COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

Clerk's Stamp

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"),

APPLICANTS	**ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")**
DOCUMENT	**WRITTEN BRIEF OF CATHERINE TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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TABLE OF CONTENTS

PART 1 INTRODUCTION 1

PART 2 ISSUES 1

(i) Issues Pertaining to Privilege 1

(ii) Directed Issue Hearing 1

(iii) Litigation Plan and Non Party Beneficiary Participation ... 1

PART 3 SUBMISSIONS 1

A. Issues Pertaining to Privilege 1

B. Directed Issue Hearing 4

C. Litigation Plan and Beneficiary Participation 6

PART 4 REMEDY SOUGHT 9

PART 1 INTRODUCTION

1. These submissions are provided on behalf of Catherine Twinn in response the Trustees' application filed August 10, 2018 and written submissions filed August 24, 2018.

2. Ms. Twinn continues to work with the parties to endeavor to resolve the issues raised in the Trustees' written submissions by consent and in advance of the September 25, 2018 case management meeting.

3. The following will address the issues that the Trustees' have put before the Court in their written submissions and inform Ms. Twinn's understanding of the matters to be dealt with at the upcoming Case Management meeting.

PART 2 ISSUES

4. The following issues are raised in the Trustees' written submissions:

   (i) ***Issues Pertaining to Privilege***

   (ii) ***Directed Issue Hearing***

   (iii) ***Litigation Plan and Non Party Beneficiary Participation***

PART 3 SUBMISSIONS

A. *Issues Pertaining to Privilege*

5. Ms. Twinn served the parties with her Affidavit of Records on April 30, 2018 in accordance with the litigation plan entered into by the parties.

6. Following service, the Trustees' expressed disagreement with Ms. Twinn's Affidavit of Records on the basis of, *inter alia*, concerns relating to solicitor/client privilege. In an effort to address these concerns, Ms. Twinn served a subsequent Affidavit of Records, sworn June 21, 2018, on the Trustees' only ("**Twinn AOR**"). The Office of the Public

Guardian and Trustee ("**OPGT**") was not served with the Twinn AOR given the Trustees' stated concerns relating to privilege.

7. A significant portion of the records contained in the Twinn AOR are documents which were already filed in the within Action and have been on the Court record since at least 2017 (the "**Filed Documents**"). In addition, cross examinations on Affidavits of Paul Bujold, the 1985 Trust administrator, along with examinations on Affidavits of Ms. Twinn, have occurred in relation to many of the Filed Documents. The transcripts of these examinations, along with the associated exhibits, have been on the Court record for some time and have been referred to in proceedings in the within Action (collectively referred to as the "**Transcripts**").

8. As set out by the OPGT in their submissions filed on September 12, 2018, the Filed Documents were provided to the OPGT, at the request of the Trustees' counsel, in or about October 2017. See paragraph 10 of the OPGT written submissions.

9. Many of the Filed Records contain information relating to the issues in the within Action and not just the 1403 Action or Code of Conduct proceedings as suggested by the Trustees in their written submissions.

10. It is Ms. Twinn's submission that it is clear that solicitor/client privilege cannot attach to the Filed Documents and the information in the Transcripts, as the Trustees' were aware that these records have been in the public domain since at least 2017.

11. That said, for the purposes of allowing the within Action to proceed in a cost effective and timely manner, Ms. Twinn is prepared to agree to an order that limits subject matter waiver in relation to the Twinn AOR and other documents already filed in the Action. This agreement is provided on the basis that the records that have already been disclosed (including those in the Twinn AOR, cross examination on affidavit transcripts and all associated undertakings, exhibits and written interrogatories) will not be subject to a claim of solicitor/client privilege in the within Action, along with terms clarifying the use of evidence and other rights to production in the within Action.

12. On September 13, 2018 Ms. Twinn circulated a proposed form of Order to resolve the Trustees stated concerns relating to the waiver of privilege issue which form of Order is attached as Schedule A.

Letter from McLennan Ross LLP dated September 13, 2018– TAB 1

Schedule A – Proposed form of Order to address Privilege Issue

13. Ms. Twinn views this Order as more appropriate than the Order put forward by the Trustees for the following reasons:

a) The Trustees' Order is inconsistent in that it contemplates that the contents of the Filed Documents (as that term is defined in the Order) can be utilized, but not the subject matter of the documents. These two concepts cannot co-exist as content and subject matter are essentially the same thing. Records already filed in the within Action should be usable as evidence by the parties. The Order put forward by Ms. Twinn rectifies this inconsistency;

b) The Trustee's Order restricts the use of the Filed Documents, as the Trustees' Order maintains the argument that privilege may somehow still attach to these records despite the clear difficulties with this position. The Order put forward by Ms. Twinn provides that this issue may not be raised by the Trustees which brings finality to this issue;

c) The Trustees' Order seeks to place protection on documents voluntarily put forward by the Trustees in their own Affidavit of Records and questioning responses. This is inappropriate, Ms. Twinn's Order excludes such documents from falling within the scope of the Order;

d) The Trustees' Order would unduly restrict the respondents ability to meaningfully question on records in the Action. Ms. Twinn's Order clarifies precisely what

subject matter waiver is considered to be such that it provides the parties with certainty as to what matters can be questioned on and allows the parties to still engage in meaningful questioning;

e) The Trustees' Order creates uncertainty on the use of affected records in future proceedings as the scope of the restrictions being placed on the use of the documents is not clearly defined. This is resolved in Ms. Twinn's Order through the defining of "Subject Matter Waiver";

f) The Order must not affect parties' rights to records or information that exist outside the legal concept of subject matter waiver for the purpose of utilizing same as evidence in the Action. More particularly, it is arguable that solicitor/client privilege does not even exist as between the trustees and the beneficiaries of the 1985 Trust in the context of the subject litigation. In his learned text, AM Dodek stated that "the privilege belongs to the trust and not the trustee". The writer concludes that "A communication between a trustee and a solicitor regarding the business and affairs of the trust is not privileged from disclosure to the beneficiaries of the trust." Accordingly, given that the within Action is an application for advice and direction by the Trustees, there is arguably no basis for the Trustees to assert a claim of privilege as against the OPGT (which represents the minor class of beneficiaries) or Ms. Twinn, who qualifies as a beneficiary of the 1985 Trust under the existing definition. The Order put forward by Ms. Twinn robustly protects these rights.

