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<br><br>IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust") |
| APPLICANTS | ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust; |
| DOCUMENT | REPLY BRIEF OF THE PUBLIC GUARDIAN AND TRUSEE |
| ADDRESS FOR SERVICES AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **Hutchison Law**<br>#190 Broadway Business Square<br>130 Broadway Boulevard<br>Sherwood Park, AB T8H 2A3<br><br>Attention: **Janet L. Hutchison**<br>Telephone: (780) 417-7871<br>Fax: (780) 417-7872<br>File: 51433 JLH |

Dentons LLP
2900 Manulife Place
10180 - 101 Street
Edmonton Alberta T5J 3V5

Attention: Doris Bonora and Mandy England

**Solicitors for the Sawridge Trustees**

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, Alberta
T5N 3Y4

Attention: Karen Platten, Q.C. and Crista Osualdini

**Solicitors for Catherine Twinn**

## TABLE OF CONTENTS


| | Page Number |
|---|---|
| PART I - INTRODUCTION | 1 |
| PART II – FACTS | 1 |
| PART III – SUBMISSIONS | 2 – 9 |
| PART IV - REMEDY SOUGHT | 9 |
| LIST OF APPENDICIES | 10 |
| LIST OF AUTHORITIES | 11 |

## PART I - INTRODUCTION

1.) The Office of the Public Guardian and Trustee of Alberta's ("OPGT") submissions are provided in response to the Trustees' Application dated August 10, 2018 and Brief dated August 24, 2018.

2.) The OPGT acknowledges the parties are still in discussions in relation to all issues addressed in the Trustees' August 24, 2018 brief. The OPGT will continue to work with the parties to attempt to narrow the issues for the September 25, 2018 hearing. It was necessary to file this brief while discussions are still ongoing as I am absent from the office from September 12-17, 2018.

## PART II – FACTS

*Privileges Documents Issue*

3.) Catherine Twinn served the parties with an Affidavit of Records on April 30, 2018 ("the Twinn Affidavit of Records").

4.) The Trustees objected to the contents of the Twinn Affidavit of Records. They requested the OPGT delete the Twinn Affidavit of Records and refrain from review of any of the documents listed therein. [ Email from Mandy England, Counsel for the Trustees, dated May 1, 2018, Appendix 1 to the Reply Brief of the OPGT]

5.) The OPGT agreed to the Trustees' request and thus does not have the benefit of having reviewed the documents in dispute as between the Trustees and Catherine Twinn in the privileged documents issue. [Email from Janet Hutchison, Counsel for the OPGT, dated May 1, 2018, Appendix 2 to the Reply Brief of the OPGT]

## PART III – SUBMISSIONS

*Privileged Documents Issue*

6.) The OPGT is not opposed, in principle, to providing the Trustees' with protection in relation to privileged documents in the Twinn Affidavit of Records that have not been previously disclosed. Confirmation there has not been a subject matter waiver in relation to the documents in the Twinn Affidavit of Records may also be appropriate.

7.) The form of order included in the Trustees' August 24, 2018 goes beyond those goals. As such, the OPGT cannot consent to the proposed order in its current form. [Proposed Form of Privilege Order, Schedule "D" to Trustees' Brief, filed August 24, 2018]

8.) The Trustees' proposed order would extend to Paul Bujold's Affidavit of Records, Supplemental Affidavits of Records, Affidavit Exhibits, questioning exhibits and Answers to Undertakings ("the Trustees' Documents"). In other words, it would apply to the documents voluntarily produced by the Trustees. [Proposed Form of Privilege Order, Schedule "D" to Trustees' Brief, filed August 24, 2018]

9.) The Trustees' proposed form of order also appears to seek to re-establish solicitor-client privilege over documents that were voluntarily provided to the OPGT in 2017 ("the 1403 documents"). [Proposed Form of Privilege Order, Schedule "D" to Trustees' Brief, filed August 24, 2018]

10.) The 1403 documents were provided to counsel for the OPGT by McLennan Ross at the request of Trustees' counsel. If the 1403 documents were previously protected by solicitor-client privilege as against the OPGT, the Trustees' waived that privilege in or about October 2017. [Emails from Dentons and McLennan

Ross, Counsel for the Trustees and Catherine Twinn, dated October 12, 2017, Appendix 3 to the Reply Brief of the Public Trustee]

11.) In response to paragraph 10 of the Trustees' Brief, without the ability to review the documents in question, the OPGT cannot confirm the privileged documents the Trustees seek to protect do not affect beneficiaries' interests in any material way. At minimum, there appears to be potential for the 1403 documents to be relevant to future accounting or taxation applications that may directly affect the minor beneficiaries' interests.

12.) Regardless, the OPGT seeks a cost effective and practical solution to this issue. As such, the OPGT would support an order that takes into consideration the following matters:

i.) The OPGT has yet to question Catherine Twinn or Paul Bujold on the Twinn Affidavit of Records. The interests of the minor beneficiaries require avoiding an overly broad order that unduly restricts the OPGT's ability to question on the Twinn Affidavit of Records.

ii.) Given their voluntary production, the OPGT should also not be restricted in the use of the Trustees' documents or the 1403 documents in future steps in this proceeding.

iii.) The OPGT does not object in principle to an Order granting the Trustees' the requested protections over the Twinn Affidavit of Records in relation to non-parties to the action.

iv.) It is the OPGT's general understanding from the Trustees that the Twinn Affidavit of Records does produce additional, potentially privileged documents, that have not been previously filed or shared with the OPGT. The OPGT is not opposed to an order putting the requested protections in place in relation to those documents.

v.) The Order must not impair beneficiaries' normal rights to seek information and documents from the Trustees.

*Directed Issue Hearing*

13.) The Directed Issue, as framed by the Trustees' August 10, 2018 Application, would require the Case Management Justice to hear several aspects of the final relief in this proceeding. This is inconsistent with Rule 4.15 of the *Alberta Rules of Court* and the previous directions of this Court.

*Alberta Rules of Court*, Alta Reg. 128/18 [Reply Brief of the OPGT, filed September 11, 2018, Authorities, Tab A]

Transcript from the August 24, 2016 Case Management Hearing, page 7, lines 21 – 33 and page 8, lines 14 – 20 [Appendix 4 to the Reply Brief of the Public Trustee]

Transcript from the January 19, 2018 Case Management Hearing, page 4, lines 36 – 39 [Appendix 5 to the Reply Brief of the Public Trustee]

14.) Further, the OPGT does not agree that the Directed Issue, as currently proposed and phrased, would satisfy the test under Rule 7.1. The option to use Rule 7.1 continues to be an exceptional order that must result in, *inter alia*, simplification of issues and cost savings in the proceeding.

*Gallant (Litigation Guardian of) v. Farries* [2012] ABCA 98 at para. 13 and 25-27 [Tab C of the Trustees Authorities, Trustees' Brief, filed August 24, 2018]

15.) The OPGT disputes the assertion that deciding the actual beneficiary definition, separately from consideration of how best to preserving the existing, and vested, rights of beneficiaries to the 1985 Trust (being referred to as "grandfathering"

but more properly characterized as preservation of existing rights), meets the test under Rule 7.1 of the *Alberta Rules of Court*.

