



Clerk's stamp:

COURT FILE NUMBER 1103 14112
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2000, c. T-8, AS AMENDED, and

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS
SETTLEMENT CREATED BY CHIEF WALTER PATRICK
TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now
known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
(the "1985 Sawridge Trust")

APPLICANT ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT,
EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees
for the 1985 Sawridge Trust ("Sawridge Trustees");

DOCUMENT **REPLY BRIEF OF THE SAWRIDGE TRUSTEES**

**JURISDICTION APPLICATION RETURNABLE APRIL 25,
2019**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT Dentons Canada LLP
2900 Manulife Place
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Attention: Doris C.E. Bonora
Michael S. Sestito
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File No: 551860-001-DCEB

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

Attention: Janet L. Hutchison

Counsel for the Office of the Public Guardian
and Trustee

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

Attention: Crista Osualdini

Counsel for Catherine Twinn

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I. REPLY SUBMISSIONS

1. The Trustees of the 1985 Sawridge Trust (the “**Trustees**”) make the following reply submissions to the submissions of the Office of the Public Guardian and Trustee (the “**OPGT**”) and Catherine Twinn (“**Ms. Twinn**”) both filed on April 12, 2019.
2. The Trustees perceived that the Court’s preference during the Case Management Meeting held on December 18, 2018 was to work constructively on moving forward rather than rehashing past conduct. The Trustees are mindful of that preference. Much of the reply submissions appear focused on the past conduct and intentions of the Trustees rather than the legal questions before the Court. To be clear, the Trustees maintain that they have acted appropriately during this litigation and have at all times met their obligations, fiduciary or otherwise. That said, the Trustees will not address these allegations as they are clearly outside the scope of this application.

Scope of Jurisdiction:

3. It appears that, broadly speaking, the Trustees and the OPGT agree that there exists common law jurisdiction for the Courts to amend a trust, such as the 1985 Sawridge Trust, on public policy grounds. No party is submitting that the Court ought to exercise that amendment and the Trustees concede that it must be decided another day whether the 1985 Sawridge Trust ought to be amended and, if so, how the amendment ought to be structured.
4. The OPGT submits that the power of amendments is not limited to simple deletion. For the sake of clarity, the Trustees suggest that the Court can expand the jurisdiction of the Court to address public policy concerns in the case of quasi-public trusts. With respect to remedy, the Trustees suggest that the less intrusive manner of expanding this jurisdiction is simple deletion. That said, the Trustees would be open to a proposal that included the insertion of text should the Court conclude that its jurisdiction includes that power.
5. The OPGT submits that the Court can simply amend the amending formula contained within the trust deed for the 1985 Trust. The Trustees see the basis of the Court’s power of intervention as being grounded in public policy concerns. The Trustees suggest that there is nothing inherently problematic (from a public policy perspective) with the amending formula that would merit Court intervention. Furthermore, the common law restricts the ability of an amending party to use a power of amendments to amend an amending restriction. While this subject matter is relatively rare in reported law, the issue was canvassed recently in the High Court of Justice (Chancery Division).¹ The Court concluded that amendments to amending provisions that purport to remove an amending restriction are invalid, finding: “an amending party cannot achieve in two steps what it cannot achieve in one.”²

¹ *IBM UKHoldings Ltd. & Anor v Dalgleish & ors*, [2014] EWHC 980 (Ch) [TAB 1].

² *Ibid* at para 163 [TAB 1]. In other words, a party cannot delete a fetter to an amendment power and subsequently make a second amendment which would have been precluded by that fetter.

Section 42 of the Trustee Act:

6. With respect to the Trustees approach to section 42, the OPGT and Ms. Twinn have both taken the position that the Trustees did not make a meaningful effort to come to compromise and effect a section 42 resolution. This is simply not the case. Notwithstanding the characterizations from the filed reply submissions, the Trustees have participated in countless settlement meetings and negotiations with the parties to no avail. They went so far as to table a generous settlement proposal to the Court without success.³ The Trustees do not believe that section 42 offers a realistic prospect of success given the extensive, lengthy litigious history of this case. The accusatory tone of the reply submissions in what ought to have been an application on the law illustrates this point sufficiently.
7. However, there is a larger issue with relying on section 42 as the only means of external intervention. Ms. Twinn argues that section 42 of the *Trustee Act* is the only avenue at the Court's disposal to amend a discriminatory trust. Effectively, this means that it is near impossible for the Court to amend a discriminatory trust. By necessity, the finding that a beneficiary definition in a trust is discriminatory and offends public policy will necessitate that some beneficiaries lose their status as beneficiaries or, at the very least, see their potential benefits diluted by the addition of excluded beneficiaries. To suggest that the only way to amend a discriminatory definition is the *Trustee Act* (which requires 100% agreement of beneficiaries) would effectively make it impossible to remove discrimination, as it would be unreasonable to expect beneficiaries to consent to their own removal or the dilution of their trust value. By way of example, it is highly doubtful that the National Alliance would have consented to amending the trust in *McCorkill*⁴, to change the beneficiary to a group that did not promote hate propoganda. It would require that trustees accept any discrimination of any nature, notwithstanding public policy concerns, and expose trustees to potential liability for effecting distributions in a discriminatory trust.

The Sawridge First Nation Membership:

8. In her submissions, Ms. Twinn highlighted the "serious concerns" raised about the application of the First Nation's membership rules and went on to outline the history of concerns with the Sawridge First Nation's membership rules.⁵ The Trustees question the appropriateness of reviewing the membership rules in this forum. As Justice Thomas noted in *Sawridge #3*:

The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v. Sawridge First Nation*, there is no need, nor is it appropriate, for this court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be

³ Settlement Offer dated June 1, 2015, Tabled, Schedule "B" to the Application filed June 12, 2015 [TAB 2].

⁴ *McCorkill v. McCorkill Estate*, 2014 NBBR 148, Brief of Catherine Twinn, Jurisdiction Application at TAB 16

⁵ Catherin Twinn Reply Brief at para 89(h)

reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.⁶

9. The Trustees concede the point made by the OPGT that the question of whether or not the membership rules address the discriminatory concerns within the 1985 Trust Deed is yet to be determined by the Court. Again, this application is not asking the Court to apply its jurisdiction in this case at this time.