AM Dodek, Solicitor-Client Privilege, (Markham: LexisNexis, 2014) at 6.43-6.44 – Tab 2

B. *Directed Issue Hearing*

14. Ms. Twinn agrees with the written submissions of the OPGT in relation to this issue and does not intend to duplicate same in her own submissions.

15. Ms. Twinn would simply further note that she has grave concerns with proceeding with seeking the alteration of the existing beneficiary definition in the 1985 Trust deed in the absence of also considering properly identifying, confirming and "grandfathering" existing beneficiaries and unborn future beneficiaries. Doing so has the foreseeable potential of adversely impacting individuals with existing beneficiary status without clear direction or consideration of how those rights could (or should) be protected.

16. In addition, the case management decisions in this Action to date, have been suggestive that those with current beneficiary status should not have that status interrupted as a result of the final relief that may be granted in terms of the beneficiary definition.

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377 at paras. 33 and 37 – Tab 3

17. As such, to address final relief as it pertains to definition amendment and "grandfathering" (as defined in paragraph 15 of the OPGT submissions) independently, would foreseeably have the consequence of relief being granted that is inconsistent with this commentary from case management.

18. Ms. Twinn supports having the Jurisdictional Issue (as defined in paragraph 20 of the OPGT submissions) dealt with as a Rule 7.1 Directed Issue and would propose the form of Order in that regard that is appended to these submissions. Ms. Twinn recognizes that this form of Order has not been provided to the parties on a "with prejudice" basis to date and will work with the parties to attempt to reach consent on these matters in advance of the case management meeting. Ms. Twinn notes that the attached schedule to the Order has been intentionally omitted, as it will ultimately be comprised of the form of Order the Court grants in relation to the litigation plan.

Schedule B – Proposed form of Order to address Jurisdictional Issue

19. Determining the Jurisdictional Issue in advance of an application for final relief is consistent with the recommendations of the Court of Appeal that such matters be addressed with the case management Justice prior to final relief being heard.

Twinn v Twinn, 2017 ABCA 419 at para. 22 – Tab 4

C. ***Litigation Plan and Beneficiary Participation***

20. Ms. Twinn has reviewed the litigation plan proposed by the OPGT that is appended to their written submissions. Ms. Twinn is supportive of the procedural steps noted therein and is agreeable to complying with those timelines.

21. Ms. Twinn is in agreement that the next iteration of a litigation plan should only contemplate steps up to and including the application to determine the Jurisdictional Issue.

22. The outcome of the application to determine the Jurisdictional Issue will affect the process for determining final relief as the parties will only then have a refined understanding of the issues that need to be advanced and the type of evidence that will be required.

23. In addition, the outcome of the Jurisdictional Issue will affect what would be appropriate notice and consultation with the existing beneficiaries. As such, determining these steps would be more efficiently and appropriately completed following the adjudication of the jurisdictional question.

24. Ms. Twinn concurs with the OPGT that the settlement meetings that have occurred to date amongst the parties have been very helpful in focusing and narrowing issues and would like to see this work continue.

25. Ms. Twinn notes that the Trustees seek proposals for a varied beneficiary definition by October 19, 2018 for the purpose of circulating these proposals, along with the Trustees', to the "identified potential beneficiaries" of the 1985 Trust.

26. While the Trustees' propose to circulate these definitions to "identified potential beneficiaries", the Trustees have not provided any evidence to the Court on who these people are. This is essential for many reasons, not the least of which is so that the Court and the other parties are aware of who is receiving notice to ensure that the list is as complete as possible.

27. While Ms. Twinn is very supportive of regular, clear and informative communication on the progress of the within Action being provided to the beneficiaries, she is not of the view that potential definition amendments should be circulated to the beneficiaries in advance of an application that will only deal with the Jurisdictional Issue. This is because the outcome of the Jurisdictional Issue application will directly impact the type of proposals the parties can make. For instance, the Jurisdictional Issue application would determine whether the Court has jurisdiction to make amendments to the definition on the basis of public policy grounds and whether those amendments can include adding or deleting words from the 1985 Trust Deed. Until this question is answered, focused proposals cannot be made.

28. Ms. Twinn notes that if the purpose of the circulation of these definitions to the affected beneficiaries is for the purpose of determining whether 100% beneficiary approval can be gathered in order to utilize the amending provisions of s. 42 of the *Trustee Act*, the manner in which the Trustees are proposing to assess this issue would not be effectual and could not generate persuasive evidence. More particularly:

    a) The group of persons from which approval is required would need to be identified first. It is unclear who the trustees are proposing are the "identified potential beneficiaries";

b) Proper and meaningful consultation with the beneficiary class would need to occur, which in Ms. Twinn's view is not met by a one-time mail circular in conjunction with posting to the Sawridge Trusts website, which many beneficiaries may not even be able to access;

c) Fully informed consent and consideration of the beneficiary's best interest could not be obtained until the jurisdictional question is decided. The potential for a beneficiary's position on this issue could foreseeably be very different depending on the outcome of the Jurisdictional Issue application. In addition, providing a request for consent on amendment at this stage, with a follow up request for consent following the adjudication of the Jurisdictional Issue has the potential to be very confusing to a recipient beneficiary.