*Alberta Rules of Court*, Alta Reg. 128/18 [Tab A of the Trustees Authorities, Trustees' Brief, filed August 24, 2018]

16.) A hearing regarding the necessary changes to the current beneficiary definition will, at minimum, require a Court to hear evidence and submissions to provide:

a. A full understanding and explanation of the *Indian Act* membership provisions that existed before April 15, 1982;

b. An overview of the genealogy/family history of the individuals, including minors, who appear to have vested rights as current beneficiaries;

c. An understanding of how the current Sawridge First Nation membership list interacts with the list of current beneficiaries;

17.) These are also the very matters a Court would need to consider in determining a "grandfathering" solution. As such, dividing the issues will require the parties to call similar, and certainly overlapping, evidence at two separate hearings. This is inconsistent with the goals of Rule 7.1.

18.) Also, the issues raised by the Directed Issue hearing are matters of mixed fact and law, which are not amenable to the Rule 7.1 split proposed by the Trustees.

*Brown (Next friend of)* v. *University of Alberta Hospital,* [1995] A.J. No. 631 at para. 22-30 [Reply Brief of the OPGT, filed September 11, 2018, Authorities, Tab B]

19.) A Court asked to decide how best to alter the current beneficiary definition, without access to evidence on how proposed changes will affect existing vested beneficiary rights could create a far more difficult problem than it solves. It will potentially remove vested rights without having a clear picture of the impacts of such an order. Any separation of a decision on a definition change from a decision on grandfathering will unnecessarily complicate and lengthen the proceeding.

20.) There are elements of the proposed Directed Issue that could be reframed in order to meet the requirements of Rule 7.1. Specifically, the question of whether the Court has jurisdiction to amend the beneficiary definition in the 1985 Trust has yet to be addressed in this proceeding ("the Jurisdictional Issue"). The OPGT's support for having this issue decided in advance of the final hearing is noted in its July 27, 2018 correspondence. [Letter from Janet Hutchison dated July 27, 2018, Tab A of the Trustees Authorities, Trustees' Brief, filed August 24, 2018]

21.) A decision on the Jurisdictional Issue will save time and expense in the future steps of the proceeding. The parties will have the critical direction as to the existence, and scope, of the Court's jurisdiction to address discrimination in the definition by removing or adding provisions. The findings on the Jurisdictional Issue will set the stage for a more efficient final hearing.

22.) Depending on the Court's findings, the Jurisdictional Issue hearing will also provide the parties with certainty in relation to the degree to which beneficiary consent is required for a final remedy. These findings will also inform notice to and participation of beneficiaries in a final hearing.

23.) Addressing the Jurisdictional Issue in advance of the final hearing will also provide closure on one of the outstanding issues from the Trustees' January 9,

2018 Application and satisfy the Court of Appeal's direction in this regard in *Sawridge #5*.

> Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue), filed January 9, 2018 [Appendix 6 to the Reply Brief of the Public Trustee]
>
> *Twinn* v. *Twinn*, (2017) ABCA 419 at para. 22 [Reply Brief of the OPGT, filed September 11, 2018, Authorities, Tab C]

24.) The remaining issues raised by the Trustees' Directed Issue hearing application, including a decision on the actual wording of changes to the beneficiary definition in the 1985 Trust, must be decided at a final hearing of this matter by the trial judge.

*Litigation Plan*

25.) The OPGT's proposed form of Litigation Plan is attached at Appendix 7. While the parties have been in discussion on the Litigation Plan, discussions only reached a point where the OPGT could usefully propose a comprehensive plan today.

26.) The OPGT acknowledges the parties are receiving this particular form of proposed Litigation Plan for the first time on September 11, 2018. The OPGT will continue to work co-operatively with the parties to finalize an agreed Litigation Plan after I return to the office on September 17, 2018.

27.) The OPGT's Litigation Plan seeks to address issues within the Trustees' proposed Litigation Plan, including:

a. Scheduling of settlement discussions, and with consideration to the other steps in the plan. The OPGT fully supports these ongoing discussions and their potential to resolve and narrow issues. Having deadlines for meetings in the previous Litigation Plan assisted in keeping discussions moving forward;

b. Setting a schedule for the parties' ongoing work on the Agreed Statement of Facts. The OPGT fully supports these ongoing efforts to prepare a comprehensive document to assist a trial judge. The previous deadlines in the Litigation Plan assisted in keeping the matter moving forward;

c. The need for a reasonable period of time for the OPGT to review the Catherine Twinn Affidavit of Records documents and assess the scope of questioning needed for Catherine Twinn and Paul Bujold. It is the OPGT's understanding that the Twinn Affidavit of Records will result in production of thousands of pages of new documents. The OPGT's counsel has considerable scheduling limitations throughout October 2018. The proposed dates should also avoid conflicts with the Jurisdictional Brief filing deadlines;

d. Fairly allocate work periods around the holiday season. The Trustees' current Litigation Plan would obligate the Respondents to prepare their submission entirely over the holiday season. The Respondents would receive the Trustees' submission on the final day of business before Christmas and file two business days after reopening in the New Year. We note the offices of Hutchison Law close from noon on December 21, 2018 through to January 3, 2019 inclusive and I am away until January 7, 2019 [see Item # 6 Schedule B of the Trustees' Application.];

e. The OPGT also suggests that additional pre-trial steps, such as exchange of expert reports, are best addressed in an amended Litigation Plan once the Jurisdictional Issue is decided.

## PART IV - REMEDY SOUGHT

28.) For the above noted reasons, the OPGT requests an Order directing:

i.) A modified privilege order, taking into consideration the factors noted in paragraph 12;

ii.) An order directing hearing of the Jurisdictional Issue by the Case Management Justice, rather than the Directed Hearing issue proposed by the Trustees;

iii.) Approval of the Litigation Plan in the form proposed by the OPGT;

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the Hamlet of Sherwood Park, in the Province of Alberta, this 11th day of September, 2018

**HUTCHISON LAW**

Per: _____

**JANET L. HUTCHISON**
Solicitors for the Office of the Public Guardian and Trustee of Alberta

Estimation of time for Oral Argument: 20 minutes

## LIST OF APPENDICIES

| Tab | Appendices |
|---|---|
| 1 | Email from Mandy England, Counsel for the Trustees, dated May 1, 2018 |
| 2 | Email from Janet Hutchison, Counsel for the OPGT, dated May 1, 2018 |
| 3 | Emails from Dentons and McLennan Ross, Counsel for the Trustees and Catherine Twinn, dated October 12, 2017 |
| 4 | Transcript from the August 24, 2016 Case Management Hearing |
| 5 | Transcript from the January 19, 2018 Case Management Hearing |
| 6 | Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue), filed January 9, 2018 |
| 7 | OPGT's proposed form of Litigation Plan |

## LIST OF AUTHORITIES

| Tab | Authorities |
|---|---|
| A. | *Alberta Rules of Court*, Alta Reg. 124/2010 |
| B. | *Brown (Next friend of)* v. *University of Alberta Hospital*, [1995] A.J. No. 631 (Q.B.) |
| C. | *Twinn* v. *1985 Sawridge Trust*, [2017] A.J. No. 1340 (C.A.) |

# Tab 1

**From:** England, Mandy [mailto:mandy.england@dentons.com]
**Sent:** Tuesday, May 01, 2018 10:50 AM
**To:** Karen Platten <kplatten@mross.com>; Crista Osualdini <cosualdini@mross.com>; David Risling <drisling@mross.com>
**Cc:** Janet Hutchison (jhutchison@jlhlaw.ca) <jhutchison@jlhlaw.ca>; Bonora, Doris <doris.bonora@dentons.com>; Chantelle Monson <CMonson@jlhlaw.ca>
**Subject:** URGENT-Catherine Twinn Affidavit of Records
**Importance:** High

Karen, David and Crista,

I am writing regarding your proposed affidavit of records.

