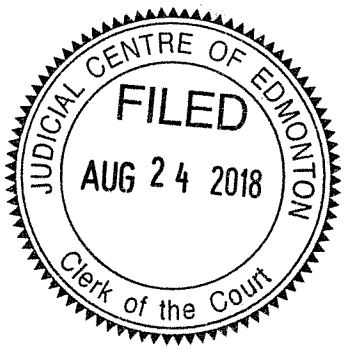
Clerk's stamp:



COURT FILE NUMBER	1103 14112
COURT	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, 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 SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust;
DOCUMENT	**BRIEF OF THE SAWRIDGE TRUSTEES** **APPLICATION RETURNABLE SEPTEMBER 25, 2018**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8H 2A3

Attention: Janet L. Hutchison

Counsel for the Office of the Public Guardian and Trustee

McLennon Ross LLP
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Attention: Karen Platten, Q.C.
Attention: Crista Osualdini

Counsel for Catherine Twinn

TABLE OF CONTENTS

1. The Sawridge Trustees propose to address three issues at this scheduled case management hearing:

   (a) Request that the Case Management Justice grant an order to protect lawyer-client privilege of the 1985 Sawridge Trust in respect of certain matters;

   (b) Request that the Case Management Justice grant a directed issue hearing on the issue of the beneficiary definition; and

   (c) Request that direction be provided in respect of a litigation plan, including any steps for non-party beneficiary participation.

A. Privilege Order

2. Pursuant to Rule 4.14,[1] a case management Justice has the ability to make orders that facilitate the fair and efficient resolution of the proceedings, including any procedural order the Justice considers necessary. Such orders may relate to evidence. Rule 1.4 also provides broad powers to the Court to grant orders that advance the objective of seeing claims fairly and justly resolved in or by a court process in a timely and cost-effective way.[2]

3. The Sawridge Trustees request that such an order be granted with respect to certain documents at issue that are the subject of lawyer-client privilege. Catherine Twinn proposes to file an Affidavit of Records that contains a number of documents, the contents of which would be covered by lawyer-client privilege.

4. A number of these documents were previously filed in conjunction with the "Code of Conduct" proceedings and in court file number 1403 04885 ("1403 Action"). At the same time that they were filed in connection with the 1403 Action, they were simultaneously filed in these proceedings in relation to the specific indemnity action brought by Ms. Twinn. Questionings were held in which those documents were discussed. Further answers to undertakings and interrogatories may also contain references to such matters. The lawyer-client privileged documents were relevant to the 1403 Action and the Code of Conduct proceedings.

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[1] Rule 4.14(1)(c),(d),(f) and (g), Tab A

[2] Rule 1.4, Tab A

5. The Sawridge Trustees wish to protect the 1985 Trust from any argument by any person, including persons who are not parties to these proceedings, that privilege has been broadly waived over any or all subject matter raised by those documents.

6. At the same time, the Sawridge Trustees are committed to moving this proceeding forward expeditiously. As a result, they are proposing the declaratory order attached as Schedule "D" to the Application and attached hereto at Tab B[3], which they believe is a compromise that will permit the matter to move forward in a cost-effective and timely manner, while at the same time affording protection to the 1985 Trust.

7. The Sawridge Trustees believe that the proposed order represents a practical compromise. The effect the Sawridge Trustees believe will be achieved by the order is as follows:

- There will be a declaration that any waiver of privilege is limited to the documents that have been filed to date, and to the transcripts of the questionings on them and any documents produced as a result of those questionings. There is no broader subject-matter waiver such that any person can demand further production from the Sawridge Trustees of lawyer-client privileged material.
- The parties to the proceedings can refer to any of the documents filed to date, and the transcripts of any questioning. It is just that any waiver of privilege is expressly limited to those particular documents.
- The order contains a provision clarifying that it does not affect the ability of any beneficiary to ask to see a trust document, if they have the right to do so at law. Beneficiaries of a trust do have a right to see certain trust documents, and that may include the right to see some documents that would be covered by lawyer-client privilege as against the rest of the world. This arises from his or her status as a beneficiary, and is entirely independent of the issue of waiver of privilege.
- There is also a provision that addresses what would occur if a party who is a beneficiary, and who has a right to see an otherwise privileged document because it is a trust document that they are entitled at law to see, then wishes to rely on such a document in this litigation. To protect the 1985 Trust from the issues of waiver of privilege as against the rest of the world that may arise if that document is filed with the Court, the provision provides that the parties may agree on a protocol for dealing with such a document, or if no such agreement can be reached, this Court may

[3] See Proposed Privilege Order attached as Schedule D to the Application filed August 10, 2018, Tab B

provide further direction (such as admitting the document but sealing it from the public court file).

8. The Sawridge Trustees believe this order strikes a fair balance between efficiency and protection for the 1985 Trust. The Sawridge Trustees also believe that it provides a fair mechanism and recognition for the parallel issue of the potential right of beneficiaries to see trust documents to which privilege would otherwise attach. That right is separate and apart from waiver. Put differently, a stranger to the 1985 Trust would only have a right to see a privileged document if there has been a waiver of privilege over that document. A beneficiary may have another, special right to see such a document because it can be considered a relevant trust document. This is a separate rationale, which has nothing to do with a general waiver of privilege. It is the general waiver and access to yet unproduced documents that this order is intended to address. Any rights of beneficiaries would continue. It is only the doctrine of waiver of further lawyer-client privilege over additional documents and information that is intended to be limited by this order.

9. It is the usual situation in litigation that parties do not have access to the contents of privileged documents. The Sawridge Trustees do not believe that there is any prejudice that can be argued to arise by limiting the waiver. Catherine Twinn has conducted her questioning of the Sawridge Trustees, and the Sawridge Trustees likewise do not intend to hold any further questioning of Ms. Twinn. Ms. Twinn has sworn her proposed Affidavit of Records, and thus has sworn under oath that all relevant records are produced. She had been a Trustee until recently.

10. The role of the OPGT in this litigation is limited to representing the interests of specified minors in respect of issues respecting the definition in the trust deed. What legal advice may have been received by the Sawridge Trustees in respect of these matters is not relevant to advancing that retainer, as indeed the role of counsel for the OPGT is to provide legal advice for them about the issues raised in these proceedings. There is no prejudice to them in not being able to fully explore what advice may have been given to the Sawridge Trustees in respect of those issues, and certainly not any prejudice in not being able to demand further privileged communications about this or other subjects.

11. The alternative to this approach is a lengthy application on the issue of privilege, involving the appointment of a referee to review and redact documents; redoing the

questionings that have been done to date; and redoing the written interrogatories and seeking new undertakings. This process is not efficient, and would come at substantial cost of legal expense and time, which is not in the best interests of the 1985 Trust or its beneficiaries. We must remember that the beneficiaries have not received funds from this trust and cannot receive funds until the definition is settled.

12. The proposed order was first proposed to the parties in late June, but to date no agreement has been reached on such an order.[4]

B. Directed Issue Hearing

13. Rule 7.1 of the *Alberta Rules of Court*[5] permits the Court to order a question or issue to be heard or tried before the next stage of a trial where it will:[6]

    (a) Dispose of all or part of a claim;

    (b) Substantially shorten a trial; or

    (c) Save expense.

14. For an order to issue under this Rule, a split trial must be likely to achieve those aims.[7]

15. There are two issues that must be determined regarding the definition. The first is whether the Court has jurisdiction to make a change pursuant to common law principles, or whether the only jurisdiction to make a change would be pursuant to s. 42 of the *Trustee Act*. If it is determined that the Court has jurisdiction to make a change, then the next issue is whether the Court will exercise that jurisdiction in this case, and if so, what the new definition will be.

16. The Sawridge Trustees submit that the question of whether the Court has jurisdiction to make a change to the definition is a threshold issue that can be determined by the case management Justice pursuant to the powers in Rule 4.14.[8] That would be an issue of law, upon which parties can make submissions. Once the issue of what jurisdiction may

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[4] See Proposed Privilege Order, Tab B

[5] Reg 124/2010

[6] Rule 7.1(1)(a), Tab A

[7] *Gallant v. Farries*, 2012 ABCA 98 at para 25, Tab C

[8] Rule 4.14(1)(a),(d) and (g), Tab A

be exercised is determined, the Sawridge Trustees propose that the question of what changes, if any, will be made to the definition be the subject of a Directed Issue Hearing to be heard by the trier of fact.