29. In effect, the process the Trustees' appear to be proposing to provide an evidentiary basis to the Court on whether 100% approval can be obtained amongst the beneficiary class to a definition amendment, essentially ensures that the answer to that question is "no".

30. Ms. Twinn submits that the process for determining whether beneficiary consent can be obtained to effect a s. 42 *Trustee Act* amendment must be more robust in order to generate meaningful evidence. Particularly in light of the fact that the 1985 Trust beneficiary group is foreseeably comprised of many vulnerable and marginalized persons.

31. With respect to the Trustees' proposal for non-party beneficiary participation, Ms. Twinn does not take issue with allowing for five page written submissions for the purpose of the jurisdiction question, with future participation to be determined as future litigation plans are set, subject to the following caveats:

a) If a potential beneficiary is required to use their page count in order to establish that they are in fact a current beneficiary of the 1985 Trust, the pages and attachments included to address this matter should not count towards the five page limit; and

b) Ms. Twinn strongly disagrees with the Trustees' requests pertaining to cost awards against non-party beneficiaries for duplicitous submissions.

32. Ms. Twinn notes that, at present, the adult non-party beneficiaries are unfunded and many are without any access to legal advice. It is important that the manner in which the beneficiaries are allowed to participate reasonably permits them to have their views heard without fear of crippling cost awards. This is especially so, recognizing that many may be self-represented.

33. If the Trustees are concerned about beneficiary participation occurring in a more efficient manner, without the difficulties that can arise with self-represented litigants, a form of class counsel for proceedings pertaining to final relief that is indemnified by the 1985 Trust may be necessary and more effectual. Ms. Twinn notes that the possibility of class counsel for adult beneficiaries was contemplated by the Court of Appeal.

Twinn v Twinn, 2017 ABCA 419 at para. 22 – Tab 4

34. Given that the litigation is nearly ready for final relief to be heard and the Trustees are seeking substantive positions from the adult beneficiaries that require complex consideration of their legal rights, the time may be right to have class counsel appointed.

35. Finally, Ms. Twinn notes that the Trustee's litigation plan contemplates the participation of the Sawridge First Nation ("SFN") for jurisdictional questions and final relief. Ms. Twinn submits that this is inappropriate as the SFN is not a party and does not have a recognized beneficial interest in the 1985 Trust. Ms. Twinn objects to the participation of the SFN in this regard.

PART 4 REMEDY SOUGHT

36. Catherine Twinn respectfully requests an Order:

a) Granting the form of Privilege Order attached as Schedule "A";

b) Granting the form of Jurisdictional Issue Order attached as Schedule "B";

c) Granting the form of Litigation Plan proposed by the OPGT in their written submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 14 day of September, 2018.

McLennan Ross LLP

Per: _____
Karen A. Platten, Q.C.
Solicitor for Catherine Twinn

TABLE OF AUTHORITIES

Letter from McLennan Ross LLP dated September 13, 2018 ..... **TAB 1**

AM Dodek, Solicitor-Client Privilege, (Markham: LexisNexis, 2014) ..... **TAB 2**

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377 ..... **TAB 3**

Twinn v Twinn, 2017 ABCA 419 ..... **TAB 4**

TAB 1

MC LENNAN ROSS LLP
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Our File Reference: 144194

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PLEASE REPLY TO EDMONTON OFFICE

September 13 2018

Sent Via Email:
mandy.england@dentons.com

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

Attention: Mandy England

Dear Madam:

Re: Privilege Order – 1985 Sawridge Trust
Court File No.: 1103 14112

We write further to your July 27, 2018 correspondence and our subsequent discussions in respect of this matter. We enclose with this letter a copy of the order that we propose is a resolution to the privilege issues that have been raised by the Sawridge Trustees in respect of the materials referred to therein. We are sending this letter to notify you that we are putting this proposed order on the record and intend to refer to it at the upcoming case management appearance before Justice Thomas in the event that a resolution cannot be worked out in the meantime.

Yours truly,

CRISTA OSUALDINI

CCO/blr
Encl.
00144194 - 4147-2470-6070 v.1

cc: Janet Hutchison
Sent Via Email: jhutchison@jlhlaw.ca

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 TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT 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 Catherine Twinn has sworn an affidavit of records dated June 21, 2018, to be filed, which contains records, including, but not limited to, the Filed Documents, that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Twinn Affidavit of Records**");

AND WHEREAS the Sawridge Trustees do not object to Catherine Twinn filing the Twinn Affidavit of Records so long as this Order is granted;

AND WHEREAS Paul Bujold deposed affidavits on September 6, 13 and 30, 2011 exclusively in the within Court File ("**1103 Action**"); the Office of the Public Guardian and Trustee ("**OPGT**") questioned Paul Bujold on May 27 and 28, 2014 and on June 11, 2018 and transcripts are produced in respect of those questionings; Paul Bujold answered undertakings from such questionings; Exhibits were marked in such questionings; Paul Bujold deposed an affidavit of records dated November 2, 2015 and a supplementary affidavit of records dated April 27, 2018; and collectively such affidavits, transcripts, exhibits and undertakings shall be referred to as the "**Excluded 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 did not have the intention to waive solicitor-client privilege over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents or the Questioning Responses as that term is defined below;

AND WHEREAS the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the aforementioned documents in the prior paragraph ("**Subject Matter Waiver**") has not occurred;

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

IT IS HEREBY ORDERED AND DECLARED;

1. No response in a questioning to date, 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, the Twinn Affidavit of Records, and/or the 1403 Filed Documents (collectively "**Questioning Responses**"), can be construed as Subject Matter Waiver over the subject matter of any communications contained therein.