Many of the items listed in your Schedule 1 are solicitor-client privileged documents belonging to the Trust. They came into your client's possession in her capacity as a Trustee. She cannot waive privilege over those documents.

We ask that you do not send records to the OPGT before this matter is sorted out. Janet, we respectfully request that you do not request or receive records until this is sorted out.

We ask your affidavit of records be amended immediately to move the privileged documents to Schedule 2. If this matter cannot be resolved promptly, we will be bringing an application to Justice Thomas to address this matter.

Without being able to see the documents, the ones that we could identify from the descriptions as privileged are:

- Many of the undertakings, exhibits and interrogatories of Catherine Twinn from the indemnification process (#1-3)
- Number 25
- Number 26
- Number 41
- Number 42
- Number 46
- Number 49
- Number 50
- Number 54
- Number 60
- Number 62
- Number 67
- Number 68
- Number 69
- Number 71
- Number 72
- Number 73
- Number 76
- Number 77
- Number 78
- Number 89

We also have a concern regarding certain other documents that are confidential and irrelevant, and therefore we do not think are appropriate to produce. However, we will address that further. The immediate and urgent issue is the privileged documents. The Trustees **do not** consent to waive privilege, and it is not Catherine's to waive.

We ask for your confirmation that these will be moved to Schedule 2.

Regards,
Mandy

DENTONS

Mandy L England
Partner

D +1 780 423 7227
mandy.england@dentons.com
Bio | Website

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

Maclay Murray & Spens > Gallo Barrios Pickmann > Muñoz > Cardenas & Cardenas > Lopez Velar
> Rodyk > Boekel > OPF Partners > 大成 > McKenna Long

# Tab 2

## Chantelle Monson

**From:** Janet Hutchison
**Sent:** Tuesday, May 01, 2018 11:10 AM
**To:** England, Mandy
**Cc:** Bonora, Doris; Chantelle Monson; Crista Osualdini; kplatten@mross.com; Dave Risling
**Subject:** Re: Catherine's Affidavit of Records

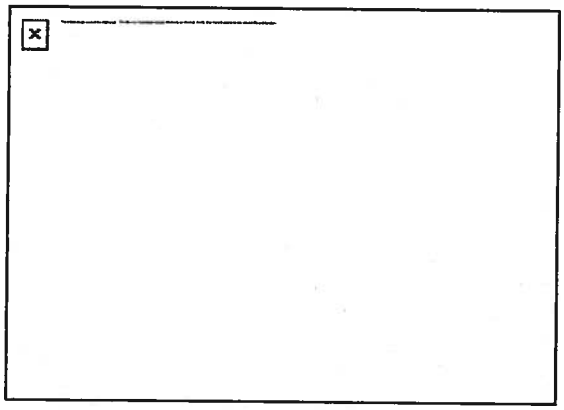
Mandy

I am out of the office until Monday. I will not request or review challenged documents upon my return without further discussion.

One point of clarification for my return- I am unclear how documents filed/ produced in the indemnification application ( which I understand was filed in two actions, including this one) could be problematic- I understood those documents were on the website.

It may be that I am simply not up to date on the full production in that application. Any clarification would be very useful in considering our client's position next week.

Thank you,



**Janet L. Hutchison**

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**#190 Broadway Business Square**
**130 Broadway Boulevard**
**Sherwood Park, Alberta T8H 2A3**
**Phone: 780-417-7871 (ext. 225)**
**Fax: 780-417-7872**

On May 1, 2018, at 10:53 AM, England, Mandy <mandy.england@dentons.com> wrote:

Janet,

As you will see from my last email, there is a serious issue regarding proposed waiver of lawyer-client privilege by Catherine over a number of records. We will work quickly to try to have this resolved so that they are moved to Schedule 2. However, in the meantime, we do ask that you please do not ask Catherine to produce those records, and do not accept delivery of the same.

Thank you,
Mandy

大成 DENTONS Mandy L England
Partner

D +1 780 423 7227
mandy.england@dentons.com
Bio | Website

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

Maclay Murray & Spens > Gallo Barrios Pickmann > Muñoz > Cardenas & Cardenas > Lopez Velai > Rodyk > Boekel > OPF Partners > 大成 > McKenna Long

# Tab 3

## Chantelle Monson

**From:** Crista Osualdini <cosualdini@mross.com>
**Sent:** Thursday, October 12, 2017 10:26 AM
**To:** Bonora, Doris; Janet Hutchison
**Cc:** Karen Platten; Nancy Cumming (necumming@bryanco.com); Rosalee Hayman
**Subject:** RE: October 13, 2017 Application - 51433 JLH

Janet,

I have checked with our paralegal and we do have electronic copies of the undertakings, exhibits and written interrogatories. Our paralegal, Rosalee, will be sending these to you shortly. I will also send to you our electronic copies of transcripts from questioning of Mr. Bujold.

In addition, we recently filed a reply brief in response to the submissions of the Trustees, along with a supplemental Affidavit from Catherine. I note that these are not on the Sawridge website at present. I will have Rosalee send you these documents as well.

**Crista Osualdini** | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
**McLennan Ross LLP** | www.mross.com | BIOGRAPHY
600 McLennan Ross Building, 12220 Stony Plain Road, Edmonton, AB T5N 3Y4



**From:** Bonora, Doris [mailto:doris.bonora@dentons.com]
**Sent:** Thursday, October 12, 2017 7:52 AM
**To:** Janet Hutchison <jhutchison@jlhlaw.ca>; Crista Osualdini <cosualdini@mross.com>
**Cc:** Karen Platten <kplatten@mross.com>; Nancy Cumming (necumming@bryanco.com) <necumming@bryanco.com>
**Subject:** RE: October 13, 2017 Application - 51433 JLH

Janet

The materials that we have filed since September 22 are the transcripts. These are electronic and therefore there is no difficulty sharing these with you. We are however hoping that outside of the context of an application the OPGT will not spend a great deal of time reviewing them as you know that we are trying to control costs. In the interests of efficiency I will send you both the transcripts of Paul Bujold and Catherine Twinn.

The other materials that we filed are the written interrogatories, answers to undertakings and the exhibits to the questioning of Catherine Twinn. We do not have those in electronic form. These consume 5 large binders. I wonder if you would like to come and look at them before you ask me to copy them.

Or if Crista has all of them scanned, then perhaps she could send them to you.

I look forward to your response.

Doris

DENTONS Doris C.E. Bonora
Partner

D +1 780 423 7188
doris.bonora@dentons.com
Bio | Website

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

大成 Salans FMC SNR Denton McKenna Long



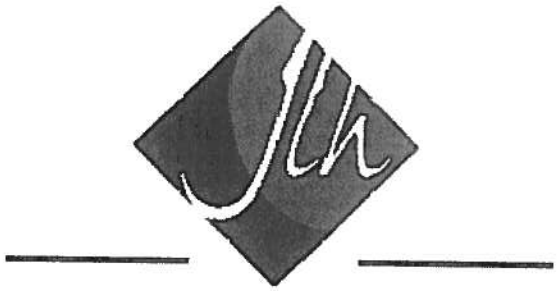
**From:** Janet Hutchison [mailto:jhutchison@jlhlaw.ca]
**Sent:** 12-Oct-17 2:36 AM
**To:** Bonora, Doris; Crista Osualdini (cosualdini@mross.com)
**Cc:** Karen Platten; Nancy Cumming (necumming@bryanco.com)
**Subject:** October 13, 2017 Application - 51433 JLH
**Importance:** High

I had understood from recent correspondence that additional materials were being filed in the above noted matter after the Trustee's September 22, 2017 brief.