17. The Sawridge Trustees submit that this proposed Directed Issue Hearing is certain to achieve the first aim of Rule 7.1. Regardless of what is decided at the Directed Issue Hearing regarding the definition, it will dispose of the important question of whether the court has certain jurisdiction regarding the definition, and what will result.

18. The Directed Issue Hearing is also substantially likely to achieve the other two aims. If the Court holds that no change can be made to the definition, there will be no need for a further hearing on the question of grandfathering. That will substantially shorten the trial and save expense. In contrast, if the trial is not split and the question of the definition is heard at the same time as the question of grandfathering, the parties may prepare and present several days of evidence with multiple witnesses and experts regarding grandfathering that would be rendered moot by the decision regarding definition. Given this, it is clear that there is a substantial prospect for costs savings.

19. Even if the Court does find that it can make changes to the definition at the directed issue hearing, there is likely to be expense saved and shortening of a trial, as the parties will know the manner in which the definition will be changed, and therefore what potential rights may be affected, which will better allow them to focus the evidence for a trial on grandfathering.

20. It may even be the case that no grandfathering would be required at all, even if there is a change in the definition. For example, the OPGT suggested a potential definition in the letter of its counsel dated July 27, 2018. The Trustees interpret this proposed definition as suggesting that the current definition of beneficiary, which has been found to be discriminatory on the January 19, 2018 Order of this Court, would continue to operate unchanged with some new wording added to include current members.[9]

21. The proposed Directed Issue Hearing is a question of law. Little, if any, evidence will be required. There will not be an overlap of evidence between the Directed Issue Hearing and the remainder of the trial.[10] Further, because it is a question of law, it is clear that

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[9] See Letter from Janet Hutchison dated July 27, 2018 at page 5, Tab D

[10] *Gallant* at para 54, Tab C

the hearing of that issue will be much shorter than a trial regarding grandfathering, which will be a question of fact and law and is likely to involve viva voce evidence.[11]

22. Rule 7.1 also permits the Court to define the question, or in the case of a question of law, approve or modify the issue agreed by the parties.[12] As the proposed Directed Issue Hearing is a question of law, the Sawridge Trustees seek approval of the issues proposed.

23. We request that the case management Justice decide the issue of jurisdiction, including the issues regarding s. 42 of the *Trustee Act*. Only the actual changes to the definition will be determined by the ultimate trier of fact.

C. Litigation Plan and Non-Party Beneficiary Participation

24. In these issues, the Sawridge Trustees recognize that the many beneficiaries, or potential beneficiaries, who are not parties have interests that may be affected. As such, the Sawridge Trustees seek direction from the Court regarding the manner in which such non-party beneficiaries might participate in the next steps in these proceedings. In *Sawridge #5*, the Court held that potential beneficiaries may have some participation. The Sawridge Trustees propose that this be incorporated into such litigation plan as may be established at this Case Management Conference.

25. The Sawridge Trustees submitted at the Case Management Conference held on January 19, and their submission remains, that participation in writing only by any person who is a beneficiary and/or potential beneficiary will be the most effective and efficient method of participation in the Trust litigation.

26. The Sawridge Trustees propose that the participation be limited to one submission per individual at each stage of the hearing of issues and that this be incorporated into the Litigation Plan. If this Court agrees to the Directed Issue Hearing, one submission could be made at that time, and one at the time of any subsequent hearing in respect of grandfathering.

27. Given the number of individuals who would have the right to participate in such a manner if they so choose, the Sawridge Trustees believe that such a direction would be

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[11] *Gallant* at para 48, Tab C

[12] Rule 7.1(1)(b), Tab A

consistent with the objectives of Rule 1.2 and 1.4,[13] in achieving a balance between fair participation and ensuring this matter proceeds in a timely and cost-effective manner.

28. Given the number of potential non-party participants, the Sawridge Trustees submit that a page limit of **5 pages per written submission** (including attachments) would be appropriate. The Sawridge Trustees would further suggest a direction that such submissions are not to be duplicative of arguments already made. Any duplication could be subject to costs awards.

29. The Sawridge Trustees submit that, for the Directed Issue Hearing, evidence from non-parties would not be required, as it is a question of law. However, if this Court disagrees, the Sawridge Trustees propose that any beneficiary or potential beneficiary who wishes to file an affidavit can only do so to raise evidence that is unique and distinct from evidence that has already been filed by the parties. If a beneficiary or potential beneficiary filed duplicative evidence, the issue of the duplicative nature of the evidence will be addressed in a costs application and there may be costs consequences for duplication of submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29 OF AUGUST, 2018.

DENTONS CANADA LLP

PER: _____

DORIS BONORA
Solicitors for the Sawridge Trustees

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[13] Rules 1.2, 1.4, Tab A

LIST OF AUTHORITIES

TAB A	Excerpts from *Alberta Rules of Court*, Alta Reg 128/10
TAB B	Proposed Privilege Order attached as Schedule D to the Application filed August 10, 2018
TAB C	*Gallant v. Farries*, 2012 ABCA 98
TAB D	Letter from Janet Hutchison dated July 27, 2018

Tab A

TAB A

Excerpts from *Alberta Rules of Court*, Alta Reg 128/10

Purpose and intention of these rules

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

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

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

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

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

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

Procedural orders

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

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

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3) A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

Authority of case management judge

4.14(1) A case management judge, or if the circumstances require, any other judge, may

(a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,

(b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,

(c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,

(d) make an order to promote the fair and efficient resolution of the action by trial,

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial,

(f) make any procedural order that the judge considers necessary, or

(g) as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to

(i) the admissibility of evidence,

(ii) expert witnesses,

(iii) admissions, and

(iv) adverse inferences.

(2) Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed.

(3) A decision that results from the exercise of the power referred to in subrule (1)(g) is binding on the parties for the remainder of the trial, even if the judge who hears the evidence on the merits is not the same as the case management judge, unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

AR 124/2010 s4.14;85/2016

Application to resolve particular questions or issues

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense,

(b) in the order or in a subsequent order

(i) define the question or issue, or

(ii) in the case of a question of law, approve or modify the issue agreed by the parties,

(c) stay any other application or proceeding until the question or issue has been decided, or

(d) direct that different questions of fact in an action be tried by different modes.

(2) If the question is a question of law, the parties may agree

(a) on the question of law for the Court to decide,

(b) on the remedy resulting from the Court's opinion on the question of law, or

(c) on the facts or that the facts are not in issue.

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may

(a) strike out a claim or order a commencement document or pleading to be amended,

(b) give judgment on all or part of a claim and make any order it considers necessary,

(c) make a determination on a question of law, or

(d) make a finding of fact.

(4) Part 5, Division 2 applies to an application under this rule unless the parties otherwise agree or the Court otherwise orders.

Tab B

Schedule "D" – Proposed Privilege Order

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	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, 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 SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	**ORDER (PRIVILEGE)**
DATE ORDER PRONOUNCED LOCATION WHERE ORDER PRONOUNCED	**Edmonton, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER	**Honourable Justice D.R.G. Thomas**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

AND WHEREAS certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees, The Office of the Public Trustee and Guardian of Alberta ("**OPGT**") and Catherine Twinn agree that there is no intention to waive solicitor-client privilege over the subject matter of the communications contained in the Filed Documents and the 1403 Filed Documents;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. Any waiver of solicitor-client privilege that may be implied from the contents of the Filed Documents, and/or the 1403 Filed Documents, is expressly limited to the contents of those documents.

2. No response in a questioning, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, and/or the 1403 Filed Documents (collectively "Questioning Responses"), can be construed as a general waiver of solicitor-client privilege over the subject matter of any communications contained therein.