2. Any waiver of solicitor-client privilege in respect of the contents of the Filed Documents, the Twinn Affidavit of Records, the Questioning Responses and the 1403 Filed Documents is expressly declared to be limited to the content of those documents, and it is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.

3. Further to paragraph 2, nothing in the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and/or the Questioning Responses can be used to compel the Sawridge Trustees to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by the Sawridge Trustees on the basis that Subject Matter Waiver has occurred.

4. 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 and obtain as a beneficiary of the 1985 Trust.

5. 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 file or otherwise admit to evidence any other document or record in the 1103 Action, other than those covered by this Order (being the Filed Documents, the Twinn Affidavit of Records, 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.

6. For clarity, the *Alberta Rules of Court* and such other rules of evidence as would ordinarily apply will continue to apply to the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and the Questioning Responses in respect of their use in any aspect of the 1103 Action, and none of the parties may object to the use of any of these documents on the basis of an argument of solicitor-client privilege. For further clarity, all transcripts from cross examination on affidavit in the 1103 Action, including any associated undertakings, exhibits or written interrogatories may continue to be utilized by any party to the 1103 Action as evidence at any application or trial in the 1103 Action and this Order does not affect this right.

7. This order shall not apply to the Excluded Documents.

The Honourable Justice D. R. G. Thomas

CONSENTED TO BY:
MCLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

TAB 2

8. THE TRUSTEE AS CLIENT

Solicitor-Client Privilege

Adam M. Dodek

PART II

Chapter 6 — "The Client"

8. THE TRUSTEE AS CLIENT

§6.43 A communication between a trustee and a solicitor regarding the business and affairs of the trust is not privileged from disclosure to the beneficiaries of the trust.[1] Manes & Silver saw this rule as consistent with the principle underlying privileged communications between co-parties or joint clients, *viz.* that the privilege is not maintained as between them.[2] Justice Lederman agreed with this rationale in *Re Ballard Estate*.[3]

§6.44 However, I think the better explanation is that the privilege belongs to the trust not to the trustee. In this way, the situation is analogous to the partnership or corporate context. If the trustee ceases to act as trustee or is replaced, control over the privilege would pass to the new trustee. The previous trustee would relinquish any right to access or control privileged information.

§6.45 In *Re Ballard Estate*,[4] Lederman J. of the Ontario General Division adopted the rationale of Lord Wrenbury in *O'Rourke v. Darbishire* as follows:

> The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access them… . No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees in their *cestuis que* trust, and the beneficiaries are entitled to see them because they are beneficiaries.[5]

Beneficiaries who have the right to access privileged documents include those who merely have a contingent or residual interest under a will or trust.[6]

§6.46 The old law used to be that a lawyer could not refuse to disclose the names of the client trustees on the ground of privilege.[7] However, the leading case in support of this proposition, the Ontario Divisional Court's decision in *Greymac*[8] has been called into question by the Supreme Court of Canada in *Maranda*[9] and subsequent cases as discussed in Chapter 5.

Footnote(s)

1 Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 62.

2 *Ibid.*, at 63.

3 *[1994] O.J. No. 2281*, *20 O.R. (3d) 350* (Ont. Gen. Div.).

4 *Ibid.*

5 [1920] A.C. 581 at 626-27, [1920] All E.R. Rep. 1 (H.L.).

6 *Re Ballard Estate*, *[1994] O.J. No. 2281* at para. 830, *20 O.R. (3d) 350* (Ont. Ct. (Gen. Div.)) (citing *Halsbury's Laws of England*, 4th ed., vol. 48 (London: Butterworths, 1985)).

7 See Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at 63. *Cf. Ontario Securities Commission v. Greymac Credit Corp.*, *[1983] O.J. No. 2986*, *41 O.R. (2d) 328* (Ont. Div. Ct.) ["*Greymac*"].

8 *Ibid.*

9 *[2003] S.C.J. No. 69*, *[2003] 3 S.C.R. 193* (S.C.C.) ["*Maranda*"].

End of Document

Tab 3

2017 ABQB 377
Alberta Court of Queen's Bench

1985 Sawridge Trust v. Alberta (Public Trustee)

2017 CarswellAlta 1193, 2017 ABQB 377, [2017] A.W.L.D. 3870, 281 A.C.W.S. (3d) 276

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 byChief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust"), Patrick Twinn, on his behalf, and on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley, and Shelby Twinn, and Deborah A. Serafinchon (Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Original Applicants) and Public Trustee of Alberta ("OPTG") (Respondent) andCatherine Twinn (Respondent)

D.R.G. Thomas J.

Judgment: July 5, 2017
Docket: Edmonton 1103-14112

Counsel: N.L. Golding, Q.C., for Applicants, Patrick Twinn et al.
D.C. Bonora, A. Lopraco, Q.C., for 1985 Sawridge Trustees
J.L. Hutchison, for OPTG
C.K.A. Platten, Q.C., C. Osualdini, for Catherine Twinn

***D.R.G. Thomas J.*:**

I Introduction

1 This is a case management decision on an application filed on August 17, 2016 (the "Application") by Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon ("Applicants") to be added as full parties in Action No. 1103 14112 (the "Action"), for payment of all present and future legal costs and an accounting to existing Beneficiaries. The application by Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn and his wife, Melissa Megley, appears to have been abandoned and, in order to keep the record clear, is dismissed. The balance of the Application by the Applicants is also dismissed, although the claims for an accounting from the Trustees by Patrick and Shelby Twinn are dismissed on a without prejudice basis.

II Background

2 This Action was commenced by Originating Notice, filed on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application".