Advance Legal Fees:

10. Ms. Twinn and the Shelby Twinn *et al* brief suggests that the Trustees should be required to pay for independent legal advice for the beneficiaries. The topic of the payment of advance legal fees has been consistently advanced over the course of this action and consistently denied.⁷

Current Beneficiaries:

11. Both Ms. Twinn and the OPGT raise concerns over those beneficiaries who may lose their beneficiary status due to an amended definition. The Trustees agree that the rights of current beneficiaries ought to enter into the Court's final analysis. With regard to the current beneficiaries of the 1985 Trust, the issue of grandfathering has yet to be addressed by the Court and is not the subject of this application. Regardless, if the definition was amended to be the members of the First Nation, beneficiaries who lose their status can still apply to the Sawridge First Nation in order to become members of the Sawridge First Nation and therefore become beneficiaries. As discussed above, any issues with the membership process are appropriately dealt with by the Federal Courts and are subject to the sovereignty of the First Nation itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th OF APRIL, 2019.

DENTONS CANADALLP

PER: 

DORIS BONORA
MICHAEL SESTITO
Solicitors for the Sawridge Trustees

⁶ *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 [Sawridge #3] at para 35. See also the Order of Thomas, J. pronounced December 17, 2015 [TAB 3]

⁷ See Sawridge #5 at paras 1, 28, & 46, where advance legal fees were sought and rejected for Patrick Twinn and Shelby Twinn [TAB 4]. This decision was upheld on appeal at *Twinn v Twinn*, 2017 ABCA 419. See also Sawridge #6, where Maurice Stoney sought advance legal fees at paras 1 and 67 [TAB 4]. In both of these cases, costs were awarded against the applicants. See also Decision of Belzil, J. of October 13, 2017 at pages 48 and 49, where Ms. Twinn herself sought advance legal fees and was denied [TAB 4].

LIST OF AUTHORITIES AND EVIDENCE

TAB NO.	DESCRIPTION
TAB 1	<i>IBM UKHOldins Ltd. & Anor v Dalgleish & ors</i> , [2014] EWHC 980 (Ch) at para 163
TAB 2	Settlement Offer dated June 1, 2015, Tabled, Schedule "B" to the Application filed June 12, 2015
TAB 3	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2015 ABQB 799 [Sawridge #3] at para 35 Order of Thomas, J. pronounced December 17, 2015
TAB 4	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2017 ABQB 377 [Sawridge #5] at paras 1, 28, & 46 <i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2017 ABQB 436 [Sawridge #6] Decision of Belzil, J. of October 13, 2017 at Pages 48 and 49

Tab 1

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
04/04/2014

Before:

MR JUSTICE WARREN

Between:

(1) IBM UNITED KINGDOM HOLDINGS LIMITED
(2) IBM UNITED KINGDOM LIMITED

Claimants

- and -

(1) STUART DALGLEISH
(2) LIZANNE HARRISON
(3) IBM UNITED KINGDOM PENSIONS TRUST
LIMITED

Defendants

Andrew Simmonds QC, Paul Newman QC, Henry Legge QC, and Joseph Goldsmith (instructed by Dickinson Dees LLP) for the Claimants

Michael Tennet QC , Nicolas Stallworthy QC, Benjamin Faulkner, and Bobby Friedman (instructed by DLA Piper UK LLP) for the 1st and 2nd Defendants

Andrew Spink QC and Edward Sawyer (instructed by Nabarro LLP) for the 3rd Defendant

Hearing dates: 18th,19th,20th,21st,22nd,25th,26th,27th, and 28th February,
1st,4th,5th,6th,7th,8th,11th 12th,13th,14th,15th,18th,19th,20th,21st, and 27th March, 8th,9th,10th,11th, and
12th, April 2013

HTML VERSION OF JUDGMENT

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Mr Justice Warren :

Heading	Paragraph
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Trust Deeds and Rules; Notices of Exclusion	6

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Answer to Issue 4B	1594
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ANNEX B	B
ANNEX C	C
ANNEX D	D
ANNEX E	E

Introduction

1. This is an application for declaratory relief concerning certain proposed changes first announced by the First and Second Claimants in July 2009, and announced in their final form in October 2009, in relation to two final salary pension plans that operated for the benefit of their UK workforce, namely the IBM Pension Plan ("**the Main Plan**") and the IBM IT Solutions Pension Scheme ("**the I Plan**", together "**the Plans**"). These changes were announced following a project known internally as "**Project Waltz**".
2. In these proceedings, the changes are challenged on behalf of the members of the Plans.
3. The First Claimant ("**Holdings**") is the principal employer for the purposes of the Plans (which means that certain important powers and discretions under the relevant rules are vested in it). The Second Claimant ("**IBM UKL**") also participates in the Plans and is the employer of most of the active members. I shall refer to them together as "**IBM UK**" in order to distinguish them from the US parent IBM Corporation. IBM Group's headquarters is in Armonk and is known as "**CHQ**". I use "**IBM**" as a catch-all to include the Group as a whole.
4. The First and Second Defendants, Mr Dalgleish and Ms Harrison, have been selected to be representative beneficiaries ("**RBs**") for the purposes of the Project Waltz Proceedings. They are respectively members of the Main Plan and the I Plan.
5. The Third Defendant ("**the Trustee**") is (and has at all material times been) the sole corporate trustee of the Plans. It takes a neutral role in these proceedings (although it has adduced factual evidence that it considers to be of assistance to the Court).

Trust Deeds and Rules; Notices of Exclusion

6. The Deeds and Rules which currently govern the Plans are described in the following paragraphs.
7. The Main Plan is currently governed by three Deeds dated 24 April 1997 (as amended) comprising:
 - i) the 1997 Definitive Trust Deed ("**the Main Plan Definitive Trust Deed**") setting out the general provisions governing the Main Plan as a whole;
 - ii) a Deed comprising the 1997 Defined Benefit Section Rules ("**the Main Plan DB Rules**") setting out the Rules for the C, N and DSL Plans and other defined benefit ("**DB**") sections;
 - iii) a Deed establishing the 1997 Money Purchase Section Rules ("**the Main Plan DC Rules**") setting out the Rules for the defined contribution ("**DC**") sections.

i) His starting point is that the aggregate value referred to in proviso (e) would for active members have included the value of the final salary linkage applicable to the retirement benefits accrued by past Pensionable Service. I do not need to address his submissions in support of that point since it is common ground: Mr Simmonds concedes, as I have said, that the retirement benefits referred to in proviso (e) to the 1983 Amendment Power do embrace a link between accrued service and future salary increases. The same is true of proviso (d) but, in IBM's submission, that proviso is subsumed by proviso (e) and, accordingly, there is no need to deal with it separately. I add that it is also common ground that the final salary link is irrelevant in the case of proviso (c).