3. The Sawridge Trustees are expressly declared not to have waived solicitor-client privilege over the subject matter of any matters discussed in the Filed Documents, the 1403 Filed Documents, and/or the Questioning Responses. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or any Questioning Responses given in these proceedings, can be used to compel the Sawridge Trustees to produce further documents or answer questions in respect of legal advice received by the Sawridge Trustees.

4. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or the Questioning Responses, can be used to compel the Sawridge Trustees to produce

further documents or answer questions in respect of legal advice received by the Sawridge Trustees.

5. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request as a beneficiary of the 1985 Trust.

6. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to use any other document or record in this Application, other than those covered by this Order (being the Filed Documents, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.

The Honourable Justice D. R. G. Thomas

Tab C

paras. 25, 48, 54

2012 ABCA 98
Alberta Court of Appeal

Gallant (Litigation guardian of) v. Farries

2012 CarswellAlta 539, 2012 ABCA 98, [2012] A.W.L.D. 2135, [2012] A.J. No. 357, 20 C.P.C. (7th) 86, 348 D.L.R. (4th) 134, 522 A.R. 13, 544 W.A.C. 13, 60 Alta. L.R. (5th) 374

Shawn Gregory Gallant by his Guardians Sharon Gallant and Paul Gallant, Sharon Gallant and Paul Gallant, Respondents (Plaintiffs) and Dr. Alayne M. Farries, Appellant (Defendant)

Jean Côté, Elizabeth McFadyen, Peter Martin JJ.A.

Heard: March 5, 2012
Judgment: April 5, 2012
Docket: Calgary Appeal 1101-0294-AC

Counsel: B.E. Devlin, Q.C., for Respondents / Plaintiffs
A.L. Friend, Q.C., L.A. Goldbach, for Appellant / Defendant

Subject: Torts; Civil Practice and Procedure; Public

Related Abridgment Classifications

Torts
XVI Negligence
XVI.14 Practice and procedure
XVI.14.f Trials
XVI.14.f.vi Miscellaneous

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Headnote

Torts --- Negligence — Practice and procedure — Trials — Miscellaneous

Bifurcating trial — Into liability and damages stages — Plaintiffs brought action for damages for negligent medical malpractice — At time plaintiffs filed certificate of readiness for trial, plaintiffs had not provided list of witnesses as to damages — It was likely that certain witnesses on damages would come from Prince Edward Island to Alberta for trial — Plaintiffs objected to examination of plaintiff SG as to plaintiffs' financial circumstances or means of funding litigation — Plaintiffs brought motion for order bifurcating trial into liability and damages stages — Motion was granted, motions judge holding that plaintiffs were of modest means in comparison to defendant — Appeal allowed — As no evidence was adduced as to either plaintiffs' or defendant's financial situation, it was error of law for trial judge to find plaintiffs impecunious, and certainly to make relative determination of parties' financial situation, which was irrelevant in any event — Rule 1.2 of new Alberta Rules of Court did not effect "sea change" in manner with which bifurcated trials are to be considered — While read mechanistically, R. 7.1 of new Rules provided no purposes for bifurcation: "read in the modern purposive fashion, it means that a trial split must be one likely to achieve those aims which R 7.1 lists, not to thwart them" — Ultimate consideration, expressed in jurisprudence from prior to enactment of new Rules and still valid, was whether bifurcation would actually save time and money — In present case no evidence was present as to whether bifurcation would meet that objective, and scenarios existed in which exact opposite result would occur — Appeal was accordingly properly allowed and matter ordered to proceed to one trial.

Table of Authorities

Cases considered by *Jean Côté J.A.*:

Brick Protection Corp. v. Alberta (Provincial Treasurer) (2011), 2011 CarswellAlta 1256, 47 Alta. L.R. (5th) 211, 99 C.C.L.I. (4th) 23, [2011] 6 C.T.C. 183, 337 D.L.R. (4th) 154, [2011] 11 W.W.R. 268, 2011 ABCA 214, 510 A.R. 336, 527 W.A.C. 336 (Alta. C.A.) — referred to

Canada (Attorney General) v. Mowat (2011), 93 C.C.E.L. (3d) 1, D.T.E. 2011T-708, 337 D.L.R. (4th) 385, 26 Admin. L.R. (5th) 1, 2011 CarswellNat 4190, 2011 CarswellNat 4191, 2011 SCC 53, 422 N.R. 248, (sub nom. *C.H.R.C. v. Canada (A.G.)*) 2011 C.L.L.C. 230-043, (sub nom. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*) [2011] 3 S.C.R. 471 (S.C.C.) — referred to

Canada Mortgage & Housing Corp. v. Canative Housing Corp. (1988), 90 A.R. 303, 1988 CarswellAlta 560 (Alta. Q.B.) — considered

Canadian Cancer Society v. Bank of Montreal (1966), 57 W.W.R. 182, 1966 CarswellAlta 47 (Alta. C.A.) — considered

Cathcart v. Sun Life of Canada (2002), 8 Alta. L.R. (4th) 292, [2003] 2 W.W.R. 186, 2002 ABQB 827, 2002 CarswellAlta 1194, 42 C.C.L.I. (3d) 48 (Alta. Q.B.) — referred to

D. (L.K.) v. B. (J.) (2012), 2012 CarswellAlta 365, 2012 ABCA 72 (Alta. C.A.) — considered

Duffy v. Gillespie (1997), 105 O.A.C. 283, 17 C.P.C. (4th) 91, 36 O.R. (3d) 443, 155 D.L.R. (4th) 461, 1997 CarswellOnt 4939 (Ont. Div. Ct.) — considered

Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills (1986), 16 O.A.C. 69, 9 C.P.C. (2d) 260, 55 O.R. (2d) 56, 1986 CarswellOnt 618 (Ont. C.A.) — considered

Envision Edmonton Opportunities Society v. Edmonton (City) (2011), 2011 CarswellAlta 72, 2011 ABQB 29, 20 Admin. L.R. (5th) 342, 44 Alta. L.R. (5th) 1, 507 A.R. 275, 78 M.P.L.R. (4th) 300 (Alta. Q.B.) — considered

Esso Resources Canada Ltd. v. Stearns Catalytic Ltd. (1991), 1991 CarswellAlta 31, 77 D.L.R. (4th) 557, 79 Alta. L.R. (2d) 1, 114 A.R. 27, 50 C.P.C. (2d) 192 (Alta. C.A.) — considered

Goodman v. Viljoen (2006), 2006 CarswellOnt 5407, 36 C.P.C. (6th) 195 (Ont. S.C.J.) — referred to

Klassen v. Morden Hospital District No. 21 (1987), 1987 CarswellMan 127, 22 C.P.C. (2d) 1, 51 Man. R. (2d) 161 (Man. Q.B.) — referred to

Manson Insulation Products Ltd. v. Crossroads C & I Distributors (2011), 2011 ABQB 51, 2011 CarswellAlta 108 (Alta. Q.B.) — considered

Moseley v. Spray Lakes Sawmills (1980) Ltd. (1994), 33 C.P.C. (3d) 382, 26 Alta. L.R. (3d) 359, 164 A.R. 76, [1995] 4 W.W.R. 367, 1994 CarswellAlta 297 (Alta. Q.B.) — considered

Murphy Oil Co. v. Predator Corp. (2002), 2002 ABQB 629, 2002 CarswellAlta 867, 319 A.R. 328 (Alta. Q.B.) — referred to

O'Brien v. Tyrone Enterprises Ltd. (2012), 2012 CarswellMan 6, 2012 MBCA 3, 341 D.L.R. (4th) 618 (Man. C.A.) — considered

Potash Corp. of Saskatchewan Mining Ltd. v. Allendale Mutual Insurance Co. (1989), 80 Sask. R. 184, 41 C.C.L.I. 11, 1989 CarswellSask 146 (Sask. C.A.) — referred to

Prevost (Committee of) v. Vetter (2002), 210 D.L.R. (4th) 649, 2002 BCCA 202, 2002 CarswellBC 610, (sub nom. *Prevost v. Vetter*) 166 B.C.A.C. 56, (sub nom. *Prevost v. Vetter*) 271 W.A.C. 56, 11 C.C.L.T. (3d) 127, 100 B.C.L.R. (3d) 44 (B.C. C.A.) — referred to

Ratcliffe v. Nakonechny (2003), 2003 ABQB 667, 2003 CarswellAlta 1184, 23 Alta. L.R. (4th) 21, 44 C.P.C. (5th) 325 (Alta. Q.B.) — considered

Tanguay v. Vincent (1999), 1999 CarswellAlta 991, 75 Alta. L.R. (3d) 90, 1999 ABQB 814 (Alta. Q.B.) — considered

Windsor Refrigerator Co. v. Branch Nominees Ltd. (1960), [1961] Ch. 375, [1961] 1 All E.R. 277 (Eng. C.A.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 1.2 — considered

R. 1.2(1) — considered

R. 1.2(2)(b) — considered

R. 7.1 — considered

R. 7.1(1) — considered

R. 7.1(1)(a) — considered

R. 7.1(1)(a)(ii) — considered

R. 7.1(1)(a)(iii) — considered

APPEAL by defendant from judgment granting plaintiff's motion for order bifurcating trial into separate trials of liability and damages.