In my correspondence dated October 5, 2017, I requested emailed copies of all such materials if they were not going to be posted on the Trust website on the same day. No further materials have been posted on the Trust website.

Given that the materials that are posted on the site include repeated references to my client and given that these materials have been filed in a proceeding my client is a party to, we trust we will receive any materials filed since September 22, 2017 early in the day on October 12th, 2017.

Thank you,

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# Tab 4

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

| | |
|---|---|
| August 24, 2016 | Morning Session |
| The Honourable<br>Mr. Justice Thomas | Court of Queen's Bench of Alberta |
| C.K.A. Platten, Q.C. | For Catherine Twinn |
| C. Osuladini | For Catherine Twinn |
| L. Maj | For the Minister of Aboriginal Affairs and Northern Development |
| J.L. Hutchison | For the Public Trustee of Alberta |
| D.C. Bonora | For Sawridge Trustees |
| A. Loparco | For Sawridge Trustees |
| N.L. Golding, Q.C. | For Patrick Twinn, et al |
| E.H. Molstad, Q.C. | For Sawridge First Nation |
| G. Joshee-Arnal | For Sawridge First Nation |
| S.A. Wanke | For Morris Stoney, et al |
| C. Wilde | Court Clerk |

**Discussions**

THE COURT: Good morning.

Are you going to do the introductions?

MR. MOLSTAD: I have been assigned that task, Sir.

THE COURT: All right.

MR. MOLSTAD: We have, representing the Sawridge Trustees, Ms. Bonora and Ms. Loparco.

We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us today.

We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

Twinn.

Subsequent to the filing of those briefs, we received applications by Morris Stoney and his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra Sarafinchin.

In respect of the standing of those parties and whether they are beneficiaries, we believe that until those applications are heard, that, as beneficiaries, they probably have a right to speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they have a right to speak to distribution, and so we think it appropriate to postpone that issue. It's ready to go once we've determined the standing of the various other parties and -- and it would be our submission that especially with respect to the clients Ms. Golding represents.

So those are my submissions in respect of the adjournment, and I think all counsel are on board with that adjournment request.

THE COURT: So both the distribution plan, I'll call it, plus the issue of -- the outstanding issue of who the beneficiaries are?

MS. BONORA: Yes. So the beneficiary definition is also postponed. Counsel have advised that they believe it would be perhaps a two-day application to deal with that particular issue, and so we still have to determine exactly how we're going to come to bring that issue before the Court. We're still in discussions among counsel on that issue.

THE COURT: Well, thank you for that, but I'll give you my thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing it. It will be some other judge. I'm finding that the estimates of counsel in this matter aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is. I'm not making an order, but I'm thinking this is not going to be determined on the basis of affidavit evidence. It's going to go to a trial and get this thing resolved once and for all. So --

MS. BONORA: Thank you, Sir.

THE COURT: -- just so you know my thinking on it.

MS. BONORA: And it --

THE COURT: And that you might want to start preparing a

contingency plan around that approach.

MS. BONORA: M-hm. That's very helpful to all counsel, because there was some discussion about whether you would, in fact, hear that application, and there was a discussion about whether we needed to make an application about whether you would hear that application. So if, in fact, you are saying perhaps you won't and that it should move to a trial, that gives us some direction in our next discussions about scheduling and moving towards that.

THE COURT: Okay.

MS. BONORA: So thank you for those comments.

THE COURT: Yeah. No, I -- the reason I'm saying it is I really came on to this before we had all sorts of rules around case management in -- generally, and specifically in commercial matters. I mean, case managers are meant to deal with process issues, and not substantive disputes. I mean, we deal with a lot of disputes over the appropriate process, but this one is going off in the direction of a more general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a trial, I would not be the case manager in this case.

MS. BONORA: Yes, Sir.

THE COURT: All right?

MS. BONORA: So perhaps if you could leave the issue of the actual process and whether it would be a trial or whether counsel may be able to agree that it could proceed by affidavit evidence, and whether we could maybe discuss that before you made a decision about that and we could make some -- even if we just did it by way of written submissions to you, that would be helpful to all of us, I think, to have us consider that and consult with our clients.

THE COURT: That would be satisfactory to me.

MS. BONORA: Thank you. Mr. Molstad just asked me if you were talking about trials of other issues on the agenda, but I think you're just talking about --

THE COURT: No, I'm --

MS. BONORA: -- the definition of beneficiary, which was the

# Tab 5

Action No.: 1103 14112
E-File No.: EVQ18SAWRIDGEBAND1
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, C. T-8, AS AMENDED, 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") -and- ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as Trustees for the 1985 Sawridge Trust

ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")

Applicant

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# PROCEEDINGS

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Edmonton, Alberta
January 19, 2018

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

MS. BONORA: Thank you. I will, sir. And the only other thing, at the last order you asked us to file applications. We filed those --

THE COURT: Yes.

MS. BONORA: -- and we have provided you with those.

THE COURT: I saw those. Thank you. That is good.

MS. BONORA: Those are all the matters --

THE COURT: Okay.

MS. BONORA: -- I believe we have for you this afternoon.

THE COURT: Okay. Let me just raise this with you, I mean, now I see the revised time line, which is reasonable, but I will ask this question. Have any steps been taken to reserve trial dates in the future in 2019 or 2020 or whenever you could get dates?

MS. BONORA: Sir, we haven't. I suppose the issue is we have always hoped we maybe would not, in fact, have a full trial, given the expense of that, and so that's why we haven't pursued those dates at this point. And you will see the litigation plan contains three separate occasions for us to need to settle, so we're still hoping that that might be a possibility.

THE COURT: All right. Well, let me just put this on the record, that, you know, those settlement steps or the dates for meetings are, in terms of how things move in this Court, relatively close, but if you conclude that maybe you are not going to settle it, I would be glad to intervene to try and get some tentative trial dates reserved for you, or for the participants, because I think they are now setting long trials out into 2020, if not 2021.

MS. BONORA: Okay.

THE COURT: It is not going to be my problem, because I will be gone in the first few days of 2019, but I am not going to be the trial Judge anyway. But I will certainly try to get you a block of earlier dates, and I think in the circumstance, I can probably make a pretty good case to the powers that be to get you a block of time. So maybe you can -- you know, if things are not going well, try and get a fix on how long you think a trial might take, and I will go to bat for you to see if we can get some

time blocked.

MS. BONORA: Very good, sir.

THE COURT: All right.

MS. BONORA: Just I suppose I should have started by saying for the record, of course, you know that McLennan Ross is here, Catherine Twinn and Ms. Hutchinson and Eugene are here for the OPGT and, of course, Dentons is here on behalf of the Sawridge Trustees.

THE COURT: Yes, I have got my little note here from the clerk.

MS. BONORA: Thank you. Thank you, sir. I think that's it.

THE COURT: So thank --

MS. BONORA: Thank you for those comments --

THE COURT: So thank you.

MS. BONORA: -- and we will have that discussion.

THE COURT: Thank you, counsel.