ii) The reference to "aggregate value" is significant. The draftsman appears to have used the word "value" to connote sums which cannot be mechanistically determined but require valuation (usually by an actuary). From that, it follows that the Actuary would have to form an opinion as to whether the amendment had an adverse effect on the value of the benefit taking account of potential salary increases making appropriate assumptions in order to derive a predicted Final Pensionable Salary. This in turn suggests that proviso (e) is not concerned narrowly with the "amount" of presently accrued pension (calculated by reference to current Pensionable Service and Salary as at the date of amendment). As will be seen I do not agree with the suggestion.

iii) The temporal element of the fetter is the reference to the aggregate value of the retirement benefits payable "in respect of contributions already received by the Trustee". The fetter is not expressed by reference to benefits earned by Pensionable Service prior to the date of amendment. Nor is there any indication that the aggregate is to be determined on the basis of a deemed fiction that the Member left Pensionable Service immediately prior to the amendment (which is the assumption under section 124(2) Pensions Act 1995 when assessing the level of statutory protection against adverse amendments).

iv) And so the introduction of the Exclusion Power (which permits Holdings unilaterally to terminate contributions without triggering a winding up) not only breaks the final salary linkage but also denies non-pensioner Members the value of augmentation out of surplus which in turn breaches the fetter imposed by proviso (e).

161. In support of his submissions, Mr Stallworthy has referred to a number of cases in this jurisdiction and other common law jurisdictions, where the courts have had to grapple with the effects of various fetters on powers of amendment. He prepared a short analysis of the cases relied on. I have taken that analysis into account in reaching my conclusions.
162. Mr Stallworthy's argument is that, assuming the Exclusion Power to have the scope for which IBM contends, the Actuary should (and if he had appreciated that scope, would) have formed and expressed the opinion that provisos (e) and (d), and perhaps even proviso (c), were infringed. He says "would" because such an opinion was given in relation to the amendments under Project Soto implementing partial non-pensionability of further pay rises. Those amendments were only rendered valid by the consent of the affected members. Those are bold submissions in the light of the absence of any expert evidence directed at the question whether the fetters were infringed, not by the Soto changes but by the making of the 1990 Trust Deed and Rules.
163. The point is also made that these conclusions are not affected by the fact that the amendment introduced a power for future use, rather than immediately itself terminating accrual. Mr Stallworthy relies on *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 513C-F which demonstrates that Millett J was indeed concerned about the future exercise of the powers inserted by amendment; and in *Bradbury v BBC* [2012] EWHC 1369, [2012] PLR 283 at [67] I reached a similar conclusion (albeit *obiter*) in relation to the particular power concerned in that case. As Mr Stallworthy observes, an amending party cannot achieve in two steps what he cannot achieve in one (eg by purporting to delete a fetter to an amendment power and subsequently making a second amendment which would have been precluded by that fetter): see *Air Jamaica v Charlton* [1999] 1 WLR 1399 at 1411G and *HR Trustees Ltd v German & IMG* [2009] EWHC 2785, [2010] PLR 23 at [115]-[125], especially [123].

Tab 2



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

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

DOCUMENT

APPLICATION

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

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10180 - 101 Street
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Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

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

Attention: Marco S. Poretti
Telephone: (780) 497-3325
Fax: (780) 429-3044

NOTICE TO RESPONDENT

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

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

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

Date June 30, 2015

Time	2:00pm
Where	Law Courts Building, Edmonton Alberta
Before Whom	Justice D. Thomas

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

Remedy claimed or sought:

1. Advice and direction with respect to the litigation plan which is attached hereto as Schedule "A".
2. Advice and direction with respect to the offer of settlement which is attached hereto as Schedule "B".
3. Advice and direction with respect to the Public Trustee of Alberta retaining out-of-province lawyers to advise and provide research at significant costs to the trustees, when able lawyers exist in Alberta.
4. Advice and direction with respect to a full audit and review of this matter with all accounts including those of agents retained by the Public Trustee, produced in full without redaction.
5. Such further and other relief as this Honourable Court deems just and appropriate.

Grounds for making this application:

6. The litigation in this action seems to have stalled and the trustees seek the direction of the Court to set a litigation plan as set out in Schedule "A" or as may be directed by the Court.
7. The trustees have made a settlement offer to the Public Trustee of Alberta which settles all issues for the minor children who are affected by a change in definition of the 1985 Sawridge Trust. The trustees seek direction on the narrow issues which must be addressed if all the minor children who would be excluded by the change in definition are given irrevocable beneficiary status in the 1985 Sawridge Trust.
8. The Court in its inherent jurisdiction in the protection of minors and its *parens patriae* jurisdiction, must review the settlement and determine if it is appropriate for the Public Trustee of Alberta to refuse the generous settlement that is offered to the minor children. There are significant benefits to being granted beneficiary status without the need to apply for membership in the Sawridge Band. Such an offer should not be disregarded. There is no guarantee that these minors would be granted beneficiary status in the final result of this action.
9. The Public Trustee of Alberta was granted advance costs in this action. The expenditures are reviewable by this Court. To date the accounts of the Public Trustee have been paid without question although given the redacting of the accounts, it is difficult for the trustees to challenge the accounts.
10. The Public Trustee has now requested that out-of-province lawyers at significantly higher hourly rates than the Alberta lawyers involved in this action be retained and paid. The first account was submitted in excess of \$5,000 as a disbursement to the account of Ms. Hutchison. The account and letter from Ms. Hutchison are attached hereto as Schedule "C".

DENTONS

Doris C.E. Bonora

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June 1, 2015

File No.: 551860-1

SENT VIA E-MAIL

WITH PREJUDICE

Chamberlain Hutchison
Suite 155, Glenora Gates
10403 - 122 Street
Edmonton AB T5N 4C1

Attention: Ms. Janet L. Hutchison

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement ("1985 Sawridge Trust" or "Trust" Action No.
1103 14112

These proceedings were initiated on August 31, 2011. At that time, the trustees of the 1985 Sawridge Trust obtained an Order directing that an application for advice and directions was to be brought regarding the definition of "beneficiaries" contained in the Trust deed. It is coming upon 4 years since the issuance of that Order, and despite great expense incurred by our clients, we are no nearer resolution of this issue. The time that has elapsed and the costs that have been incurred are detrimental to the Trust and are not in the best interests of the beneficiaries.

We are now in receipt of your letter dated May 15, 2015, wherein you advise that you will be seeking joinder of our action with Action No. 1403 04885. It is our respectful view that the two actions are unrelated, and joinder of these actions would result in further significant delay and expense to the Trust.

