. KINDRAKE: My Lord --

THE COURT: Oh.

MR. KINDRAKE: -- with your indulgence, might I address --

THE COURT: Certainly.

MR. KINDRAKE: -- a couple matters?

The reason I am doing this, we didn't file any proceedings and I -- it was on the basis of what we saw, but I feel like I want to set the record straight on a couple of things so they're not viewed as agreeing by silence, and it's something Mr. Molstad said. He gave an overview of the Sawridge litigation, and he said a few things there that I don't accept.

I was actually the counsel that got the injunction from Justice Hugessen, but -- so I'm familiar with it, but I didn't bring all this material; but I can just say this: He indicated that Bill C-31 was some sort of government recognition insofar as it dealt with membership of residual sovereignty. That's an American concept, and I'm not aware of any view of Canada following that. We've always viewed Aboriginal rights as unextinguished (sic) and under our *Charter*. We don't -- we've -- I'm not aware of any -- and there's nothing in his brief to show that there's some sort of concept of residual sovereignty that would shield their membership.

Second, Mr. Molstad said there was no decision on the merits. That's a characterization. I disagree. We went through a trial. There was evidence. A lot of it was struck, but we can argue about that; but there is another case, *Potskin* where Justice Hugessen wouldn't let this issue go. He said, It's moot. It's been decided in Sawridge. That went recently to the Federal Court of Appeal which dismissed the appeal of the Sawridge Band. This is the *Potskin* case, and I can supply Your Lordship or counsel with it if you need. So from the Crown's point of view, Sawridge was a decision on the merits; and the right to control membership as some sort of residual sovereignty argument is not the Crown's position.

And lastly, I think he mentioned that the onerous conditions referred to in Hugessen's order, I would just confirm that there was a copy of the application form for membership before Justice Hugessen, and I -- as I recall, and again, My Lord, I wasn't prepared for this, none of this appears in his material, that was what Justice Hugessen was referring to once he read it. And Ms. Hutchison probably has a copy.

MS. HUTCHISON: It's -- My Lord, it's attached to -- or the current version is attached to the affidavit of Elizabeth Poitras.

THE COURT: Poitras.

MR. KINDRAKE: And that's what Justice Hugessen was looking at, and Your -

THE COURT: Mm-hm.

MR. KINDRAKE: -- Lordship can look at it as well and come to your conclusion of whether it's onerous or not. That's -- those are the only things I wanted to correct.

As for the application itself, we don't take any sides in it. I just wanted to clarify the record.

MR. MOLSTAD: Can I respond to that, My Lord?

THE COURT CLERK: First, sorry, could I have your name, sir?

MR. KINDRAKE: Oh, it's Jim Kindrake, K-I-N-D-R-A-K-E.

THE COURT CLERK: Thank you.

THE COURT: Just so you are -- unlike Mr. Molstad, you do not see yourself as a party of any -- the Government of Canada, the Crown Right of Canada, is it not --

MR. KINDRAKE: No, I do not.

THE COURT: Yes. Yes.

MR. KINDRAKE: Our view is these are not Indian monies. These are the band's monies. The trust is out there in --

THE COURT: Mm-hm.

MR. KINDRAKE: -- the public domain, and it's dealt with according to those principles.

THE COURT: Yes. Okay. Now, you seem to have stepped on one of Mr. --

MR. MOLSTAD: Yes.

THE COURT: -- Molstad's toes, I think.

Further Submissions by Mr. Molstad

MR. MOLSTAD: Just a couple. I just wanted to make it clear that we can agree to disagree in terms of whether there was a decision on the merits.

MR. KINDRAKE: Okay.

MR. MOLSTAD: Our position is that all the evidence was struck. There was no decision on the merits, so that is an issue that we will not agree on.

Secondly, we've never suggested that the application was not part of the record. What we suggested was that the Court ought to have not been making comments about that application without any evidence in relation to the culture, the history, and the natural laws in relation to this First Nation and that those comments were clearly obiter and they should be given the weight they deserve, which is none. That's our submission.

THE COURT: Okay.

Further Submissions by Ms. Bonora

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

THE COURT: Sure.