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PROCEEDINGS CONCLUDED

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# Tab 6

| | |
|---|---|
| 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<br><br>IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 |
| APPLICANTS | ROLAND TWINN,<br>WALTER FELIX TWIN,<br>BERTHA L'HIRONDELLE,<br>CLARA MIDBO, and<br>CATHERINE TWINN, as trustees for the 1985 Sawridge Trust ("Sawridge Trustees") |
| DOCUMENT | **Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue)** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | Dentons Canada LLP<br>2900 Manulife Place<br>10180 - 101 Street<br>Edmonton, AB T5J 3V5<br>Counsel for the Sawridge Trustees<br><br>Attention: Doris C.E. Bonora<br>Telephone: (780) 423-7188<br>Fax: (780) 423-7276<br>File No: 551860-001-DCEB |

Respondents:

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

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton AB T5N 3Y4
Attention: Karen A. Platten, Q.C.

Counsel for Catherine Twinn as a Trustee of the 1985 Sawridge Trust

**NOTICE TO RESPONDENT(S)**

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

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

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

| | |
|---|---|
| Date | January 19, 2018 |
| Time | 1:00 PM |
| Where | Law Courts, 1 A Sir Winston Churchill Square, **Edmonton** |
| Before Whom | Case Management Justice D.R.G. Thomas |

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

**Remedy claimed or sought:**

1. The Sawridge Trustees request that the Court find that all parties have admitted that the definition of Beneficiary in the Trust Deed is discriminatory and thus declare that the definition of Beneficiary is discriminatory.

2. In the alternative, the Sawridge Trustees request that this Court grant an order for a question or issue to be determined, pursuant to Rule 7.1 of the *Alberta Rules of Court* (**"Directed Issue Hearing"**), with respect to the following issue:

   (a) Is the definition of "Beneficiary" in the Trust Deed of the Sawridge Band Inter Vivos Settlement ("1985 Trust") discriminatory?

3. If the Directed Issue Hearing is ordered, the Sawridge Trustees further request that a timetable in respect of that Hearing be set according to Schedule "A" Litigation Plan attached.

4. The Sawridge Trustees also seek direction from this Court as to the method by which beneficiaries and/or potential beneficiaries may participate in the Trust litigation. The Court of Appeal, in paragraphs 21 and 22 of *Twinn v Twinn*, 2017 ABCA 419, recommended that further direction and clarification be sought with respect to the method of permitted participation by non-parties who are beneficiaries or potential beneficiaries of the 1985 Trust.

**Grounds for making this application:**

***Directed Issue Hearing***

5. The Trustees believe all the parties have admitted that the definition of "Beneficiary" in the Trust Deed is discriminatory and thus submit that, within the jurisdiction granted to a case management justice in Rule 4.14 of the *Alberta Rules of Court* to identify, simplify and clarify the real issues in dispute, the Court may determine that the 1985 Trust's definition of "Beneficiary" is discriminatory.

6. If the Court cannot determine this issue, the Trustees submit that the resolution of this question or issue meets the objectives in Subrule 7.1(1):

   (a) Determining whether the definition of "Beneficiary" is discriminatory may dispose of the rest of the claim. If it is found that the definition is not discriminatory, that will likely make determination of the balance of the Application unnecessary, as the Sawridge Trustees will not seek a change to the definition of "Beneficiary" if it is not discriminatory.

   (b) The Directed Issue Hearing will be a short hearing, and will not require much time before it is ready to be heard by the Court. The Directed Issue Hearing will substantially shorten the required final determination application or trial, as this narrow question will require far less evidence than the balance of the Application. It is likely that the determination can be made with only affidavit evidence or very little evidence as the argument will involve legal arguments on the statute.

   (c) It will save expense, as a determination that the definition is not discriminatory would save the need for the more expansive and expensive trial that may be required for the balance of the Application.

7. If the definition of "Beneficiary" is found to be discriminatory, the parties can then focus on a hearing respecting the appropriate remedy. That remedy may involve striking the discriminatory language, amending the trust using the amending provisions of the 1985 Trust, or proceeding under section 42 of the *Trustee Act*.

8. The Sawridge Trustees submit that the 1985 Trust should be amended by striking language. Other parties have suggested that section 42 of the *Trustee Act* applies and thus all the beneficiaries would have to be identified and there would need to be 100% approval from the beneficiaries. The Court would have to consider the fact that the Trust Deed prohibits amendment. The Sawridge Trustees suggest that if the 1985 Trust needs to be amended, it may be amended under the provisions of the Trust Deed requiring only 80% approval of the beneficiaries. Which of these approaches is appropriate must be determined by the Court.

9. The Sawridge Trustees submit that the issue of the appropriate remedy is a discrete issue from the question of whether the 1985 Trust is discriminatory. There is little or no overlap between the evidence that will be required for the Directed Issue Hearing, which requires the interpretation of

a document and a statute and the evidence that will be required to determine the appropriate remedy. Further, if the definition is not discriminatory, it may be unnecessary to determine a remedy.

***Method of Non-Party Beneficiary Participation***

10. The Sawridge Trustees submit that it is their position 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. The Sawridge Trustees propose that the participation be limited to one submission per individual at each stage of the hearing of issues. (So, if this Court agrees to the Directed Issue Hearing, one submission could be made at that time, and one at the time of the final hearing with respect to remedy.)

11. There are many people who claim to be potential beneficiaries of whom the Trustees are aware. Given the number of such potential beneficiaries, the Sawridge Trustees further submit that a page limit of **5 pages per written submission** (including attachments) would provide an appropriate balance between the interests of the beneficiary/potential beneficiary in making a submission in respect of his or her interests, with the need to maintain proportionality and efficiency in the proceedings. The submissions are not to be duplicative of arguments already made. Any duplication could be subject to costs awards.

12. If the beneficiary or potential beneficiary wishes to file an affidavit, it can only do so to raise evidence that is unique and distinct to that 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 evidence.

13. If participation in this manner is directed, the Sawridge Trustees suggest that a deadline for beneficiary submissions in respect of the Directed Issue Hearing be incorporated into the proposed timetable, as shown in the proposed timetable attached as Schedule A. The Sawridge Trustees propose that notice be provided by way of case management order, which would be published on the website for this proceeding.

14. Further, the timeline for affidavit evidence can be incorporated in to the deadlines set out above so that the parties may know the evidence filed and then determine if they need to file further evidence. The Sawridge Trustees propose that non-party potential beneficiaries must file affidavit evidence for the Directed Issue Hearing by **February 15, 2018** and that notice of the same be provided by way of case management order, which would be published on the website for this proceeding.

**Material or evidence to be relied on:**

15. Proposed timetable for Directed Issue Hearing, attached as Schedule A.

16. Evidence already filed and posted on the website on the issue of discrimination.

**Applicable Rules:**

17. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.2, 4.14, 7.1.

**How the Application is proposed to be heard or considered:**

18. The Sawridge Trustees propose that this application proceed in the manner set out by the Court on January 5, 2018, in an oral hearing in Court on January 19, 2018.