3 The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #1*"), aff'd 2013 ABCA 226 (Alta. C.A.), (2012), 543 A.R. 90 (Alta. Q.B.) ("*Sawridge #2*"), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ("*Sawridge #3*"), time extension denied [*Stoney v. Twinn*] 2016 ABCA 51, 616 A.R. 176 (Alta. C.A.), *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2017 ABQB 299 (Alta. Q.B.) ("*Sawridge #4*") (collectively the "*Sawridge Decisions*"). Some of the terms used in this decision ("*Sawridge #5*") are also defined in the previous *Sawridge Decisions*.

4 I had directed that this Application be dealt with through the filing of written briefs, subject to requests for clarification through correspondence between the Court and counsel. These letters have been added to the court file in this Action in a packet described as "*Sawridge #5 Correspondence*" and are listed in Schedule 'A' Part II to this decision.

III The Applicants

5 Some factual background in relation to the three remaining Applicants is set out below and has been derived from the Affidavits forming part of the materials filed by the participants as described in Schedule 'A' Part I to this decision.

A Patrick Twinn

6 Patrick Twinn was born on October 22, 1985. His father, Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

7 His mother is Sawridge Trustee, Catherine Twinn, who is also a member of the SFN.

8 Patrick is also a member of the SFN and acknowledges that he is currently and will remain a Beneficiary of the 1985 Sawridge Trust even if the Trustees are successful in their application to vary the definition of 'beneficiary'.

9 Patrick Twinn also acknowledges that his beneficial interest in the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the Trust.

B Shelby Twinn

10 Shelby Twinn was born on January 3, 1992 and resided on the SFN Reserve for the first 5 years of her life. She is a granddaughter of Chief Walter Twinn and the daughter of Paul Twinn, a son of Chief Walter Twinn. Paul Twinn is recognized as an Indian by the Government of Canada under the *Indian Act* and is a member of the SFN. The mother of Shelby Twinn was married to Paul Twinn at the time of Shelby's birth.

11 Shelby Twinn is registered as an Indian under the *Indian Act*. She is not listed as a member of the SFN and claims that she may lose her entitlement as a Beneficiary if the application of the Trustees to vary the definition of 'beneficiary' under the 1985 Sawridge Trust succeeds. Shelby Twinn acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust.

C Deborah Serafinchon

12 Deborah Serafinchon claims to be the daughter of Chief Walter Twinn and Lillian McDermott, the latter being recognized as an Indian under the *Indian Act*.

13 Deborah Serafinchon states that she was born an illegitimate child, was placed in foster care at birth and was raised in that system. Deborah Serafinchon asserts that Patrick Twinn is her brother and co-applicant.

14 Deborah Serafinchon notes that if the current definition of 'beneficiary' under the 1985 Sawridge Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", she will then be included as a 'beneficiary' under the 1985 Sawridge Trust. She expresses concern about any proposed definition which would have the effect of excluding her as a 'beneficiary' being accepted by the Court.

IV Positions of the Parties

15 The materials filed on this Application and reviewed by me are extensive. They are described in Schedule 'A'. The written briefs forming part of this array of materials contain the arguments of the various participants.

16 The initial position of the Public Trustee of Alberta ("OPTG") on the Application is set out in a short letter, dated October 31, 2016, as supplemented by clarification letters of June 23 and 30, 2017 and are all included in the "Sawridge #5 Correspondence" packet.

17 The Application is also supported by Sawridge Trustee Catherine Twinn, who is the mother of the Applicant, Patrick Twinn. She disassociates herself from the opposition to the Application by the other Trustees.

18 The Sawridge Trustees (except Catherine Twinn) oppose the Application in its entirety.

V Issues

19 The issues to be decided on this Application are:

a Whether some or all of the Applicants should be made a Party to this Action?

b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

20 While claims for an accounting by the Trustees have been made by some of the Applicants, no submissions were made on this remedy.

VI Disposition of the Application

21 I confirm that the claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn, and his wife, Melisa Megley, have been abandoned and, for clarity of record purposes, are dismissed.

22 I also dismiss the claims of the remaining Applicants for the reasons which follow.

A Applicability of Rules 3.74 and 3.75 of the Alberta Rules of Court, Alta Reg 124/2010

23 *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*" or individually a "*Rule*") *Rules* 3.74 and 3.75 provide for the procedure for the addition of parties to an action commenced by a statement of claim or originating notice, respectively.

24 The Trustees characterize the Applicants as "third parties" and argue that they cannot be added as parties, because they are not persons named in the original litigation. They rely on the decision of Poelman, J in *Manson Insulation Products Ltd. v. Crossroads C & I Distributors*, 2011 ABQB 51 (Alta. Q.B.) at para 48, 2011 CarswellAlta 108 (Alta. Q.B.) ("*Manson Insulation*").

25 *Manson Insulation* involves an action commenced by statement of claim. This Action was commenced by an originating notice, a procedure under which all participants are not known at the outset and it is also less clear as to when the 'pleadings' close. I do not accept that the Applicants are barred by application of *Rule* 3.74(2)(b) because they may be "third parties".

26 However, *Rules* 1.2 and 3.75(3) do have application to the circumstances here. I must be satisfied that an order should be made to add the Applicants as parties and I must also be satisfied that the addition of these Applicants as parties will not cause prejudice to the primary Respondents, the Trustees.