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

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

MR. KINDRAKE: It was around 2004 --

MS. HUTCHISON: Four --

THE COURT: -- My Lord.

THE COURT: Okay. So --

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

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

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

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

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

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

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

Thank you so much for your indulgence in --

THE COURT: Okay.

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

Further Submissions by Ms. Hutchison

MS. HUTCHISON: My Lord, I --

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.

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

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

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

So I just thought I would --

THE COURT: Mm-hm.

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

THE COURT: Thanks.

MR. PORETTI: -- Sir. Thank you.

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

MR. PORETTI: Thank you, Sir.

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

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

MR. MOLSTAD: It'll probably rain --

THE COURT: (INDISCERNIBLE)

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

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

MS. HUTCHISON: Thank you.

MR. MOLSTAD: Thank you, Sir.

MS. BONORA: Thank you, Sir.

PROCEEDINGS CONCLUDED

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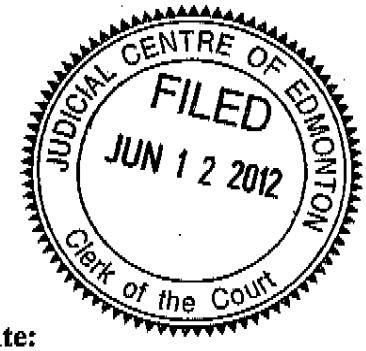

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365

Date:
Docket: 1103 14112
Registry: Edmonton

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

Reasons for Judgment of the Honourable Mr. Justice D.R.G. Thomas

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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.

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[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.

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[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 seeks 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.

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[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

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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

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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

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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 membership 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 independent 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

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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).

[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.

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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.

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[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 crystalized. 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***

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(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.

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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.

Heard on the 5th day of April, 2012.
Dated at the City of Edmonton, Alberta this 12th day of June, 2012.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Ms. Janet L. Hutchison
(Chamberlain Hutchison)
for the Public Trustee / Applicants

Ms. Doris Bonora,
Mr. Marco S. Poretti
(Reynolds, Mirth, Richards & Farmer LLP)
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge Band / Respondents

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Clerk's Stamp:

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

Date on which Judgment Pronounced: June 12, 2012

Location of hearing or trial: Edmonton, Alberta

Name of Justice who made this Order: Justice D.R.G. Thomas

UPON the application of the Public Trustee; AND UPON review of the Affidavits filed in this proceeding; AND UPON review of the filed written submissions; AND UPON hearing the submissions of Counsel for the Public Trustee, Counsel for the Sawridge Trustees and Counsel for the Sawridge First Nation; IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

1. The Public Trustee is appointed litigation representative for the 31 minors who are children of current Sawridge First Nation members as well as any minors who are children of applicants seeking to be admitted into membership of the Sawridge First Nation.

2. The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.

3. The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceeding.

4. The Public Trustee may inquire, on questioning on affidavits, into the process the Sawridge Band uses to determine membership, the Sawridge Band membership definition and into the status and number of Band membership applications that are currently awaiting determination.

5. The Public Trustee is granted costs of this application to be calculated on a solicitor and its own client basis, to be paid by the Sawridge Trust.

6. This Order may be consented to in counterpart and by way of facsimile signature.

Mr. Justice D. R. G. Thomas

CONSENTED TO AS TO FORM AND CONTENT:

REYNOLDS MIRTH RICHARDS & FARMER LLP
Per:

Marco S. Poretti
Solicitors for the Trustees

CHAMBERLAIN HUTCHISON
Per:

Janet Hutchison
Solicitors for the Office of the Public Trustee of Alberta

PARLEE McLAWS LLP
Per:

Edward H. Molstad, Q.C.
Counsel for Sawridge First Nation

MYLES J. KIRVAN - DEPUTY ATTORNEY GENERAL OF CANADA
Per:

E. James Kindrake
Solicitors for the Minister of Indian Affairs and Northern Development

DAVIS LLP
Per:

Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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Mr. Justice D. R. G. Thomas

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Per:

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DAVIS LLP
Per:

_____
Priscilla Kennedy
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

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FORM N

Appeal Number: 1203-0230 AC

Q.B. Number: 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

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

APPELLANTS
(Respondents)

-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)

CIVIL NOTICE OF APPEAL

1. **APPEAL FROM**: Order

PORTION BEING APPEALED (R. 511): Paragraphs 2, 3 and 5.