**WARNING**

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

**Schedule A – Proposed Litigation Timetable**

| NO. | ACTION | DEADLINE | PROPOSED DIRECTION |
|---|---|---|---|
| 1. | All affidavits filed on issue of whether the trust beneficiary definition is discriminatory (Directed Issue Hearing) | By January 30, 2018. | Parties shall advise of affidavits which are previously filed upon which they intend to rely. All documents intended to be relied upon shall be included in affidavits. Parties will be directed to be focussed on the issue of discrimination alone, with cost consequences possible if parties file irrelevant materials in an affidavit. |
| 2. | All questioning on affidavits filed for Directed Issue Hearing | By February 28, 2018 | |
| 3. | All undertakings answered | By March 30, 2018 | |
| 4. | All expert will say statements filed | By March 30, 2018 | If any party wishes to call an expert witness for the Directed Issue Hearing, a procedure will be implemented to determine the relevance. The purpose of this procedure is to ensure that the Hearing remains focused on the discrimination issue, and not on matters that will be more properly heard with the application to resolve the discrimination. Any party wishing to rely on the evidence of an expert witness for the directed Hearing must serve a "will say" statement outlining the evidence that would be put forward by the expert witness and signed by the expert witness. The "will say" statements must be served on all other parties, and filed with the Court |

| | | | |
|---|---|---|---|
| 5. | Any rebuttal expert will say statements filed | BY April 30, 2018 | |
| 6. | An application with respect to objections to experts based on relevance | By May 15, 2018 | |
| 7. | File written submissions on expert reports relevance | By May 31, 2018 | If objections have been filed, or upon the initiative of the Court if it has concerns about relevance, the admissibility of such party's proposed expert evidence will be determined by the Case Management Justice by written submissions submitted by May 31, 2018. |
| 8. | File expert reports | 30 days following the filing of the will say or 30 days filing a written decision by the case management Justice on relevance | |
| 9. | Non-party potential beneficiaries file non repetitive affidavits | By February 15, 2018 | |
| 10. | All submissions on the Directed Issue Hearing for parties | Will be made according to the practice Direction for special chambers applications or as directed by the court. | |
| 11. | All submissions on the Directed Issue Hearing for non-parties and will be limited to 5 pages including attachments | Will be made one week following the applicant's and respondents' submissions | |
| 12. | Determination of Directed Issue Hearing | Fall 2018 | |

# Tab 7

CLERK'S STAMP

| | |
|---|---|
| COURT FILE NUMBER | 1103 14112 |
| COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE | Edmonton |
| | IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c, T-8, AS AMENDED |
| | IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust") |
| APPLICANTS | ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust; |
| DOCUMENT | **LITIGATION PLAN** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **Hutchison Law**<br>#190 Broadway Business Square<br>130 Broadway Boulevard<br>Sherwood Park, AB T8H 2A3<br><br>Attention: **Janet L. Hutchison**<br>Telephone: (780) 417-7871<br>Fax: (780) 417-7872<br>File: 51433 JLH |

1. The remaining steps and procedures are to be completed on or before the dates specified below:

| NO. | ACTION | DEADLINE |
|---|---|---|
| 1. | Case Management Meeting to address Trustee's application for an Order on the Discrimination Issue. | January 19, 2018<br><br>**DONE** |
| 2. | Settlement meeting of all counsel for the Parties to continue to discuss remedies; | February 14, 15 or 16, 2018<br><br>**DONE** |
| 3. | Interim payment on accounts made to OPGT from the Trustees | January 31, 2018 and February 28, 2018<br><br>**DONE** |
| 4. | Agreed Statement of Facts to be circulated to all Parties, by the Trustees on issue of the determination of the definition of beneficiary and grandfathering (if any). | By February 28, 2018<br><br>**DONE** |
| 5. | Further Settlement meeting of all counsel for the Parties to continue to discuss remedies and draft Agreed Statement of Facts. | By March 30, 2018<br><br>**DONE** |
| 6. | Responses from the Trustees to the OPGT regarding all outstanding issues on accounts to the end of 2017 | March 30, 2018<br><br>**DONE** |
| 7. | All Parties to provide preliminary comments on the Trustee's first draft of an Agreed Statement of Facts. | By May 30, 2018<br><br>**DONE** |
| 8. | Concurrently with the preparation of the agreed statement of facts, all Parties to advise on whether they have any documents on which they respectively intend to rely on the issue of the remedies. If they have documents, they will file an Affidavit of Records for all such documents, provided that such Affidavit of Records need not include any government or church records that are not currently in such Party's possession but that the Party may with to rely upon in respect of the genealogy (including birth certificates), aboriginal ancestry, Registered Indian status or martial status of particular individuals whose status as a beneficiary is in issue ("Excepted Government Records"). | By April 30, 2018 (Revised as per Consent Order filed May 2, 2018)<br><br>**DONE** |
| 9. | Concurrently with the preparation of the agreed statement of facts, all non-parties may provide records on which they intend to rely to all Parties who will determine if they are duplicates and is not, non-party will file an Affidavit of Records | By February 28, 2018<br><br>**DONE** |

| NO. | ACTION | DEADLINE |
|---|---|---|
| 10. | Third 2018 Settlement Meeting of all counsel to continue to discuss remedies and draft Agreed Statement of Facts. | By April 30, 2018<br>**DONE** |
| 11. | Questioning on new documents in Affidavits of Records, if required. | By June 15, 2018<br>**DONE** |
| 12. | Non-party potential beneficiaries provide all Parties with any facts they wish to insert in the Agreed Statement of Facts. | By May 30, 2018 (Revised as per Consent Order filed May 7, 2018)<br>**DONE** |
| 13. | Parties to provide additional comments on draft Agreed Statement of Facts. | July 27, 2018<br>**DONE** |
| 14. | Fourth 2018 Settlement Meeting of parties' counsel. | Held August 16, 2018<br>**DONE** |
| 15. | Fifth 2018 Settlement Meeting of parties' counsel. | Held August 24, 2018<br>**DONE** |
| 16. | Sixth 2018 Settlement Meeting of parties' counsel. | Held September 7, 2018<br>**DONE** |
| 17. | Case Management Meeting to address Trustees' Application for Advice and Direction, including the Trustees' application for an Order on the Privilege Issue. | September 25, 2018 |
| 18. | Catherine Twinn to provide parties with her Affidavit of Records and documents. (if, the Privileged Order issued). | By October 1, 2018 |
| 19. | Seventh 2018 Settlement Meeting of parties' counsel. | By October 30, 2018 |
| 20. | Brief of the Sawridge Trustees on the Jurisdictional Issue Hearing to be filed. | By November 16, 2018 |
| 21. | Deadline to hold Questioning of Catherine Twinn and Paul Bujold on Catherine Twinn's Affidavit of Records, if any. | By November 23, 2018 |

| NO. | ACTION | DEADLINE |
|---|---|---|
| 22. | Any responding brief on Jurisdictional Issue to be filed by Catherine Twinn and the OPGT.<br><br>Written Submissions by any non-party beneficiaries/potential beneficiaries on Jurisdictional Issue (maximum of 5 pages, including attachments), if permitted by the Court. | By December 7, 2018 |
| 23. | Hearing in respect of the Jurisdictional Issue. | By December 17, 2018<br>(Court time permitting) |
| 24. | Answers to undertakings, from November 2018, questioning of Paul Bujold and Catherine Twinn, if any. | January 11, 2019 |
| 25. | Further exchange of draft Agreed Statement of Facts based on questioning. | January 24, 2019 |
| 26. | First 2019 Settlement Meeting of parties' counsel (Eighth Settlement Meeting). | January 31, 2019 |
| 27. | The parties shall file a Supplemental Affidavit of Records for any Excepted Government Records, which shall include: (a) any Excepted Government Records received by this deadline, and (b) evidence of a request or order for such records in the case of any Excepted Government Records not received by the deadline. | *60 days after decision on Jurisdictional Issue received. |
| 28. | All other steps to be determined in a case management hearing | As and when necessary |

# Tab A

# ALBERTA RULES OF COURT, Alta. Reg. 124/2010

Alberta Rules of Court

Enabling Act: Judicature Act

**Alta. Reg. 124/2010**



## RULE 4.15

*Case management judge presiding at summary trial and trial*

4.15 Unless every party and the judge agree, a case management judge must not hear an application for judgment by way of a summary trial or preside at the trial of the action for which the case management judge is appointed.