Our clients have considered how to best proceed given the circumstances and we wish to propose a settlement. As you know, the concern of the trustees is that the current definition of "beneficiaries" is discriminatory, and we are seeking the advice and direction of the Court to address this concern. By changing the definition of "beneficiaries" to one that references membership in the Band, it was thought that this would best express the intentions of all parties concerned including the settlors and trustees of the original trust. However, we acknowledge that such a change is a concern to your client and the minors that you represent. We have our list of beneficiaries and have included beneficiaries who were born after the litigation began and included children who have become adults and further included children who have become members. In particular, there are 24 children that are currently beneficiaries of the 1985 Sawridge Trust, and all but 4 of them would lose their beneficiary status should the definition of "beneficiaries" be changed to equate to membership. There are 4 children who have attained

membership status and thus they will continue to be beneficiaries if the definition of beneficiary changed to "members". See table 1 for a list of the children who would lose beneficiary status. See Table 2 for a list of the children who have been admitted as members. There are 4 minors who have become adults since the litigation began (or will be adults in 2015). They have remained on the tables despite becoming adults.

Our client is prepared to "grandfather" the 20 children who have not yet been admitted to membership whereby they would not lose their beneficiary status, despite the change in the definition. These individuals would maintain their beneficiary status throughout their lifetime. Thus we are essentially offering these minors a complete victory in this matter. They would not be excluded from the trust regardless of their ability to obtain membership. While we maintain that they are likely to become members, we would now guarantee their beneficiary status in the trust which could offer them significant benefits in the future. There is no guarantee that a change in definition if approved by the court would provide benefits for these children.

The perpetuation of discrimination in the current definition of beneficiaries is evident in respect to the women who were excluded from beneficial status in the 1985 Trust by the Indian Act, 1970 even though they may have regained membership in the Sawridge First Nation. These women were granted membership in the Sawridge First Nation as a result of Bill C-31 either through application to the First Nation or as a result of a Court Order. Since these women are all current members of the Sawridge First Nation and since it is the intent of the Trustees to apply for a variance to the 1985 Trust definition of beneficiary which includes all members of the Sawridge First Nation as beneficiaries, these women will be included as beneficiaries in the 1985 Trust should the Court agree to the proposed variance to the 1985 Trust. The delay in this litigation and the delay in the change of definition perpetuates the discrimination for these women. They cannot receive benefits from this trust and they continue to be singled out as members who do not enjoy the same status as other members of the First Nation. A change in definition is a very good step to remedying the discrimination for these women as they are presently excluded from the trust and with the change in definition will be included as beneficiaries.

We believe that such a solution of grandfathering the minors on Table 1 is not only fair but provides the Public Trustee with everything that it could reasonably expect in these proceedings. Not only is the discriminatory provision removed, but all of the minor "beneficiaries" who would lose their status are protected. While we acknowledge that the Court will ultimately have to decide whether such a proposal is appropriate, we are hopeful that a joint submission to that effect will convince Justice Thomas of the same. We are also hopeful that your client will view such a proposal as a good faith attempt by the trustees to address the interests of the minor beneficiaries, and that you will agree to join us in seeking the necessary Order from the Court without delay. As noted above, we are essentially offering these minors a complete victory in this matter.

As we are proposing to grandfather as beneficiaries all of the minor children who would lose their status we feel that the Public Trustee has fulfilled the mandate provided to it by the court. We are offering to grandfather all of these children in the interests of fairness and in the interests of stopping the litigation and proceeding to use the trust assets for the benefit of the beneficiaries instead of the costs of litigation.

We would also seek consent or at least no opposition to the nunc pro tunc approval of the transfer of assets from the 1982 trust to the 1985 trust. We believe that this was clearly intended and the trust has been operating since 1982. It would be impossible to overturn the transactions and events that have occurred since 1982. Thus we seek the approval for the transfer of assets. It is a benefit to all the beneficiaries to remove this uncertainty. To be clear, if the transfer is not approved we believe that the assets would need to return to the 1982 trust in which the definition of beneficiary is the members of the First Nation and thus the children you represent would not be included.

Thus we seek your approval for an order

1. To amend the definition of beneficiaries as follows:

"Beneficiaries" at any particular time shall mean:

- a. all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;
- b. the individuals who are listed as Schedule A to this trust (Schedule A would include all the individuals listed on Table 1).

2. Approving the transfer of assets from the 1982 trust to the 1985 trust nunc pro tunc.

This offer is open for acceptance until **June 29, 2015**. We look forward to hearing from you.

Yours very truly,
Dentons Canada LLP

Doris C.E. Bonora

Reynolds Mirth Richards & Farmer LLP

Marco Poretti
DCEB/pach

Table 1: Minor Beneficiaries of the 1985 Trust as at August 31, 2011 updated to 2015

Beneficiary	Birthdate	Age in 2015	Category
1. Lamouche-Twin, Everett (Justin Twin)	05/10/2003	12	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
2. Lamouche-Twin, Justice (Justin Twin)	02/04/2001	14	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
3. Lamouche-Twin, Kalyn (Justin Twin)	24/08/2007	8	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
4. Lamouche-Twin, Maggie (Justin Twin)	27/03/2009	6	Illegitimate Child of Illegitimate Male Child of Female Band member Not Protested
5. Moodie, Jorja L. (Jeanine Potskin)	29/01/2008	7	Illegitimate Child of Female Band member Not Protested
6. Potskin, Ethan E.R. (Trent Potskin)	15/01/2004	11	Illegitimate Child of Male Illegitimate Child of Female Band member Not Protested
7. Potskin, Jaise A. (Jeanine Potskin)	25/03/2003	12	Illegitimate Child of Female Illegitimate Child of Female Band member Not Protested
8. Potskin, Talia M.L. (Trent Potskin)	16/03/2010	5	Illegitimate Child of Male Illegitimate Child of Female Band member Not Protested
9. Robberstad, Jady (Jaclyn Twin)	04/07/2011	4	Illegitimate Child of Female Band member Not Protested
10. Twin, Alexander L. (Wesley Twin)	23/01/2005	10	Child of Married Male Band member
11. Twin, Autumn J. (Darcy Twin)	26/09/2002	13	Child of Married Male Band member
12. Twin, Destin D. (Jaclyn Twin)	24/06/2008	7	Illegitimate Child of Female Band member Not Protested
13. Twin, Justice W. (Wesley Twin)	20/09/2001	14	Child of Married Male Band member
14. Twin, Logan F. (Darcy Twin)	17/04/2007	8	Child of Married Male Band member