DESCRIPTION OF THE ISSUES:

The appeal involves a decision of Justice Thomas to award full, and advance, indemnification of costs to the Public Trustee of Alberta to be paid out of the 1985 Sawridge Trust. In making the award, Justice Thomas concluded that the strict criteria for an award of advance costs as set out by the Supreme Court of Canada is not applicable in these proceedings. The Public Trustee was also exempted from liability to pay costs of other parties, and without argument and without reasons the Chambers Judge awarded the Public Trustee solicitor and client costs of the application.

The issues to be addressed are:

(a) Did the Chambers Judge err in awarding full, and advance, indemnification for its costs on a solicitor and its own client basis to the Public Trustee of Alberta ("Public Trustee")?
(b) Did the Chambers Judge err in exempting the Public Trustee of any responsibility to pay costs of the other parties in the proceeding?
(c) Did the Chambers Judge err in granting the Public Trustee costs of the application on a solicitor and its own client basis?
(d) Did the Chambers Judge err in concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings?
(e) Did the Chambers Judge err in considering facts not properly before him in evidence?
(f) Did the Chambers Judge err in concluding that the property of the 1985 Sawridge Trust is the equivalent of the assets under control of the Court in an insolvency?
(g) Did the Chambers Judge err in awarding advance costs without any restriction or guidelines with respect to the amount of costs or the reasonableness of the same?

WHERE ORDER ORIGINATED:

The Order originated in the Court of Queen's Bench:

File Number: 1103 14112

Location: Edmonton

Justice: The Honourable Justice D.R.G. Thomas

2. **PARTICULARS OF ORDER APPEALED FROM:**

Date Pronounced:	June 12, 2012
Date Entered:	September 20, 2012
Date Served:	September 24, 2012
Attach Copy:	Attached

3. **IF THE ORDER ORIGINATED IN THE COURT OF QUEEN'S BENCH, INDICATE THE TYPE OF ORDER THAT IS UNDER APPEAL:**

Interim order made in chambers, appointing Public Trustee as litigation representative and awarding Public Trustee with full, and advance, indemnification for its costs on a solicitor and its own client basis, exempting the Public Trustee with any responsibility to pay costs of the other parties in the proceeding and granting the Public Trustee costs of the application on a solicitor and its own client basis.

4. **(a) IS THIS APPEAL ABOUT PROCEDURE OR CUSTODY OR ACCESS ONLY UNDER PART J. OF THE CONSOLIDATED PRACTICE DIRECTIONS?**

Yes.

(b) IS THIS A FAMILY LAW APPEAL?

No.

5. **HAS THIS FILE BEEN UNDER CASE MANAGEMENT IN THE COURT OF QUEEN'S BENCH?**

No formal case management Order has been issued however Justice Thomas has given a number of Procedural Orders to assist with determining the main issues in the action.

6. **IS THIS CASE RELATED TO ANY CASE PRESENTLY BEFORE OR ABOUT TO BE FILED IN THIS COURT?**

No.

7. **IS THE CONSTITUTIONAL VALIDITY OF AN ACT OR REGULATION BEING CHALLENGED AS A RESULT OF THIS APPEAL?**

No.

8. **HAS MEDIATION BEEN ATTEMPTED IN THE TRIAL COURT?**

No.

9. **ARE YOU WILLING TO PARTICIPATE IN JUDICIAL DISPUTE RESOLUTION WITH A VIEW TO SETTLEMENT OR CRYSTALLIZING OF ISSUES?**

Yes.

10. **WOULD CASE MANAGEMENT BE BENEFICIAL?**

To the extent we already have limited case management it is beneficial and we wish to continue.

11. **COULD THIS MATTER BE DECIDED WITHOUT ORAL ARGUMENT?**

No.

12. **SHOULD THE APPEAL BE EXPEDITED?**

No.