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End of Document

# Tab B

# Brown (Next friend of) v. University of Alberta Hospital, [1995] A.J. No. 631

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Bielby J.

Judgment: July 5, 1995. Filed: July 6, 1995.

Action No. 8703-20408

**[1995] A.J. No. 631** 31 Alta. L.R. (3d) 260 172 A.R. 221 56 A.C.W.S. (3d) 278

Between Nadine Lanai Brown, also known as Nadine Lanai Fogh, also known as Nadine Lanai Steiner, by her next friend Liana Fogh, Liana Steiner, and Steve Brown, plaintiffs, and The University of Alberta Hospital, University Hospitals Board, Gene Doris Armstrong, executrix of the estate of Herman Brock Armstrong, also known as Brok Armstrong, also known as Hemen Brock Armstrong, deceased, Gustave Ortega, Grazyna B. Jackiewicz, Richard Sebba, Dr. Wheler, John C. Taylor, Jack D.R. Miller, Gary A.J. Gelfand, Kenneth C. Petruk, Phyllis Millard, Gwen A. Docherty, Elizabeth A. Orichowski, and Katherine Mello, defendants, and The Attorney General of Alberta, intervener

(12 pp.)

[Ed. note: A Corrigendum was released by the Court July 17, 1995 and the correction has been made to the text.]

## Case Summary

## Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 220. Limitations of Actions Act, R.S.A. 1980, c.L-15, ss. 55, 56.

**Limitation of actions — Persons under disability and exemptions and exclusions — Infants — Infants in actual custody of parent or guardian — Practice — Time for determination of compliance with limitation period.**

Application by the defendants for a separate hearing to determine the applicability of the Limitation of Actions Act to the claim of the plaintiff against the defendant doctors for acts of commission or omission which exacerbated her injuries when she went to them for treatment. The respondent brought this action nearly two years after the last relevant date of treatment by the defendants. The defendants asserted that the matter was statute barred because the minor plaintiff was not under actual custody of her parents because of the fact of her brief hospitalization and therefore could not benefit from the extended limitation period of two years as opposed to the standard one year.

HELD: Application dismissed.

The degree of physical care required for a determination of actual custody was a matter of fact, not law. If this were the only issue, an efficient resolution could be achieved via a preliminary determination. However, if not resolved for the plaintiff, the issue of discoverability would be raised and likely would be found to apply. As a result, there would be considerable evidence as to the plaintiff's mother's efforts to learn of the facts at the basis of this claim. There would also be the issue of whether the mother had a separate, valid claim. Accordingly, because any preliminary application would require several complex issues to be determined the potential of overall savings of time at trial was not justified and the application failed.

## Counsel

H.W. Veale, Q.C., for the plaintiffs, except Steve Brown. J.G. Martland, Q.C., for the defendant Doctors. W.M. Wintermute, Q.C., for the defendant Hospital and Nurses. R.A. Philion, for the plaintiff Steve Brown. R.J. Normey, for the intervener.

## BIELBY J.

CONCLUSION

**1** Leave to set down, for a separate hearing before trial, the question of the applicability of the Limitation of Actions Act, R.S.A. 1980, c. L-15, as amended ("the Limitation of Actions Act") to the Plaintiffs' claims is refused.

FACTS

**2** Nadine Brown, an infant, suffered catastrophic injuries in late 1985. She sues, by her next friend, the doctors and hospital which treated her for those injuries, alleging acts of omission or commission which exacerbated her condition. She commenced this action December 11, 1987, nearly two years after the last relevant date of treatment by the Defendants. She is still a minor but will always be mentally and physically disabled.

**3** The Limitation of Actions Act provides certain limitation periods for this type of action which the Defendant doctors allege result in the matter being statute-barred. It is set for trial for nine weeks, to commence in October 1996.

**4** They allege that if the applicability of the limitation period was determined in advance the trial might not have to be held, or might be substantially reduced in time. They have therefore brought on this application for leave to set this issue down for a preliminary determination, pursuant to Rule 220 of the Alberta Rules of Court.

**5** The Plaintiffs resist, submitting that this is not a proper matter for such a preliminary determination given the scope and complexity of the issues to be resolved and the possibility that substantial evidence would have to be led to make such a preliminary determination.

ISSUES

(1) Do ss. 55 and 56 of the Limitation of Actions Act prima facie bar the action?

**6** The Defendant doctors note that the above legislation limits this type, of action to those taken within one year of treatment by a physician or service by a hospital. While the hospital is not an applicant herein, its position is analogous and therefore of interest.

**7** These sections read:

> 55 Except as provided in sections 57 to 61, an action against
>
> (a) a physician registered under the Medical Profession Act ...
>
> for negligence or malpractice by reason of professional services requested or rendered may be commenced within one year from the date when the professional services terminated in respect of the matter that is the subject of the complaint, and not afterwards.
>
> 56 Except as provided in sections 57 to 61, an action against an approved hospital within the meaning of the Hospitals Act in respect of negligence in providing a service in that hospital may be commenced within one year after the cause of action arose and not afterwards.

**8** They are subject to s. 59 which extends this limitation period to two years in certain circumstances. It reads:

> 59 (1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.
>
> (2) Subsection (1) does not apply
>
> (a) if the person under disability is a minor in the actual custody of a parent or guardian ...

**9** The Defendant doctors argue that the sole issue to be decided in the preliminary application would be whether Nadine was not under the actual custody of her parent or guardian because of the fact of her brief hospitalizations and, if so, when the suspension of time offered by s. 59 operated to allow calculation of whether the action was out of time when launched December 11, 1987.

**10** There is law on this topic which indicates that the determination of "actual custody" is one of fact, not of law. See Blair v. Fundytus (1978) 5 Alta. L.R. (2d) 346. I accept that the decision of the Alberta Court of Appeal in Millard v. Millard (1983) 65 A.R. 355 is open to the interpretation that a hospital stay need not, in every case, interrupt the actual custody of a child.

**11** In this case the fact that the child was very young and the hospital stays relatively brief may assist the Defendant doctors in this argument, although the legal issue of the degree of physical care needed to constitute "actual custody" is still to be decided.

**12** However, I respectfully agree with the decision of Cooke, J. on a similar application by a hospital in Jaffer v. Schultze and Misericordia, Alta. Q.B. February 5, 1991, Edmonton 8803 14161, in which he concluded that the use of the related Rule 221 for the determination of preliminary points is not appropriate where the issue is one of mixed fact and law, in denying the application. Here such an application would require, on this issue alone, the legal determination of the definition of "actual custody" and the leading of some evidence, much of which would be uncontroverted but all of which the Defendant doctors argue could be heard in three days, including argument.

(2) Is the limitation period extended by the fact Nadine's mother did not learn of the facts which found her claim until sometime after Nadine's discharge from the Defendant doctors' care, i.e. does the "discoverability" principle apply to this cause of action?