27 The Advice and Direction Application has been underway for almost six years. There have been a number of complex applications resulting in a variety of decisions (See the *Sawridge Decisions*). The Trustees assert that some of the Applicants have chosen not to abide by deadlines imposed by this Court. In turn the Applicants take issue with the effectiveness of the early notifications in respect to the Advice and Direction Application. All of that said it is clear that this proceeding has gone on for a long time. I agree with the Trustees that the addition of more participants will make an already complex piece of litigation more complicated, not only in terms of potential new issues, but also in terms of

more difficult logistics in coordinating additional counsel and individual parties and prolonging the procedural steps in this litigation, for example, even more questioning. All of that will in turn result in increased costs likely to be borne one way or another by the 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the Applicants, namely Patrick and Shelby Twinn.

28 In my decisions to date I have attempted to narrow and define the issues in this litigation. To allow additional parties at this stage will expand the lawsuit rather than create a more focussed set of issues for determination by a trial judge who will ultimately be tasked with determining this litigation.

29 Further, I am not satisfied that the Applicants can pay the costs if they are unsuccessful and are not awarded an indemnity against paying the Trustees and, therefore, the costs of the Trust. In other words, if this attempted entry into this Action is unsuccessful, then the Trust and its beneficiaries are left again to pay the bill.

30 In conclusion, the Applicants have not satisfied me that their addition to this proceeding as full parties will not cause prejudice to the Trustees and the 1985 Sawridge Trust. Delay in bringing this litigation to a conclusion and expanding its scope are not, in my view, capable of being remedied by costs awards.

B Is it necessary to add Patrick and Shelby Twinn as Parties?

31 The Trustees take the position that the interests of Patrick and Shelby Twinn are already represented in the Advice and Direction Application and that their addition would be redundant.

32 In respect to Patrick Twinn, I agree that it is unnecessary to add him as a party. Patrick Twinn takes the position that he is currently, and will remain a Beneficiary of the 1985 Sawridge Trust. The Trustees confirm this and I accept that is correct and declare him to be a current Beneficiary of the Trust.

33 Patrick Twinn understands and accepts that his beneficial interest under the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the 1985 Sawridge Trust. There is no circumstance that I can foresee where his status as a Beneficiary will be eliminated and there is no need to add him as a party to this Action. In fact, adding him to the litigation will only result in the Trust's resources being further reduced, to the detriment of all current and future beneficiaries.

34 Further, counsel for the OPTG in her letters of June 23 and June 30, 2017 has confirmed that the Public Trustee continues to represent minors who have become adults during the course of this litigation. As a result, both Patrick and Shelby Twinn will have their interests looked after by the OPTG in any event.

35 Shelby Twinn is in a similar situation. She acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust. The Trustee states at para 24 of its Brief, filed October 31, 2016, that:

> Shelby and her sister, Kaitlyn Twinn, are both **current beneficiaries** of the 1985 Trust.
>
> (Emphasis added.)

36 I accept the Trustees' confirmation and declare Shelby Twinn to be a current Beneficiary of the Trust.

37 As with Patrick Twinn, I cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated. Her participation through her own lawyer offers no benefit other than to dissipate the Trust's property through the payout of another set of legal fees.

38 For these reasons, there is no need to add Shelby Twinn as a party to this Action.

39 A further reason of more general application for not adding Patrick and Shelby Twinn as parties to this Action is that to do so would have the effect of making this lawsuit a more adversarial process. Since both of these Applicants are

already recognized as Beneficiaries by the Trustees and now by the Court, I observe that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees and their legal counsel and through a positive dialogue with the Trustees to ensure that their status as Beneficiaries is respected.

C Should Deborah Sarafinchon be added as a Party?

40 On the evidence presented to me, Debora Sarafinchon is not currently a Beneficiary under the 1985 Sawridge Trust. She accepts that she is not an Indian under the *Indian Act* and is not a member of the SFN. She has not applied for membership in the SFN and apparently has no intention of making such an application.

41 As I have said in my earlier decisions in *Sawridge #3*, it is not appropriate for this Court to get involved in disputes over membership in the SFN. Apart from the jurisdictional issues which might arise if I was tempted to address membership issues, it would be contrary to my position that this litigation should be narrowed rather than unnecessarily expanded.

42 I will give Ms. Sarafinchon the benefit of the doubt and will not characterize her application to be added as a party as being a collateral attack on SFN membership issues. However, I am concerned about the Court being drawn into that sort of contest in this long-running litigation.

43 There is nothing stopping Ms. Sarafinchon from monitoring the progress of this litigation and reviewing the proposals which the Trustees may make in respect to the definition of 'beneficiary' under the 1985 Sawridge Trust and providing comments to the Trustees and the Court. I also repeat my concern about increasing the adversarial nature of this Advice and Direction Application.

44 For all these reasons, I decline the request by Ms. Sarafinchon to be added as a party to this Action.

VII Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such that they ought to be entitled to party status?

45 It is not necessary for me to address this issue in deciding this Application and I decline to do so.

VIII Should the Applicants be entitled to advance costs?

46 In light of my decision to refuse to add all of these Applicants as parties to this Action, it is not necessary for me to decide the issue of awarding them advance costs.

IX Costs

47 As is apparent from my analysis, I have concluded that Patrick and Shelby Twinn, who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit. In coming to this conclusion I observe that Patrick and Shelby Twinn were not interested in paying for their own litigation costs. They instead sought to offload that on the Trust, which would then have to pay for their representation in this litigation. I would not have permitted that, even if I had concluded these were appropriate litigation participants, which they are not.

48 There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs. In that type of litigation a cost award of that kind means someone inside the group of intended beneficiaries loses, usually the residual beneficiary. Moen J in *Babchuk v. Kutz*, 2007 ABQB 88, 411 A.R. 181 (Alta. Q.B.), affirmed *en toto* 2009 ABCA 144, 457 A.R. 44 (Alta. C.A.), conducted a detailed review of the principles that guide when an estate should indemnify an unsuccessful litigant. That investigation investigates the role and need for the unsuccessful litigant's participation, for example by asking who caused the litigation, whether the unsuccessful litigant's participation was reasonable, and how the parties as a whole conducted themselves.