13. **IS THERE A STATUTORY BAN, BAN ON PUBLICATION OR AN ORDER OF THE COURT WHICH AFFECTS THE PRIVACY STATUS OF THIS FILE?**

No.

14. **APPELLANT'S ESTIMATED TIME OF ARGUMENT:**

45 minutes

15. **LIST RESPONDENT(S) OR COUNSEL FOR THE RESPONDENT(S):**

Ms. Janet L. Hutchison
Chamberlain Hutchison
Suite 155, Glenora Gates
10403 – 122 Street
Edmonton, Alberta T5N 4C1
Telephone: (780) 423-3661
Fax: (780) 426-1293
Solicitors for the Office of the
Public Trustee of Alberta

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LIST INTERESTED PARTIES OR COUNSEL FOR THE INTERESTED PARTIES:

Mr. Edward H. Molstad, Q.C.
Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta T5J 4K1
Telephone: (780) 423-8506
Fax: (780) 423-2870
Counsel for Sawridge First Nation

Mr. E. James Kindrake
Department of Justice Canada
Prairie Region
EPCOR Tower
300, 10423 – 101st Street
Edmonton, Alberta T5H 0E7
Telephone: (780) 495-6427
Fax: (780) 495-6427
Solicitors for the Minister of Indian Affairs and Northern Development

Ms. Priscilla Kennedy
Davis LLP
1201 Scotia Tower
10060 Jasper Avenue
Edmonton, AB T5J 4E5
Telephone: (780) 429-6830
Fax: (780) 702-4383
Solicitors for Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney

NOTE: The address set out in section 15 will be considered the Respondent's address for service until such time as the Respondent files documentation specifying otherwise.

All parties listed in section 15 must be served with a filed copy of the Notice of Appeal within the prescribed appeal period. (*Rule* 510(1)).

Signed by Appellants' counsel on October 10, 2012.

REYNOLDS MIRTH RICHARDS & FARMER LLP

Per: 

MARCO S. PORETTI
Solicitors for the Appellants

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Form S

CERTIFICATE OF PREPARER

I certify to the Registrar of the Court of Appeal of Alberta that

(a) I prepared the foregoing appeal record and it contains true copies of all material as set by

(i) Rules 530 to 530.6 of the *Alberta Rules of Court*,

(ii) Part J.6 of the Consolidated Practice Directions, or

(iii) a Justice of the Court of Appeal,

and

(b) the copies of the materials in the Appeal Record are

(i) as taken from the court file,

(ii) as furnished to me by counsel for the parties, or

(iii) as furnished by me.

Dated 25 October, 2012.

A Magnan

Catherine A. Magnan
Legal Assistant to Marco S. Poretti

Reynolds Mirth Richards Farmer, LLP
Barristers & Solicitors
3200, 10180 101 Street
Edmonton, AB T5J 3W8

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Form N

CLERK'S CERTIFICATE

I certify to the Registrar of the Court of Appeal of Alberta that

(a) the foregoing appeal record contains true copies of all material as set by

(i) Rules 530 to 530.6 of the Alberta Rules of Court, or

(ii) a Justice of the Court of Appeal,

and

(b) the copies of the materials in the appeal record are

(i) as taken from the court file,

(ii) as furnished to me by counsel for the parties, or

(iii) as furnished to me by the appellant.

EXCLUDING PAGES F1 - F69

Dated 25 October, 2012.

Clerk of the Court of Queen's Bench of Alberta

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Form O

LAWYER'S CERTIFICATE

I certify to the Court that:

1. I am a Barrister and Solicitor on the active roll of The Law Society of Alberta;

2. I have personally checked the contents of this Appeal Digest and found them to be complete;

3. There are no recorded reasons for the decision appealed from, except for those stated in this Appeal Digest.

Name of Lawyers: Marco S. Poretti
Doris Bonora

Address: Reynolds Mirth Richards Farmer, LLP
Barristers & Solicitors
3200, 10180 101 Street
Edmonton, AB T5J 3W8

Dated 25 October, 2012.

Marco S. Poretti

Dated 25 October, 2012.

Doris Bonora