Beneficiary	Birthdate	Age in 2015	Category
Twin)			
15. Twin, River C. (Darcy Twin)	03/05/2010	5	Child of Married Male Band member
16. Twinn, Clinton (Irene Twinn)	03/02/1997	18	<ul style="list-style-type: none"> ➤ Illegitimate Child of Female Band Member Not Protested ➤ Adult after 30 August 2011
17. Twinn-Vincent, Seth (Arlene Twinn)	01/07/2001	14	Child of Female Band member who married Non-Band member
18. Twinn-Vincent, W. Chase (Arlene Twinn)	31/07/1998	17	Child of Female Band member who married Non-Band member
19. Potskin, William (Aaron Potskin)	19/09/2013	2	<ul style="list-style-type: none"> ➤ Child of Male band member ➤ Born after the litigation began
20. Twinn, Kaitlin (Paul Twinn)	23/02/1995	20	<ul style="list-style-type: none"> ➤ Child of male band member ➤ Adult after 30 August 2011

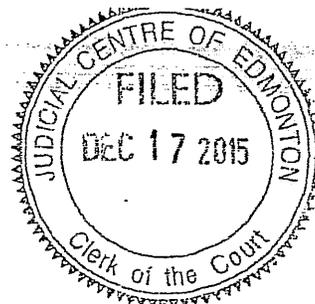
Table 1: Minor Beneficiaries of the 1985 Trust as at August 31, 2011 updated to 2015

Table 2: Beneficiaries to the 1985 Trust who have become members

Non-Beneficiary	Birthdate	Age in 2015	Category
1. Twinn, Alexander G. (Roland Twinn)	01/10/1997	18	<ul style="list-style-type: none"> ➤ Child of Married Male Band member ➤ Admitted as a member of the First nation ➤ Adult (this year) after 30 August 2011
2. Twinn, Corey (Ardell Twinn)	18/01/1994	21	<ul style="list-style-type: none"> ➤ Child of male band member ➤ Admitted as a member of the First nation ➤ Adult after 30 August 2011
3. Twin, Starr (Winona Twin)	29/11/2002	13	<ul style="list-style-type: none"> ➤ Illegitimate Child of Female Band member Not Protested ➤ Admitted as a member of the First nation
4. Twin, Rainbow (Winona Twin)	31/05/1998	17	<ul style="list-style-type: none"> ➤ Illegitimate Child of Female Band member Not Protested ➤ Admitted as a member of the First nation

Table 2: Beneficiaries to the 1985 Trust who have become members

Tab 3



Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

**Date: 20151217
Docket: 1103 14112
Registry: Edmonton**

In the Matter of the *Trustees Act*, RSA 2000, c T-8, as amended; and

In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

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

- SAWRIDGE #3

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I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365 [“*Sawridge #1*”], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 [“*Sawridge #2*”]. The terms defined in *Sawridge #1* are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the “Band”, “Sawridge Band”, or “SFN”], set up the 1985 Sawridge Trust [sometimes referred to as the “Trust” or the “Sawridge Trust”] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the “*Charter*”].

[3] The 1985 Sawridge Trust is administered by the Trustees [the “Sawridge Trustees” or the “Trustees”]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term “Beneficiaries” in the 1985 Sawridge Trust (the “Trust Amendments”) and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the “Public Trustee”] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: *Sawridge #1*, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (*Sawridge #1*, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (*Sawridge #1*, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (*Sawridge #2*).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*. (“September 2/3 Order”)

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling \$205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] *Sawridge #1* at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee’s involvement in this matter:

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately \$70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: *Sawridge Band v. Canada*, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. Canada*, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: *Poitras v. Sawridge Band*, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5. how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in *Sawridge #1* because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: *Trimay Wear Plate Ltd. v Way*, 2008 ABQB 601, 456 AR 371; *Wasylshen v Canadian Broadcasting Corp.*, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (*Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co* (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (*Gainers Inc. v Pocklington Holdings Inc.* (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v Stearns Catalytic Ltd.* (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; *Weatherill (Estate) v Weatherill*, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that *Sawridge #1* ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in *Sawridge #1* did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: *Royal Bank of Canada v Trang*, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: *Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems*, 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule 6.3*. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In *Sawridge #2* at para 29, the Court of Appeal had stressed that the order in *Sawridge #1* that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule 5.5-5.9* affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v Canada*, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in *Sawridge #1*, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: *Trimay Wear Plate Ltd. v Way*, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule 5.13*:

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

- (a) the record is under the control of that person,
- (b) there is reason to believe that the record is relevant and material, and
- (c) the person who has control of the record might be required to produce it at trial.

(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule 5.13* uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule 5.13* has referenced and used approaches developed in the application of that precursor provision: *Toronto Dominion Bank v Sawchuk*, 2011 ABQB 757, 530 AR 172; *H.Z. v Unger*, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule 5.13* jurisprudence identified by the SFN apply here: *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*; *Gainers Inc. v Pocklington Holdings Inc.*; *Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: *Royal Bank of Canada v Kaddoura*, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In *Sawridge #1* I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since *Sawridge #1* the Federal Court has ruled in *Stoney v Sawridge First Nation* on the operation of the SFN's membership process.

[34] Further, in *Sawridge #1* I noted at paras 51-52 that in *783783 Alberta Ltd. v Canada (Attorney General)*, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in *Strickland v Canada (Attorney General)*, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in *Stoney v Sawridge First Nation*, there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule 5.13(1)* application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule 5.13(1)* application by the Public Trustee. In the event no *Rule 5.13(1)* application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 - Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule 5.13(1)* application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule 5.13(1)* application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in *Poitras v Twinn*, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of

children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
 - a) made applications to join the SFN which are pending (category 3); and
 - b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited to *representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and
2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;
2. allow timely identification of:
 - a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);
 - b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and
 - c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

- a) a potential future successful SFN membership applicant and/or child of a successful applicant, or
- b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

- 1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
- 2. on a pro rata basis:
 - a) be distributed to the members of Pool 1, and
 - b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

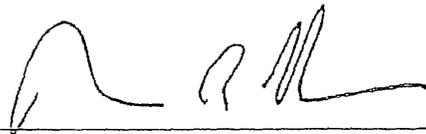
[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in *Stoney v Sawridge First Nation*. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in *Sawridge #2* at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule 5.13* applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.

Dated at the City of Edmonton, Alberta this 17th day of December, 2015.