49 Here I have concluded that Patrick and Shelby Twinn had no basis to participate, and, worse, that their proposed participation would only end up harming the pool of beneficiaries as a whole. Their appearance is late in the proceeding,

and they have not promised to take steps to ameliorate the cost impact of their proposed participation, other than to shift it to the Trust.

50 *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.) has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent *R. v. Jordan*, 2016 SCC 27 (S.C.C.), [2016] 1 S.C.R. 631 (S.C.C.) and *R. v. Cody*, 2017 SCC 31 (S.C.C.) decisions Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (*R. v. Cody*, at para 39). I further note that in *R. v. Cody* the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the Addition of the Applicants as parties is unnecessary.

51 This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. By default successful litigation parties are due costs for that reason: *Rule* 10.29(1). The Court nevertheless retains a broad jurisdiction to vary costs depending on the circumstances (*Rule* 10.33), and naturally should make cost awards to encourage the *Rules* overall objectives and purposes (*Rule* 1.2).

52 Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at paras 29-35, (2010), 488 A.R. 22 (Alta. Q.B.), affirmed 2011 ABCA 109, 505 A.R. 196 (Alta. C.A.).

53 I conclude one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of the Trustees in responding to this Application.

54 In respect to Deborah Serafinchon, she was outside the Trust relationship and though I have rejected her application she has not litigated as an 'insider' who has done nothing but attempt to diminish resources of the Trust. I therefore award costs against Deborah Serafinchon in favour of the Trustees on a party/party basis. If there is any dispute over the resolution of the amount of costs in both cases, I retain jurisdiction to resolve that problem should it arise.

55 In closing, I confirm the OPTG representation of minors who have become adults will be subject to the existing indemnity and costs exemption orders. This direction shall be included in the formal order documenting this judgment.

Schedule 'A'

Part I - Materials filed by the participants in the Application by Patrick Twinn et al.

FILING DATE	*DESCRIPTION*
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 - Borden Ladner Gervais ("BLG").
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Sarafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.

October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon - Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. - Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 - Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.
November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon - BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold - Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 - Dentons.

Part II - List of Correspondence

DATE	*FROM*	*TO*
June 09, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding
June 16, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 19, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 20, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 22, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding, QC and Ms. Janet Hutchison
June 22, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 23, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 27, 2017	Ms. Doris C.E. Bonora	Justice D.R.G. Thomas
June 28, 2017	Ms. Karen A. Platten, QC	Justice D.R.G. Thomas
June 29, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 30, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

Included in a filed packet described as "Sawridge #5 Correspondence".

Tab 4

2017 ABCA 419
Alberta Court of Appeal

Twinn v. Twinn

2017 CarswellAlta 2650, 2017 ABCA 419, [2018] A.W.L.D. 638, [2018] A.W.L.D. 647, 287 A.C.W.S. (3d) 454

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon (Appellants / Applicants) and Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees") (Respondents / Respondents) and Public Trustee of Alberta ("OPTG") (Respondent / Respondent) and Catherine Twinn (Respondent / Respondent) and Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley (Not Parties to the Appeal / Respondents)

Marina Paperny J.A., Barbara Lea Veldhuis J.A., Sheilah Martin J.A.

Heard: November 1, 2017
Judgment: December 12, 2017
Docket: Edmonton Appeal 1703-0193-AC

Proceedings: reversing in part *1985 Sawridge Trust v. Alberta (Public Trustee)* (2017), 2017 CarswellAlta 1193, 2017 ABQB 377, D.R.G. Thomas J. (Alta. Q.B.)

Counsel: N.L. Golding, Q.C., for Appellants
D.C. Bonora, A. Loparco, for Respondents, Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust
J.L. Hutchison, for Respondent, The Office of the Public Guardian and Trustee
D.D. Risling, for Respondent, Catherine Twinn

Per curiam:

Introduction

1 This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 377 (Alta. Q.B.) (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

2 In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in

provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge Band v. R.*, 2009 FCA 123, 391 N.R. 375 (F.C.A.), leave denied [2009] S.C.C.A. No. 248 (S.C.C.); *Sawridge Band v. Poitras*, 2012 FCA 47, 428 N.R. 282 (F.C.A.); *Stoney v. Sawridge First Nation*, 2013 FC 509, 432 F.T.R. 253 (Eng.) (F.C.).

3 The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination, although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

4 On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Alta. Q.B.) (Sawridge #1).

The application to be added as parties (Sawridge #5)

5 The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

6 The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

7 The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

8 The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the Trust and the assets held in it, and expand the issues beyond those identified during case management.

9 With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

10 With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

11 The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 2, [2014] 1 S.C.R. 87 (S.C.C.), he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

12 All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

13 Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v. SNC Lavalin ATP Inc.*, 2017 ABCA 95 (Alta. C.A.) at para 3, [2017] A.J. No. 276 (Alta. C.A.); *Sturgeon Lake Indian Band v. Alberta*, 2015 ABCA 253 (Alta. C.A.) at para 8, (2015), 606 A.R. 291 (Alta. C.A.); *Lameman v. Alberta*, 2013 ABCA 148 (Alta. C.A.) at para 13, (2013), 553 A.R. 44 (Alta. C.A.).

14 Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.):

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

15 This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v. Bennett Jones Law Firm*, 2010 ABCA 67 (Alta. C.A.) at para 13, (2010), 487 A.R. 111 (Alta. C.A.).

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

16 The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

17 Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.* (1993), 10 Alta. L.R. (3d) 325 (Alta. Q.B.) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v. Raphael Tuck & Sons Ltd.* (1955), [1956] 1 Q.B. 357 (Eng. Q.B.) at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

18 In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

19 Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

20 The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

21 The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

22 During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. 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. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. 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.