Jean Côté J.A.:

A. Introduction

1 The issue is splitting trial of this medical malpractice suit into two or more trials, for liability and for damages.

B. Facts

2 The plaintiff is now about 25 years old and has evidently been a dependent adult since majority. From birth he has suffered from a number of serious neurological conditions, and been developmentally delayed. When about 20 years old, he had wisdom teeth extracted, which was done under an anaesthetic administered by the defendant, an anaesthetist.

3 From that point on, the parties differ in their view of the facts. The statement of claim alleges that the plaintiff was then deprived of oxygen, causing serious brain injury. The statement of defence alleges that nothing happened, that the procedure and recovery from the anaesthetic were uneventful, and that the defendant anaesthetist did nothing wrong. Counsel for the defendant alleges that a trial judge will have to find and compare what the condition of the plaintiff was before and after the tooth extraction.

4 The events sued over occurred in Red Deer, but later (after suit) the plaintiff and his mother moved temporarily to Prince Edward Island. The suit is being run in the Judicial District of Red Deer. So likely some of the evidence, especially on damages, will have to come to Red Deer from people in Prince Edward Island, she says. One cannot be more certain about witnesses. That is because the evidence shows that when the certificate of readiness was signed, the plaintiff had not yet selected witnesses on damages.

5 The plaintiff sought and received an order to split trial of the lawsuit. The parties were to hold one trial on liability, and then later (if need be) to hold another one on damages. The plaintiff's counsel told the chambers judge that the object was to save time and money. So did the plaintiff's mother's affidavit. The thinking behind that hope was expressed: that the second trial on damages would never occur, either because the first trial would find no liability, or because the case might be settled if the judge did find liability.

6 In some recent cases on splitting trials, plaintiffs relied on lack of funds and inability to afford a full trial. Not so here. Counsel for the plaintiff told us that that was not his argument to the chambers judge, and is not his argument on appeal. Nor does he or his client say anything about how the suit is being funded, whether on a contingency

agreement or otherwise. Indeed, in cross-examination, counsel objected to questions to the plaintiff's mother about financial circumstances. Nor is there any evidence of lack of funds.

7 Therefore, the chambers judge erred in finding that the plaintiff was of "limited means" (p F8, line 33), in speaking of the family's "financial jeopardy" (p F7, line 4 and p F4, line 20), and in then relying upon those supposed facts to support his decision. Of more concern, he also made a finding about the plaintiff's relative means *vis-à-vis* the defendant. Yet there was no evidence whatever about the defendant's means. No legal authority was given for hindering a defendant and helping a plaintiff, all because the plaintiff has less money. Nor do I know of any. Some authority is contrary: *Duffy v. Gillespie* (1997), 155 D.L.R. (4th) 461, 36 O.R. (3d) 443 (Ont. Div. Ct.).

C. Do the Objectives Repeal Specific Law?

8 Counsel for the defendant suggested in oral argument that the court could decide this appeal largely on the facts and on the tests in R 7.1 of the Rules of Court. I discuss that important topic in Part F below. But that is not the approach which either the chambers judge or the plaintiff's counsel adopted. Both relied heavily on a legal suggestion in *Envision Edmonton Opportunities Society v. Edmonton (City)*, 2011 ABQB 29, 507 A.R. 275, 44 Alta. L.R. (5th) 1 (Alta. Q.B.). The facts in *Envision* were unusual, and the split there may have been proper. But the suggestion there was broad: to reverse all the case law on splitting trials (in paras 14-71). The case theorized that R 1.2 of the new Rules had effected a sea change (at least on this topic), so the prior case law on splitting off issues for separate trials could no longer apply. The defendant's factum replies to that theory.

9 Since the suggestion by the plaintiff and the chambers judge could have far-ranging implications, it is better that the Court of Appeal now offer Bench and Bar some guidance on that legal topic.

10 I quote the parts of R 1.2 which are in issue here:

> 1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way.
>
> (2) In particular, these rules are intended to be used ...
>
> (b) to facilitate the quickest means of resolving a claim at the least expense, ...

The *Envision* decision suggests that these paragraphs change the whole approach of the Rules of Court, and that therefore prior binding Alberta case law on splitting trials is repealed.

11 With respect, that suggestion is unclear. *Envision's* legal hypothesis would follow logically only if the aim of the previous Rules had been significantly different. Indeed that hypothesis would work only if the aim of the previous Rules was not speed and economy, but was delay and expense. I do not agree with any such notion. (It is not explicit in the *Envision* decision, only logically necessary.)

12 What is more, one need not speculate or extrapolate. The aim of the previous case law about splitting trials and trying issues separately, was stated there explicitly. The argument made by counsel for trying an issue separately was virtually always the same. It predicted that the split would likely save time and money, by never having to try certain issues. Of course that is the same theory which the plaintiff and the chambers judge advanced here. The courts' reply to that theory was always to see whether the split really would save time and money in that individual case. That is the same approach the defendant advocates here.

13 I will cite only a small selection of the huge body of authorities for the traditional law. That law warns that such splits are a dangerous but alluring siren, often ending by wasting everyone's time and money, not saving it. See *Windsor Refrigerator Co. v. Branch Nominees Ltd.* (1960), [1961] Ch. 375 (Eng. C.A.), 396, (1960), [1961] 1 All E.R. 277 (Eng. C.A.), 283; *Elcana Acceptance v. Richmond*, *infra*; *Ratcliffe v. Nakonechny*, 2003 ABQB 667, 23 Alta. L.R. (4th) 21, 44 C.P.C. (5th) 325 (Alta. Q.B.); *Canadian Cancer Society v. Bank of Montreal* (1966), 57 W.W.R. 182 (Alta. C.A.), 186;

Canada Mortgage & Housing Corp. v. Canative Housing Corp. (1988), 90 A.R. 303 (Alta. Q.B.), 304; *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1991), 114 A.R. 27 (Alta. C.A.), 29-30 (paras 9-11); *Keg River Métis Settlement v R* [1978] AUD 720 (CA). A number of these cases are binding authority.

14 Whence come the statements in that long line of cautionary high authority from many provinces, even some from England? They are based on many barristers' and judges' long experience of the practicalities of trials. *A priori* hopes of shortcuts often failed in practice. A new Rule of Court could not erase that actual experience. How to prove facts at trial, who has the onus of proof, the elements of torts law, the law of evidence, how to compromise a suit, and human nature, were all the same on November 1, 2010 as they were on October 31, 2010 and for decades before.

15 Not one of the pre-2010 cases in the slightest rejects that consistent aim of saving time and money. Quite the contrary: they expressly adopt the identical aim. They show the dangers of hopeful theorizing. They state that bitter experience shows that splits rarely achieve economy in practice; usually the result of the split (one way or the other) is to *increase* the time and money consumed. Savings of time and expense by severing issues have consistently proven to be elusive: *LKD v JB*, *infra* (para 6). To adopt Dr. Johnson, splitting advocates wish hope to triumph over experience.