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

Appearances:

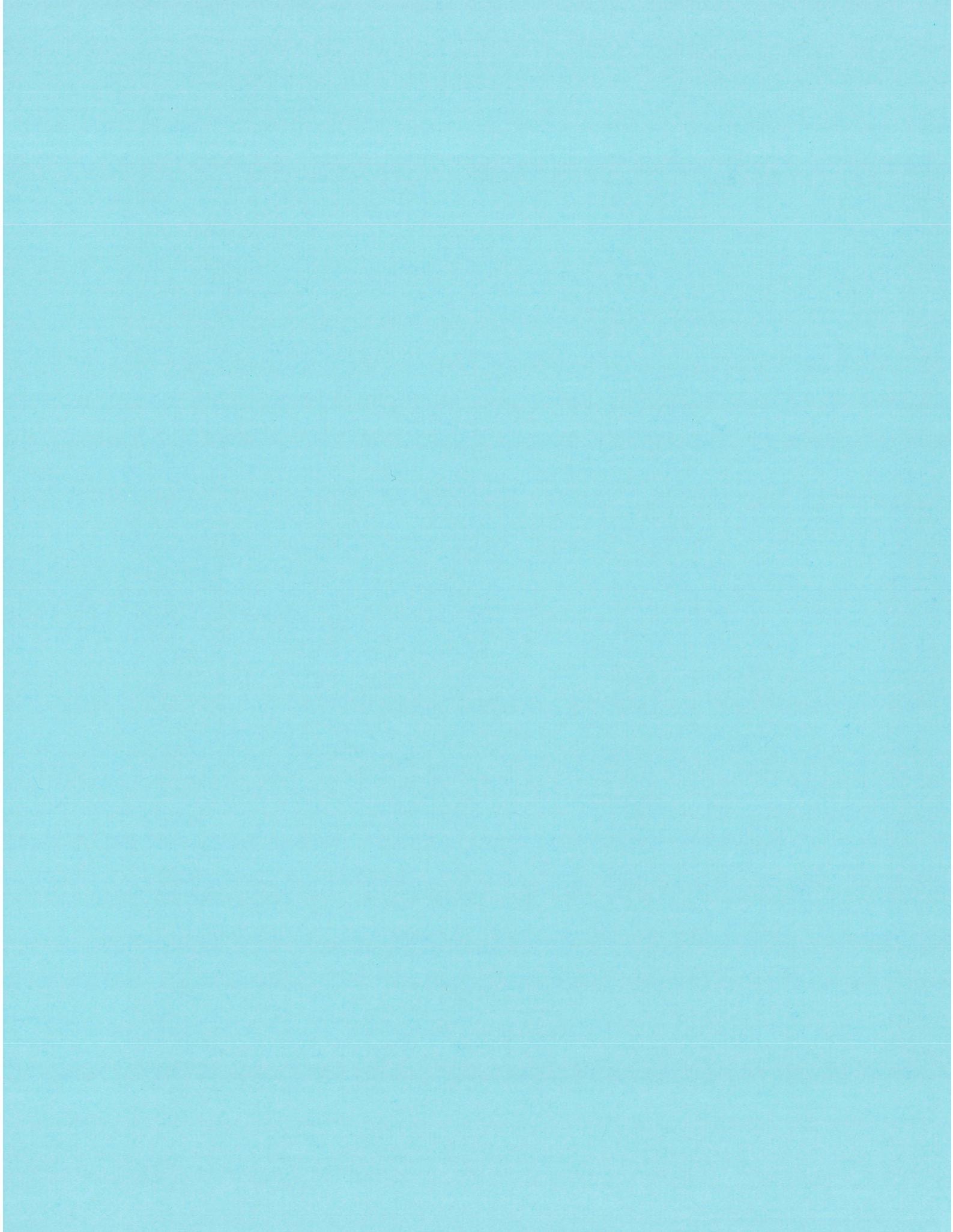
Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

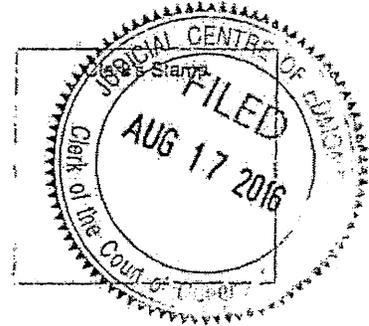
Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn



COURT FILE NUMBER 1103 14112
COURT: COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE: EDMONTON
IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED



IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")

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

DOCUMENT ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Dentons Canada LLP
2900, 10180 101 Street
Edmonton, AB T5J 3V5
Attention: Doris Bonora
Telephone: (780) 423-7188
Facsimile: (780) 423-7276
File No.: 551880 -1

DATE ON WHICH ORDER WAS
PRONOUNCED:

December 17, 2015

LOCATION WHERE ORDER WAS
PRONOUNCED:

Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

UPON THE APPLICATION of the Office of the Public Guardian and Trustee of Alberta ("Public Trustee"), and Upon hearing from the counsel for: Sawridge First Nation, the Public Trustee, Sawridge Trustees and Catherine Twinn; and Upon the decision of The Honourable Mr. Justice Dennis R. Thomas dated December 17, 2015 (2015 ABQB 799);

IT IS HEREBY ORDERED THAT:

1. The Public Trustee's application for production of records/information from the Sawridge First Nation ("SFN") is denied.
2. Document production by SFN shall only be compelled pursuant to *Rule 5.13(1)* of the *Alberta Rules of Court*, Alta Reg 124/2010.
3. The Public Trustee shall not conduct an open-ended inquiry into the membership of the SFN and the historic disputes that relate to that subject.
4. The Public Trustee shall not conduct a general inquiry into potential conflicts of interest between SFN, its administration and the Sawridge Trustees.
5. The Public Trustee shall be limited to four tasks:
 - (a) Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust; and
 - (b) Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
 - (c) Identifying potential but not yet identified minors who are children of SFN members or membership candidates as these are potentially minor beneficiaries of the 1985 Sawridge Trust; and
 - (d) Supervising the distribution process itself.