**13** The Plaintiffs allege that Nadine's mother did not learn of certain of the alleged acts of negligence until very shortly before the issuance of the Statement of claim. They rely on the principles in Kamloops v. Nielsen [(1984] 5 W.W.R. 1 (S.C.C.) and Central Trust Co. v. Rafuse [1986] 2 S.C.R. 147 to the effect that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the Plaintiff by the exercise of reasonable diligence.

**14** Whether or not this principle applies to tort claims of this type is the subject of competing authority in Alberta. Our Court of Appeal has declined to determine the matter to date, although given the opportunity to do so.

**15** Hutchinson, J. of this Court in Scott v. Birdsell (1993) 143 A.R. 254 held that the discoverability principle does not apply to s. 55 of the Limitation of Actions Act. Three months later Perras, J., also of this Court, made a contrary decision in Campbell v. Fang (1993) 146 A.R. 238. He does not appear to have been refereed to Hutchinson, J.'s earlier decision. Also, Perras, J. was cautious in noting that the discoverability principle applied based on the unique facts of that situation when not only knowledge of the negligence but of the existence of the tortfeasor was not obtained until after the statutory limitation period had run.

**16** The Court of Appeal was able to resolve the appeal on other grounds and so expressly determined it was unnecessary to resolve the issue of discoverability in that case. The matter thus remains open to debate in Alberta.

**17** If, on a preliminary determination, the principle of discoverability were to be found to apply, it is clear several weeks of evidence could be required in regard to the events leading up to the discovery of alleged acts and omissions by the Defendant doctors, much of which would have to be repeated at trial if the Defendant doctors were not completely successful on the preliminary application.

(3) Are ss. 55, 56 and 59(1) (a) of the Limitation of Actions Act contrary to the provisions of ss. 7, 15(1) and (2) of the Canadian Charter of Rights and Freedoms (the "Charter")?

**18** The Plaintiffs argue that the statutory provisions the Defendant doctors would rely on in arguing any preliminary determination have no force and effect because they are contrary to Charter provisions. The Attorney General of Alberta has intervened on that point, filing an extensive brief outlining the law in this area.

**19** It is apparent that if, on any preliminary determination the Plaintiff was not successful on either the issue of when Nadine was in her mother's "actual custody" or in having the discoverability principle apply the constitutionality of ss. 55, 56 and 59(1)(a) of the Limitation of Actions Act would be required to be determined.

(4) Is Nadine's mother's cause of action barred by ss. 55 and 56 of the Limitation of Actions Act?

**20** Whatever the result of a preliminary determination of the limitations issue regarding Nadine, her mother Liana has a separate cause of action against the Defendants. She argues that it is not barred by s. 55 of the legislation because it does not arise "by reason of professional services requested or rendered" to her or under s. 56, "in providing a service in that hospital" to her.

**21** There is some support for her situation found in the above decision of Campbell v. Fang where s. 55 was not applied to a plaintiff who did not personally receive treatment from the Defendant physician. Here the facts are much more closely aligned with the traditional situation where one Plaintiff receives those services, and the other suffers loss as a result of her obligation to care for the injured party. However, this is clearly an arguable point which would have to be determined on any preliminary application.

ANALYSIS

**22** Is this an appropriate case, therefore, to exercise my discretion to allow a preliminary determination of these points?

**23** First, on whether and when Nadine was in her mother's "actual custody", while that issue would require the leading of some evidence if it were the only issue, it is conceivable that efficient resolution could be achieved via preliminary determination. However, if not resolved in the plaintiffs' favour, the second issue of discoverability would be required to be determined.

**24** It is quite conceivable a court might find the discoverability principle to apply. If so, it would then have to hear significant evidence as to whether the mother was reasonably diligent in her efforts, and as to when she learned or should have learned of the facts underlying the plaintiffs' claims. This would all have to be determined on the preliminary application because even if this principle were applied, the Plaintiffs could be found to have been out-of-time on the facts.

**25** Third, if the Plaintiffs were unsuccessful the constitutional issues would then be required to be resolved. While Lomas, J. found in Bullen v. Hershfield (1992, unreported Alta. Q.B.) that s. 7 of the Charter was not violated by this legislation, I have been referred to no decisions relating to the balance of the Charter

arguments. I accept the Intervener's position that the proper approach would not be to try to determine this point in advance of the first two, as it would not be necessary to determine it unless the Plaintiffs were unsuccessful on one of those two issues.

**26** Fourth, the application of ss. 55 and 56 to Liana's claim would have to be determined. This, as well, would not require significant evidence to be led in addition to that led on the first point. However, if the Defendant doctors were successful on each of the first three points and thus barred Nadine's claim, Liana's claim could nonetheless survive. The trial of that claim alone would require much of the evidence that would be led on both claims. The length and complexity of that trial would not be significantly more modest, and would involve all the same Defendants, as if the preliminary application had not been brought.

CONCLUSION

**27** I note that there are many reported decisions where limitations issues have been considered appropriate for determination on a preliminary basis. I also note that if the Defendant doctors were successful on all four of the above issues they would be completely released from the action, and the trial shortened in the result.

**28** I also accept that any preliminary application would require several complex points of law to be resolved, that some if not all of those are in evolving areas of law and that there would be a significant likelihood of an appeal, whatever the determination.

**29** Sulatycky, J. in Winterhaven Stables Limited v. Attorney General of Canada (1985) 40 A.L.R. (2d) 15 catalogues these factors as the ones to be considered on this type of application. On each factor it appears that a preliminary determination would not be appropriate.

**30** The potential of overall savings of time at trial is not justified, in balance, as against these concerns. In particular, the possible need for extensive evidence if the discoverability principle was found to apply dictates dismissal of this application. Finally, at this stage, with the trial date relatively close and considering the delays inherent in rescheduling a trial of this length, the possibility of the need for adjournment of the trial proper, arising from the consequences of any preliminary determination must be avoided.

**31** The application is dismissed. Costs may be spoken to, if necessary.

BIELBY J.

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# Tab C

# Twinn v. 1985 Sawridge Trust, [2017] A.J. No. 1340

Alberta Judgments

Alberta Court of Appeal

M.S. Paperny, B.L. Veldhuis and S.L. Martin JJ.A.

Heard: November 1, 2017.

Judgment: December 12, 2017.

Docket: 1703-0193-AC

Registry: Edmonton

**[2017] A.J. No. 1340** 2017 ABCA 419

Between 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)

(28 paras.)

## Case Summary

**Appeal From:**

On appeal from the Order by the Honourable Mr. Justice D.R.G. Thomas Dated the 5th day of July, 2017, Filed on the 19th day of July, 2017 ( 2017 ABQB 377; Docket: 1103 14112).

## Counsel

N.L. Golding, Q.C., for the Appellants.

D.C. Bonora and A. Loparco, for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust.

J.L. Hutchison, for the Respondent The Office of the Public Guardian and Trustee.

D.D. Risling, for the Respondent Catherine Twinn.

**Memorandum of Judgment**

The following judgment was delivered by

**THE COURT**

## 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 (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 First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

**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 (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 at para 2, [2014] 1 SCR 87, 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 at para 3, [2017] A.J. No. 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

**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 at para 27, [2013] 2 SCR 125:

> 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*, 2010 ABCA 67 at para 13, 487 AR 111.

**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 LR (3d) 325 (QB) 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*, [1956] 1 QB 357 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 at para 8, 25 Alta LR (5th) 70; *Luft v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

**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 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. 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.

Memorandum filed at Edmonton, Alberta this 12th day of December, 2017

M.S. PAPERNY J.A.
B.L. VELDHUIS J.A.
S.L. MARTIN J.A.