16 Of course splits are not forbidden, and occasionally there is good reason to think that one will save time and money. For example, sometimes a simple readily extricable preliminary issue will take little time or money, and stands a good chance of ending the suit. An expired clear limitation period, or some discrete condition precedent to suing (such as someone's permission) have been tried separately in the past.

17 In other words, all along everyone agreed on the aims of speed and economy, and all sought them. The only disagreement was on whether a particular split would advance or retard those agreed objectives.

18 Therefore, Alberta's new Rules merely recite what everyone took for granted under the prior Rules; that speed and economy are important objectives. So that statement of the tradition is no excuse for discarding all or even big parts of Alberta precedent.

19 There is another more subtle problem with any suggestion to reject prior law because of R 1.2 (a suggestion maybe not intended when *Envision* was written). That case could be read as implying that each judge can bypass a specific Rule (such as R 7.1), and instead simply make his or her own decision in each case about what will achieve the noble objectives of R 1.2. Those objectives are numerous, and not confined to speed and economy. They expressly include honesty, openness, settlement, credibility, efficiency, effectiveness, speed, economy, compromise, credibility, analysis, re-evaluation, and effectiveness. Relying on R 1.2 as the only firm rule of law, would imply that none of the specific new Rules can stand in the way of each individual judge's view of how to attain part or all of such multifaceted perfection.

20 General Rules such as R 1.2 exist to help interpret ambiguous Rules or doubtful points. They do not repeal, nor give a judge power to dispense with observing, specific Rules which do not appeal to that judge. Legislation is to be followed, and is not an optional suggestion.

21 Counsel for the defendant found a recent Manitoba Court of Appeal case citing the *Envision* case. With commendable professional ethics, they called it to our attention. It is *O'Brien v. Tyrone Enterprises Ltd.*, 2012 MBCA 3, [2012] M.J. No. 6 (Man. C.A.) (Jan 16). It split trial of liability from trial of damages, but its facts do not resemble those here. It was a slip-and-fall case. No medical negligence was involved. There liability turned on whether a banister detached, and whether the plaintiff was intoxicated. That plaintiff was poor and could get funding for a full trial only after liability was established. There a split arguably would prejudice no one.

22 Much of the discussion in *O'Brien* was about funding, impecuniosity, and the law of other provinces (neither Alberta nor Manitoba). Again none of that is relevant here. *O'Brien* referred to *Envision* only briefly. It did not reject the traditional strict test for splits, but preferred to call it a "clear and compelling" standard for saving time and money. And *O'Brien* proceeded upon the facts of the individual case. The Manitoba Court of Appeal there did not go into the issues which are pivotal here, and did not really have to.

23 Nor do all the Alberta Queen's Bench cases under the new 2010 Rules reject the prior case law on splits. One case finds its warnings still instructive: *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51 (Alta. Q.B.) (Jan 27) (para 23). So does the Alberta Court of Appeal in *D. (L.K.) v. B. (J.)*, 2012 ABCA 72 (Alta. C.A.).

24 Before turning to R 7.1, it is useful to summarize the general principles discussed above.

1. The "purposes" provisions in R 1.2 do not change anything. They say that the purpose of the new Rules is to resolve things in a timely and cost-effective way. That does not mean that the purpose of the old Rules was delay and expense, and somehow things have changed.

2. Those purposes provisions can provide some guidelines for interpretation, but they cannot be used by individual judges to override provisions of specific Rules on a case-by-case basis.

3. In matters of civil procedure there is always a tension between flexibility and predictability. Civil procedure has to be practical at its core, and that requires flexibility. On the other hand, litigants need to know what the rules of the game are, and that requires predictability. Predictability is established by setting out tests in the case law, and having the Masters and judges follow those tests. It is not workable to have individual Masters and judges rebuild the principles of practice from the ground up in every case. Our civil procedure cannot be based on the length of the Chancellor's foot.

4. The specific issue here is severing issues. There is nothing in the new Rules that suggests that we should head off in an entirely new direction, and ignore all the learning of many decades of civil practice. Certainly R 1.2 does not provide the justification for doing that. It has always been the presumption in our civil practice that all the issues are decided at once, in one trial or proceeding. Bitter experience has shown that searching for savings in time and money by chopping litigation up into little pieces simply does not work.

D. Rule 7.1

25 More specifically, general R 1.2 cannot supersede clear criteria on splitting trials in R 7.1. Its subrule (1) reads as follows:

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense;

(b) in the order or in a subsequent order

(i) define the question or issue, or

(ii) in the case of a question of law, approve or modify the issue agreed by the parties,

(c) stay any other application or proceeding until the question or issue has been decided, or

(d) direct that different questions of fact in an action be tried by different modes.

If read mechanically and literally, R 7.1 on splits would offer no criteria, only aims. But read in the modern purposive fashion, it means that a trial split must be one likely to achieve those aims which R 7.1 lists, not to thwart them. And those same aims are just what the pre-2010 case law on splits requires.

26 My rejection of an interpretation of R 7.1 based solely on its precise words follows a rule which the Supreme Court of Canada has adopted in upwards of 60 recent decisions. (An inventory may be found in S. Beaulac and P.-A. Côté (2006) 40 Rev Jur Thémis 131.) A recent example of this rule is *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471, 422 N.R. 248 (S.C.C.), 271-88 (paras 33-64). Besides the exact wording of the legislation, one must also interpret it by weighing the context of its words, their history, the evils sought to be redressed, the aims of the legislation, and the scheme adopted by it to address them. Not wishing to kill trees or spill ink, I merely refer to the citations and quotations in *Brick Protection Corp. v. Alberta (Provincial Treasurer)*, 2011 ABCA 214, 510 A.R. 336 (Alta. C.A.) (paras 31-34).

27 Paragraph 54 of the *Envision* decision speaks both of R 1.2 and R 7.1. If it suggests that R 7.1's own wording, apart from R 1.2, contains a radically new direction or new standard of proof, I cannot agree. I see nothing of that sort in R 7.1 itself.

28 Rule 7.1(1)(a)(i) speaks of disposing of part of a suit, but that was not the aim here. There is but one claim here, one injury complained of. No one suggested that the plaintiff get a partial remedy. Sub-sub-paragraph (i) is not met. Neither result of the proposed first trial will dispose of any claim. So the relevant aims here were R 7.1(a)(ii), (iii), saving time or money. All roads lead to the same place.

29 Why should the Court of Appeal pretend that appeals do not exist? The Court of Appeal are the judges with expertise in that topic. In any event, part of the demonstration that the result may not dispose of anything, has nothing to do with appeals: both the plaintiff winning the first trial (as the plaintiff expects), and overlap in evidence are discussed in Part F below. I discuss subsection (ii) at length below in Part E. I show total trial will be longer, not shorter. Subsection (iii) overlaps with (ii), both because of longer trial, and because of overlap in evidence, and appeals.

30 The defendant's big point is that these three criteria and objectives in R 7.1(1)(a) are not met, and indeed were not even discussed by the chambers judge.

E. Saving or Loss?

31 The plaintiff does not allege inability to afford a full trial, nor seek a partial remedy. So that leaves only one possible argument to split trial. It is the usual one: a real likelihood that the net result will save time and money for all concerned. That hope was expressed here. The plaintiff and the chambers judge suggested that there was a good chance that a decision on liability alone would end the lawsuit. (The chambers judge's reasons are not consistent about the degree of likelihood of saving needed or likely present.)

32 Their suggestion that the suit might economically end early, has two branches. Maybe the first trial judge might find no liability, and then the plaintiff might not appeal, and then damages might become academic. Or instead, maybe the first trial judge might find liability, and that might motivate the defendant to settle out of court. So argues the plaintiff. (The original order appealed is silent about the number of trial judges, and it would allow two. What has happened since is discussed at the end of this judgment.)

33 For simplicity, I will assume for now (as does the plaintiff) that there would be no overlap in evidence between the two trials. Later I will examine that assumption in Part F below.

34 Therefore the plaintiff envisages a four-branched decision tree. Two of the four possible outcomes (no appeal and prompt settlement) would save time and money, if either of them occurred (assuming no evidence overlap). The other two outcomes would waste time and money, not save them.