6. The Public Trustee and the Sawridge Trustees are to immediately proceed to complete the first three tasks outlined in paragraph 5 above.
7. The Sawridge Trustees will submit a distribution arrangement by January 29, 2016.
8. The Public Trustee shall have until March 15, 2016 to prepare and serve an application, pursuant to *Rule 5.13(1)*, on SFN identifying specific documents it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.
9. If no *Rule 5.13(1)* application is made in relation to the proposed distribution scheme, submissions on the distribution proposal shall be made by the Public Trustee and Sawridge Trustees at a case management meeting held before April 30, 2016.
10. The Public Trustee shall have until January 29, 2016 to prepare and serve an application, pursuant to *Rule 5.13(1)*, on SFN identifying specific documents for production which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.
11. If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule 5.13(1)* application by the Public Trustee.
12. SFN shall provide the following to the Public Trustee by January 29, 2016:
 - (a) the names of individuals who have:
 - (i) made applications to join the SFN which are pending; and
 - (ii) had applications to join the SFN rejected and are subject to challenge;
 - (b) the contact information for those individuals where available.
13. The Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, (Minors who are children of members of the SFN), the Public Trustee shall file a *Rule 5.13(1)* application by January 29th, 2016.
14. The SFN and the Sawridge Trustees shall have until March 15, 2016 to make written submissions in response to any application by the Public Trustee described in paragraph 13 above.
15. The Public Trustee shall not engage in collateral attacks on membership processes of the SFN. The Sawridge Trustees shall not engage in collateral attacks on SFN's membership processes.
16. The decision on costs in relation to the Public Trustee's production application is reserved until the Court evaluates any *Rule 5.13(1)* applications brought by the Public Trustee.

DL
Honourable Justice D.R.G. Thomas
Thomas

Tab 4

Court of Queen's Bench of Alberta



Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377

**Date: 20170705
Docket: 1103 14112
Registry: Edmonton**

In the Matter of the Trustee Act, R.S.A. 2000, C. T-8, as amended

And in the matter of the Sawridge Band, Inter Vivos Settlement, created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust")

Between:

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

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

- and -

Catherine Twinn

Respondent

**Case Management Decision (Sawridge #5)
of the
Honourable Mr. Justice D.R.G. Thomas**

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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 v Alberta (Public Trustee)*, 2012 ABQB 365, 543 AR 90 ("Sawridge #1"), aff'd 2013 ABCA 226, 543 AR 90 ("Sawridge #2"), *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("Sawridge #3"), time extension denied 2016 ABCA 51, 616 AR 176, *1985 Sawridge Trust (Trustee for) v Sawridge First Nation*, 2017 ABQB 299 ("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 at para 48, 2011 CarswellAlta 108 (“*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 AR 181, affirmed *en toto* 2009

ABCA 144, 457 AR 44, 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 at para 2, [2014] 1 SCR 87 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, [2016] 1 SCR 631 and *R v Cody*, 2017 SCC 31 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 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196.

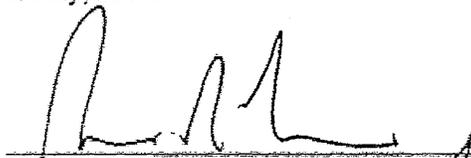
[53] I conclude one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of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

Heard and decided on the basis of the written materials described in Schedule 'A'.

Dated at the City of Edmonton, Alberta this 5th day of July, 2017.



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

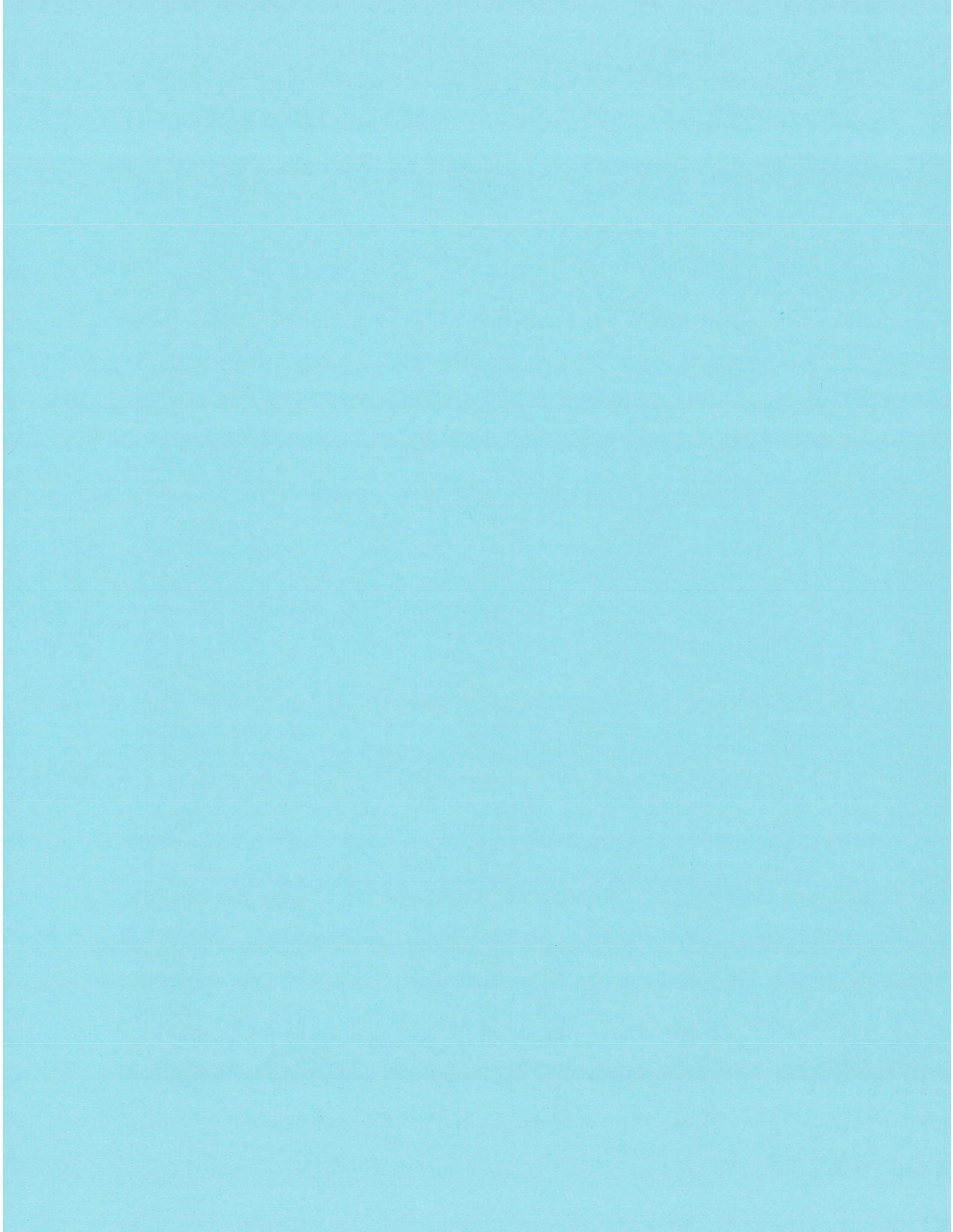
Submissions in writing from:

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for the Applicants Patrick Twinn et al.