Did the case management judge err in awarding solicitor and own client costs?

23 The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

24 Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.) at para 8, (2010), 25 Alta. L.R. (5th) 70 (Alta. Q.B.); *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at para 77, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.).

25 Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v. Condominium Plan 882-2999*, 2013 ABQB 684 (Alta. Q.B.) at para 25; *Brown v. Silvera* at paras 29-35; aff'd 2011 ABCA 109 (Alta. C.A.). The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Luft* at para 78.

26 In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

27 The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility

of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

28 In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Appeal allowed only as to scale of costs.

SCHEDULE "A"

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 TWINN 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	McLennan Ross LLP 600 McLennan Ross Bldg 12220 Stony Plain Road Edmonton, AB T5N 3Y4 Attention: Crista Osualdini Telephone: (780) 482-9200 Fax: (780) 482-9100 File No: 144194

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 Catherine Twinn has sworn an affidavit of records dated June 21, 2018, to be filed, which contains records, including, but not limited to, the Filed Documents, that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Twinn Affidavit of Records**");

AND WHEREAS the Sawridge Trustees do not object to Catherine Twinn filing the Twinn Affidavit of Records so long as this Order is granted;

AND WHEREAS Paul Bujold deposed affidavits on September 6, 13 and 30, 2011 exclusively in the within Court File ("**1103 Action**"); the Office of the Public Guardian and Trustee ("**OPGT**") questioned Paul Bujold on May 27 and 28, 2014 and on June 11, 2018 and transcripts are produced in respect of those questionings; Paul Bujold answered undertakings from such questionings; Exhibits were marked in such questionings; Paul Bujold deposed an affidavit of records dated November 2, 2015 and a supplementary affidavit of records dated April 27, 2018; and collectively such affidavits, transcripts, exhibits and undertakings shall be referred to as the "**Excluded 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 did not have the intention to waive solicitor-client privilege over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents or the Questioning Responses as that term is defined below;

AND WHEREAS the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the aforementioned documents in the prior paragraph ("**Subject Matter Waiver**") has not occurred;

IT IS HEREBY ORDERED AND DECLARED;

1. No response in a questioning to date, 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, the Twinn Affidavit of Records, and/or the 1403 Filed Documents (collectively "**Questioning Responses**"), can be construed as Subject Matter Waiver over the subject matter of any communications contained therein.

2. Any waiver of solicitor-client privilege in respect of the contents of the Filed Documents, the Twinn Affidavit of Records, the Questioning Responses and the 1403 Filed Documents is expressly declared to be limited to the content of those documents, and it

is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.

3. Further to paragraph 2, nothing in the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and/or the Questioning Responses can be used to compel the Sawridge Trustees to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by the Sawridge Trustees on the basis that Subject Matter Waiver has occurred.

4. 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 and obtain as a beneficiary of the 1985 Trust.

5. 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 file or otherwise admit to evidence any other document or record in the 1103 Action, other than those covered by this Order (being the Filed Documents, the Twinn Affidavit of Records, 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.

6. For clarity, the *Alberta Rules of Court* and such other rules of evidence as would ordinarily apply will continue to apply to the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and the Questioning Responses in respect of their use in any aspect of the 1103 Action, and none of the parties may object to the use of any of these documents on the basis of an argument of solicitor-client privilege. For further clarity, all transcripts from cross examination on affidavit in the 1103 Action, including any associated undertakings, exhibits or written interrogatories may continue to be utilized by any party to the 1103 Action as evidence at any application or trial in the 1103 Action and this Order does not affect this right.

7. This order shall not apply to the Excluded Documents.

The Honourable Justice D. R. G. Thomas

SCHEDULE "B"

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 TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	**ORDER (Hearing of Jurisdictional Question)**
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	McLennan Ross LLP 600 McLennan Ross Bldg 12220 Stony Plain Road Edmonton, AB T5N 3Y4 Attention: Crista Osualdini Telephone: (780) 482-9200 Fax: (780) 482-9100 File No: 144194

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 the Sawridge Trustees seek direction respecting the source and nature of the jurisdiction of this Court to make changes to the definition of "Beneficiary" as set out in the 1985 Trust;

AND WHEREAS Rule 4.14 of the *Alberta Rules of Court* permits a Case Management Justice to adjudicate issues that can be decided before commencement of trial;

IT IS HEREBY ORDERED AND DECLARED;

1. A hearing on a directed issue will be held, prior to trial, and the issues to be determined (the "Jurisdictional Question") will be as follows:

   (a) Does the Court have jurisdiction to amend the beneficiary definition contained in the 1985 Trust (the "**Definition**"), on the basis of public policy, its inherent jurisdiction or any other common law plenary power?

   (b) If the answer to question (a) is yes, what is the scope of the Court's jurisdiction to amend the Definition, including can the Court:

      (i) Add words to the 1985 Trust deed;

      (ii) Delete words contained in the 1985 Trust deed;

      (iii) A combination of addition and deletion of words to the 1985 Trust deed?

   (c) If the answer to question (a) is "no", is the Court's jurisdiction limited to what is permitted by s. 42 of the *Trustee Act*? If so, what evidence would be required by the Court to amend the Definition using s. 42 of the *Trustee Act*?

   (d) Do the Sawridge Trustees have jurisdiction utilizing the existing terms of the 1985 Trust deed to amend the Definition?

2. This Jurisdictional Question will be heard and determined by the Case Management Justice.

3. The timetable for the hearing of the Jurisdictional Question is to be in the form attached hereto as Schedule "A".

The Honourable Justice D. R. G. Thomas