35 Obviously the result of ordering separate trials could be that no time or money whatever would be saved. There are two ways that waste could occur.

36 First, if liability were not found and the plaintiff appealed, then the result of that appeal could be a second trial on liability; certainly that would be the plaintiff's aim. If the new trial found liability, and either party did not like the damages award, then there would probably be a second appeal. (A third, if one counts the present appeal.) Obviously then total time and money would be wasted, not saved by the split. The decided cases show many actual examples of just such a scenario, and stress the importance of allowing for possible appeals in one's calculations of time and money. See the warning in *Esso v. Stearns, supra* (paras 35-38). On the significance of a split opposed by one party, note also *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1986), 55 O.R. (2d) 56 (Ont. C.A.), 59. Many decided cases decrying splits are successful appeals from a partial trial's decision on the merits of half the suit.

37 Second, if the first trial judge found liability, the defendant might not agree with the plaintiff's suggested dollar amount for damages; so a second trial (on damages) would be necessary. Obviously no time or money would be saved by the split then.

38 Furthermore, if a second trial on damages were held, then obviously no time would be saved, since there would be a significant gap between the two trials, if only to try to negotiate a settlement. See *Moseley v. Spray Lakes, infra* (para 20).

39 Two of the four scenarios (possible outcomes) would save time and money; but two would not, and indeed would spend some extra time (even without any overlap in evidence). So on anyone's view of the law, ordering two separate trials would be actually harmful, unless (at least) it were clear that the two "saving" scenarios are much more likely than the two "spending" scenarios.

40 The first "saving" scenario postulated is that the first trial judge may find no liability, and that the plaintiff would not start a new appeal to upset that: he would give up and abandon his suit. But *neither* party makes that suggestion here. There is no evidence whatever that that is likely. The defendant opposes the split and does not agree that that will occur. The plaintiff would have to lack any faith whatever in his lawsuit to say now (before end of the first trial) that that scenario is likely. The only affidavit does not say that; it merely hints that that could occur.

41 Furthermore, the plaintiff's counsel told us that he cannot rule out the possibility of his appealing such an adverse trial ruling on liability: indeed he said that he certainly does not undertake not to appeal. Therefore, the statement in the plaintiff's factum that a decision finding no liability "would end the matter" (para 29) is simply incorrect. See *Tanguay v. Vincent* (1999), 75 Alta. L.R. (3d) 90 (Alta. Q.B.), 95 (paras 25-29).

42 The alternate "saving" scenario is that the first trial judge might find liability, and that that might then somehow motivate the defendant to agree with the plaintiff on the amount of damages. But even an increased likelihood of settling would not suffice; one would need a probability: *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1994), 164 A.R. 76 (Alta. Q.B.), 80 (para 19).

43 Yet that is a topic on which the plaintiff can only speculate. He and his mother (the affiant) cannot read the minds of those advising his opponent. Nor can the plaintiff's counsel, whom the affidavit names as its source of this idea. The relevant people, the defendant's own legal advisers, in fact say no such thing. They say that such savings are unlikely, and they oppose the split. The plaintiff's counsel declines to suggest that they are acting from oblique motives, so it is likely that the defendant's counsel genuinely think this settlement scenario unlikely. That is vital, because it is *their* minds which this scenario tries to read.

44 Furthermore, this suit was set down for trial after all the usual full discovery (disclosure), including revealing expert evidence (say both the Certificate of Readiness and the Requirement to Schedule Trial Date). After all that, the parties have been unable to settle anything. Both sides' counsel are very experienced. Both of them must know how to

negotiate, and how to make formal offers of settlement. If neither side gets any real surprises from the evidence led at the first (liability) trial, it is hard to see why the defendant's attitude to settling damages would change.

45 There is no rule that forces a settlement to take a certain form. Either party could now or at any other time suggest to the other party that any damages be agreed, and that the trial be limited to liability. Such an agreement is not uncommon in recent Alberta medical negligence litigation. Therefore, there is no necessary connection between knowing the trial judge's view of liability, and settling damages.

46 Furthermore, if the first trial found liability, the defendant might well appeal instead of settling. So far, the plaintiff has not retained damages experts, nor provided their reports. So the defendant does not know what the plaintiff's damages evidence will be. Why would the defendant not thus appeal liability? See *Tanguay v Vincent*, *supra*, at 94, 95, 96 (paras 15, 17, 26, 31-32).

47 So there is no evidence, nor any logical ground, to think that either or both of the two "saving" scenarios is any more likely than either or both of the two "wasting" scenarios. A split is not likely to save any time or money. This appeal has already spent time and money which would have been saved had there been no split. And if there were an appeal from a liability finding, then more time and money would be spent on a second appeal. So wasting time and money because of the split is also likely.

48 There is another independent problem with a split. Saving time or money requires more than just a good probability that the second trial will not be necessary. It also requires that the first trial be much shorter than the second. Otherwise even the saving hoped for will be but a small percentage of the total. That is why sometimes a limitation period, or standing to sue, is severed and tried as a preliminary issue: it will be short. (It is a cheap ticket on a big lottery.) But here liability is strenuously contested, and will not be quick to try (considering both the plaintiff's and the defendant's evidence). Probably liability will (in total) take two or three weeks to try, not hours nor even days. More detail of that is given below in Part F.

F. Overlapping Evidence

49 Alberta courts try many medical negligence cases, and so one can comment about one common feature of such recent trials. Causation is often a very important issue. As counsel for the defendant points out, typically that involves both causation in fact, and causation in law.

50 It is in the highest degree likely that such a causation issue will be important in this case. It is pled. The plaintiff contends that his already-impaired neurological state was further seriously harmed by oxygen deprivation during the anaesthetic for the tooth extraction. The defendant denies that anything untoward whatever occurred. She says that if the plaintiff has got worse, that is a natural process, and that the dental episode is unconnected. The statement of claim and statement of defence show that debate.

51 Furthermore, I presume that it is unknown whether there are physical signs of hypoxia on the plaintiff's brain. So I presume that the evidence about causation will involve not merely abstruse testing, but also detailed comparison of the plaintiff's neurological condition and performance before and after the dental procedure. Indeed, counsel for the defendant expressly suggested that the latter comparison will be important.

52 In other words, the precise condition of the plaintiff before and after the dental procedure, and any difference between the two, will very probably feature at trial. The parties and judge will use it both to see whether the defendant caused harm to the plaintiff, and also to assess how bad any such harm is. So that evidence then must be used both to determine liability, and to quantify damages. The order given by the chambers judge for two separate trials could be complied with only by giving, testing, and evaluating that evidence twice, i.e. at both trials.

53 The resulting waste of time and money would be obvious. Evidence given for one purpose or issue might well be open to cross-examination for a different purpose or issue. Counsel for the defendant suggested to us that such second

cross-examination of the plaintiff's mother will indeed be necessary. And in any event, cross-examination is not limited to the topics discussed by that witness in chief.

54 A great deal of case law denies or upsets split trials where there would be an overlap in evidence between the two trials. It is enough to note *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1991), 114 A.R. 27 (Alta. C.A.), 31-32 (paras 23-25); *Keg River Métis Settlement v R, supra*; *Potash Corp. of Saskatchewan Mining Ltd. v. Allendale Mutual Insurance Co.* (1989), 80 Sask. R. 184, 41 C.C.L.I. 11 (Sask. C.A.), 21 (para 23); *Goodman v. Viljoen* [2006 CarswellOnt 5407 (Ont. S.C.J.)], 2006 CanLII 30591 (Sep 7) (Ont) (paras 13-14, 19); *Murphy Oil Co. v. Predator Corp.*, 2002 ABQB 629, 319 A.R. 328 (Alta. Q.B.), 337, 338 (paras 31-32, 39-43); *Cathcart v. Sun Life of Canada*, 2002 ABQB 827, 8 Alta. L.R. (4th) 292 (Alta. Q.B.), 296-97 (paras 11, 15-18); *Prevost (Committee of) v. Vetter*, 2002 BCCA 202, 166 B.C.A.C. 56, 210 D.L.R. (4th) 649 (B.C. C.A.); *Klassen v. Morden Hospital District No. 21* (1987), 51 Man. R. (2d) 161, 22 C.P.C. (2d) 1 (Man. Q.B.); *Duffy v Gillespie*, *supra*, at 465, 466 (DLR).

55 In my respectful view, this lawsuit is singularly unsuited to trying liability and damages separately. This is not a case (for example) where a surgeon operated on the wrong hand and then a separate argument arose about loss of earnings from the plaintiff's career as a professional portrait painter. The evidence to prove liability (i.e. to prove that the defendant actually did something wrong) and to prove the amount of resulting loss, would be very separate there. Only a small part would be separate here.

56 The chambers judge does not discuss this overlap, though the pleadings suggest it, and even though counsel for the defendant began her argument to the chambers judge with that point.

G. Conclusion

57 I would allow the appeal and set aside the order for severance and two separate trials, with costs of the appeal and of the Queen's Bench motion to split, payable on taxation.

58 That in turn opens up a practical question. When the order was pronounced, the defendant announced her intention to appeal, and asked the chambers judge for a stay of enforcement pending appeal. The judge gave the stay. Another result of that discussion was an agreement between counsel that the liability portion of the trial (or in any event the evidence at it) would proceed without prejudice to the present appeal against the split. We were told that the first half of that first half did occur in November 2011: the plaintiff's evidence on liability. The defendant's evidence on liability has not yet been heard. And for some scheduling reason, it cannot be heard for another year, until November 2012. So the parties have found themselves in the early stages of a spaced-out series of what are virtually three trials, not merely one or two.

59 There is one optimistic note in all this. The parties are under the impression that the judge who has started and heard this first instalment (of three) is willing to carry on with the remaining trial instalments. (As the process presently planned presumably would take some years to complete, nothing would be certain. And the Chief Justice of the Court of Queen's Bench is the one to decide such assignments.)

60 Even one trial heard by one judge in widely separated instalments entails considerable dangers. There is much unnecessary litigation in instalments in Alberta today. But the parties did not argue that point, so I will say no more about it.

61 Having started the trial despite the stay of enforcement, and having split it still further, creates a unique situation. All that I can usefully say or do to mitigate the problems caused by that situation, is as follows. Setting aside the order for separate trials means that it will be necessary to have the same judge throughout. That will likely much reduce (though not eliminate) the risk of inconsistent decisions on the same topic. If the Chief Justice of the Court of Queen's Bench assigns the judge who has heard the first instalment, then probably repetition of evidence will be much reduced. (Of course if both parties preferred, they could elect to start the trial over afresh.)

62 If the trial proceeds with the same judge assigned for all of it, then that trial judge may exercise her own judgment as to how to run the trial, when (if ever) to have breaks or adjournments, the order in which witnesses are called or recalled, whether any witness will testify more than once, and when and at what stage to make rulings or decisions on various topics.

Elizabeth McFadyen J.A.:

I concur:

Peter Martin J.A.:

I concur:

Appeal allowed.

End of Document

Tab D

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

July 27, 2018

Dentons LLP
Suite 2900 Manulife Place
10180 – 101 Street
Edmonton, Alberta T5J 3W8

Attention: Doris Bonora and Mandy England

Dear Mesdames:

Re: In the Matter of the Sawridge Band Inter Vivos Settlement – Court of Q.B. Action No. 1103 14112

We are writing in response to the Trustees' proposed consent order and covering correspondence dated June 22, 2018 and related matters. We note that this letter is with prejudice, including for the purpose of cost allocations.

A. Trustees' March 21, 2018 Correspondence

As you are aware, Denton's March 21, 2018 without prejudice correspondence was related to the beneficiary definition discussions. In Denton's June 22, 2018 correspondence, and related correspondence, it was suggested the OPGT did not provide any response to that March 21, 2018 without prejudice correspondence. However, the March 21, 2018 letter was discussed extensively with Trustees' counsel in the settlement meeting held on March 29, 2018. While the discussions on the substance of the matter were without prejudice, I specifically sought confirmation from Trustees' counsel at the conclusion of the meeting that, based on our discussions, no further response was expected from the OPGT until such time as an Agreed Statement of Facts was finalized (or the parties confirmed no agreement was possible).

We trust this clarifies what occurred sufficiently and that the Trustees' comments suggesting the OPGT did not respond at all to the March 21, 2018 will not be raised again in the future, particularly not in relation to cost allocations.

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B. Steps Required Before Beneficiary Definition Change

We appreciate the Trustees' June 22, 2018 correspondence represents a commitment to moving this matter forward towards a resolution and, in that regard, appreciate the discussions and exchanges it has and will generate. We trust that our client's response on this matter will serve as the basis for a further discussion, rather than a court application without further discussion. In that regard, we note the Court's recent decisions have suggested, if not stated, that the parties should be working towards:

i.) A non-adversarial process;
ii.) Avoiding applications that do not have merit and/or are unlikely to succeed;
iii.) A litigation approach that unnecessarily dissipates trust resources or fails to have regard to economic realities.

We also note the OPGT's approach on all matters remains informed by the commitments made by all parties in the January 22, 2018 Discrimination Order, namely the commitment "*to protecting the existence of the 1985 Trust and the interest of the beneficiaries.*" We trust those commitments will guide all parties' responses to this correspondence.

Given the above and given that our client is clearly committed to continuing discussions on these matters, we trust that is what will occur. We will be responding in a separate, without prejudice letter, to the Trustees' request for a list of issues the OPGT wishes to discuss in future settlement meetings. We note, however, that our comments herein are one of the more important topics we suggest be addressed at a future settlement meeting that should include Mr. Molstad and Ms. Golding.

The Trustees' have requested the parties advise if they:

i.) Do not agree with the analysis set out in the June 22, 2018 correspondence;

ii.) Do not agree with the terms of the Order.

Our client's general comments on the above are as follows:

i.) The Trustees' have not provided their legal analysis of these issues in the June 22, 2018 correspondence, rather stating positions. It would be very useful to receive all case law the Trustees are relying on. Further, if there are any legal opinions supporting the positions stated in the June 22, 2018 that can be shared with beneficiaries, the OPGT would suggest it would be efficient and cost effective to share those documents at this juncture, even if on a without prejudice basis;

ii.) The OPGT does not, based on the evidence and law it has been made aware of to date, concur that grandfathering cannot be dealt with until after the beneficiary definition is amended in the manner proposed. Indeed, that proposed approach involves removal of existing beneficiaries vested rights. The OPGT is not able to support a position that such removal would be in the best interests of existing beneficiaries;

iii.) The Court's decision in *Sawridge #5* (QB) was also quite clear in indicating the Court could not conceive of a situation where existing rights holders would lose their rights. The current proposed order would remove Shelby Twinn's rights as a beneficiary (and all minors who have similar fact situations). Patrick Twinn (and all minors in similar situations) would also lose his otherwise irrevocable rights as a current beneficiary, in exchange for a revocable right. This raises real concerns for the OPGT that the proposed order would be seen as an indirect challenge to Court findings that were not appealed.

iv.) As discussed further below, there is an unresolved issue as to the source of the Court's jurisdiction to grant the form of order the Trustees' have proposed. That matter is to be the subject of an application, as also discussed below. It seems likely that in considering the source of its jurisdiction, and the level of beneficiary consent and notice involved in each possible scenario, the Court will be inclined to take the most conservative approach (i.e. 100% beneficiary consent under s. 42 of the *Trustee Act*) if the order before it has significant negative impacts on beneficiary interests. While the OPGT accepts a court may ultimately direct 100% beneficiary consent is required, we are conscious that with a different approach on the beneficiary definition than currently proposed by the Trustees, the Court may be more receptive to a more flexible approach on beneficiary notice and consent.

v.) As discussed further below, the OPGT also has concerns that until the two remaining applications directed by the Court of Appeal in *Sawridge #5* are brought and decided, seeking a beneficiary definition change is premature and the application likely to fail.

vi.) The OPGT supports going forward with an application on the beneficiary definition that the Court is likely to be in a position to approve, as it recognizes that a failed application on the beneficiary definition could have the potential to prompt the SFN to move forward with the application referred to in its September 18, 2017 correspondence to the Court.

While we regret that the OPGT is not currently in agreement with the timing and terms of the proposed Consent Order, the OPGT is extremely optimistic about the ability of the parties to work cooperatively through the steps that are needed in order to be in a position to present the Court a joint submission or Consent Order on final remedy. The OPGT is hopeful that the Trustees review the comments herein will result in a return to the settlement meetings and that the parties may resume work on developing agreement and joint submissions rather than proceeding on the basis of contested applications.

i. Court's Jurisdiction to Vary

As the Trustees are aware, the Court has not yet been asked to identify the source of its authority to change the beneficiary definition in the 1985 Trust. This topic was canvased in the course of the *Sawridge #5* appeal and the Court of Appeal directed an application to the case management judge on the application of s.42 of the *Trustee Act* be brought forthwith.

We recognize the parties have been involved in important work in settlement meetings since the Court of Appeal decision was issued. We also recognize that the Trustees have brought 2 of the 4 applications the *Sawridge #5* appeal decision directed. As such, our comments around the lack of an application on this jurisdiction issue are not intended in any way as a criticism. Rather, we would suggest that the June 22, 2018 proposal has been a useful catalyst to bring into focus the need to proceed with that application before seeking an order from the Court regarding final remedy.

We suggest that a practical, and economical, approach to that application would be to present the Court with a joint submission that outlines the range of options available to the Court in terms of its jurisdiction to vary the Trust and provides the Court with the "pros and cons" of each option. In this manner, the parties can avoid disputes and simply work together to provide the Court with an objective and thorough overview of the available options. Such an application would also provide the OPGT with useful direction regarding whether it must provide the Court with evidence proving consent of all minors over the age of 14 to satisfy the provisions of the *Minor's Property Act*. Once the Court issues a decision on that issue, all parties will have a clear understanding of what will be required in relation to beneficiary consent, in order to proceed forward with a final remedy application.

ii. Notice to Beneficiaries/ Participation

The other task the Court of Appeal requested be the subject of an application was: "*A second issue is what procedure will be implemented for beneficiaries and/or potential beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. ... To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.*"

Indeed, this topic has been discussed amongst that parties and our understanding as of March 30, 2018 was that the Trustees would be providing all parties with a proposal to respond to. As with the above, our notation that this has not occurred to date is not intended as a criticism. All counsel have been engaged in important and productive work around settlement discussion, investigation of beneficiary lists based on all the new information received in 2018 and work on the Agreed Statement of Facts. However, the June 22, 2018 proposal again served as a useful catalyst to remind all concerned of this important step that will be necessary for a successful final application.

As above, we suggest the parties attempt to address this issue by way of a joint submission to the Court once it has determined the source of its jurisdiction.

C. Advancing Discussions Around the Beneficiary Definition/ Final Remedies

While the above noted steps are being taken, the OPGT suggests the parties can still work productively on the matter of what remedy, or variation, is most likely to protect the best interests of the beneficiaries and result in an Order that can bring this proceeding to a conclusion.

As the Trustees will appreciate, regardless of what source of jurisdiction the Court concludes would permit a variation of the beneficiary definition in the 1985 Trust, the Court will have to be satisfied that the changes are in the best interests of the current beneficiaries.

For this reason alone, the OPGT is not in agreement with the Trustees that the preservation of the existing beneficiaries' rights (which we have taken to referring to as "grandfathering") can be dealt with separately from, and indeed after, the vested rights of existing beneficiaries are removed by changing the beneficiary definition as proposed by the Trustees' June 22, 2018 proposal. The OPGT continues to be conscious of the Court's findings in *Sawridge #5* (QB) to the effect that there are not foreseeable circumstances where existing beneficiaries would lose rights. We regard that as a robust message from the Court that existing rights holders must be protected in the remedy stage of this proceeding.

However, the OPGT is also of the view that developing a solution to preserve the vested rights of existing beneficiaries by way of a consent order is possible as long as the parties continue to work co-operatively towards that goal.

An option that the parties have yet to discuss in any depth is a revision to the beneficiary definition that leaves the current definition largely unchanged (*consistent with the settlor's original intentions that beneficiaries should be able to continue to qualify in the future, despite the possible repeal of the 1970 Indian Act – see preamble & para 2(a) of the 1985 Trust) and simply adds in a second beneficiary group, being the current members of Sawridge First Nation. We recognize that there may be individuals that could qualify both under the 1970 Act and as SFN members, but this can hardly be said to negatively affect the interests of those beneficiaries and so should not be an impediment.

Possible wording that could achieve this goal is:

> *"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982. ~~and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever;~~ provided, for greater certainty, that any person who shall voluntarily become enfranchised, become a member of another Indian*

band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 after the establishment of this Trust ~~under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto~~ shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

We appreciate that the Trustees are currently of the view that the Court's jurisdiction to amend a Trust to address public policy issues is limited to deletion. However, we have yet to locate case law that suggests such a restrictive approach to this plenary common law jurisdiction. We have located two authorities that would support the position that if authority to vary or amend exists, it will not be interpreted as narrowly as limiting changes to deletions:

i.) *Re: The Esther G.Castanera Scholarship Fund* (2015) MBQB 28; and
ii.) *Sprott Estate (Re)* (2011) NSSC 327

The advantages of the OPGT's proposed definition are multiple:

i.) No rights are removed from existing beneficiaries;

ii.) As such, the revisions remain as true as possible to the Settlor's intention;

iii.) By avoiding the loss of rights of existing beneficiaries, the Court may be more inclined to waive any requirements for unanimous, or close to, beneficiary consent that could be argued to exist under the Trust Deed or under legislation;

iv.) The discrimination against Bill C-31 members, or indeed, others who became SFN Members after April 15, 1982 and who do not qualify as members under the 1970 *Indian Act* provisions, is addressed by SFN's ability to grant any of those individuals membership, and thus beneficiary status;

v.) The parties have a well-developed list of existing beneficiaries and SFN Members. This definition would then allow the Trustees' to easily identify the objects of the Trust in order to move ahead with the distribution application once the definition is varied.

We recognize that there are remaining complexities around interpretation and application of aspects of the 1970 *Indian Act* to determine beneficiary status on a go forward basis, but the OPGT would suggest these concerns need not be a barrier to final relief that does not involve a loss of rights for existing beneficiaries. Considerations on this front include:

i.) Although there are possible interpretation arguments in relation to specific fact situations as applied to sections 11-12 of the *Indian Act* as it existed on April 15, 1982, the reality is that this registration/membership scheme was administered successfully by the Registrar of Indian Affairs for decades prior to its repeal by Bill C-31. There is no risk of a serious argument about lack of certainty of objects in such a fact situation;

ii.) As part of the application, which is an advice and direction application, the Trustees can seek the Court's guidance on particularly challenging fact situations. The parties can continue work in settlement meetings, if useful, to develop the examples or categories where all concerned would benefit from Court direction.

As you are aware, the OPGT has been extremely encouraged by the progress made in 2018 around beneficiary identification and has greatly appreciated all the new information received since February 15, 2018. As you will also gather from our client's response on the Agreed Statement of Facts, while there is work remaining to be done, the OPGT is also of the view that if the parties work co-operatively, substantial progress can still be made on a joint submission of fact and law. If the parties all commit to continuing work on that document while the jurisdiction and beneficiary notice applications are dealt with, the OPGT is currently of the view that a significant portion of the work required for a final remedy application will already be done and ready to present to a Court.

As noted, we understand the June 22, 2018 correspondence was intended to open a dialogue on, and progress forward with, the issues affecting the final remedy that should be sought in this proceeding. We look forward to work with all parties in a co-operative and constructive manner – that also has regard for the need to proceed forward with settlement discussions rather than contested applications.

In closing, our complete response to the Trustees' request for a list of productive issues for future settlement meetings will follow in the near future. In the interim, we would suggest the issues addressed in this letter would serve as an extremely valuable starting point for our next settlement meeting and would appreciate discussing available dates in August for such a meeting.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

cc: K. Platten, Q.C. and C. Osualdini, McLennan Ross LLP