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for The 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for the OPTG

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
for Catherine Twinn





Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 436

Date:
Docket: 1103 14112
Registry: Edmonton

In the Matter of the Trustee Act, RSA 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" or "Trust")

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

- and -

The Sawridge Band (the "Band" or "SFN")

Intervenor

**Case Management Decision (Sawridge #6)
of the
Honourable Mr. Justice D.R.G. Thomas**

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I. Introduction

[1] This is a case management decision on an application filed on August 12, 2016 (the "Stoney Application") by Maurice Felix Stoney "and his brothers and sisters" (Billy Stoney, Angeline Stoney, Linda Stoney, Bernie Stoney, Betty Jean Stoney, Gail Stoney, Alma Stoney, and Bryan Stoney) to be added "as beneficiaries to these Trusts". In his written brief of September 28, 2016, Maurice Stoney asks that his legal costs and those of his siblings be paid for by the 1985 Sawridge Trust.

[2] The Stoney Application is opposed by the Trustees and the Sawridge Band, which applied for and has been granted intervenor status on this Application. The Public Trustee of Alberta ("OPTG") did not participate in the Application.

[3] The Stoney Application is denied. Maurice Stoney is a third party attempting to insert himself (and his siblings) into a matter in which he has no legal interest. Further, this Application is a collateral attack which attempts to subvert an unappealed and crystallized judgment of a Canadian court which has already addressed and rejected the Applicant's claims and arguments. This is serious litigation misconduct, which will have costs implications for Maurice Stoney and also potentially for his lawyer Priscilla Kennedy.

II. Background

[4] 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".

[5] 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 v Alberta (Public Trustee)*, 2012 ABQB 365, 543 AR 90 ("*Sawridge #1*"), aff'd 2013 ABCA 226, 543 AR 90 ("*Sawridge #2*"), *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*"), time extension for appeal denied 2016 ABCA 51, 616 AR 176, *1985 Sawridge v Alberta (Public Trustee)*, 2017 ABQB 299 ("*Sawridge #4*"). A separate motion by three third parties to participate in this litigation was rejected on July 5, 2017, and that decision is reported as *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 ("*Sawridge #5*"), (collectively the "*Sawridge Decisions*").

[6] Some of the terms used in this decision ("*Sawridge #6*") are also defined in the various Sawridge Decisions.

[7] I directed that this Application be dealt with in writing and the materials filed include the following:

August 12, 2016	Application by Maurice Felix Stoney and His Brothers and Sisters
September 28, 2016	Written Argument of Maurice Stoney, supported by an Affidavit of Maurice Stoney sworn on May 17, 2016.
September 28, 2016	Written Submission of the Sawridge Band, supported by an Affidavit of Roland Twinn, dated September 21, 2016, for the Sawridge Band to be granted Intervenor status in the Advice and Direction Application in relation to the August 12, 2016 Application, and that the Application be struck out per <i>Rule 3.68</i> .
September 30, 2016	Application by the Sawridge Trustees that Maurice Stoney pay security for costs.
October 27, 2016	Written Response Argument to the Application of Sawridge First Nation filed by Maurice Stoney.
October 31, 2016	The OPTG sent the Court and participants a letter indicating it has "no objection" to the Stoney Application.
October 31, 2016	Trustees' Written Submissions in relation to the Maurice Stoney Application and the proposed Sawridge Band intervention.
October 31, 2016	Sawridge Band Written Submissions responding to the Maurice Stoney Application.
November 14, 2016	Reply argument to Maurice Stoney's Written Response Argument filed by the Sawridge Band.

30-34, the implications of a restriction of this kind should not be exaggerated, it instead "... is not a great hurdle."

[63] I therefore order that Maurice Stoney is to make written submissions **by close of business on August 4, 2017**, if he chooses to do so, on whether:

1. his access to Alberta courts should be restricted, and
2. if so, what the scope of that restriction should be.

[64] The Sawridge Band and the Trustees may make submissions on Maurice Stoney's potential vexatious litigant status, and introduce additional evidence that is relevant to this question, see *Chutskoff v Bonora* at paras 87-90 and *Ewanchuk v Canada (Attorney General)* at paras 100-102. Any submissions by the Sawridge Band and the Trustees are due **by close of business on July 28, 2017**.

[65] In addition, I follow the process mandated in *Hok v Alberta*, 2016 ABQB 335 at para 105, and order that Maurice Stoney's court filing activities are immediately restricted. I declare that Maurice Stoney is prohibited from filing any material on any Alberta court file, or to institute or further any court proceedings, without the permission of the Chief Justice, Associate Chief Justice, or Chief Judge of the court in which the proceeding is conducted, or his or her designate. This order does not apply to:

1. written submissions or affidavit evidence in relation to the Maurice Stoney's potential vexatious litigant status; and
2. any appeal from this decision.

[66] This order will be prepared by the Court and filed at the same time as this Case Management decision.

VIII. Costs

[67] I have indicated Maurice Stoney's application had no merit, and was instead abusive in a manner that exhibits the hallmark characteristics of vexatious litigation. The Sawridge Band and Trustees seek solicitor and own client indemnity costs against Maurice Stoney. Those are amply warranted. In *Sawridge #5*, I awarded solicitor and own client indemnity costs against two of the applicants since their litigation conduct met the criteria identified by Moen J in *Brown v Silvera*, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196, for the Court to exercise its *Rule 10.33* jurisdiction to award costs beyond the presumptive *Rule 10.29(1)* party and party amounts indicated in Schedule C. The same principles apply here.

[68] The costs award to the Sawridge Band is appropriate given its valid intervention and the important implications of Maurice Stoney's attempted litigation, as discussed above.

[69] In *Sawridge #5*, at paras 50-51, I observed that there is a "new reality of litigation in Canada":

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 at para 2, [2014] 1 SCR 87 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, [2016]

1 SCR 631 and *R v Cody*, 2017 SCC 31 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.

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. ...

[Emphasis in original.]

[70] Then at para 53, I concluded that the "new reality of litigation in Canada" meant: ... 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.

[71] The Supreme Court of Canada has recently in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 ["*Jodoin*"] commented on another facet of the problematic litigation, where lawyers abuse the court and its processes. *Jodoin* investigates when a costs award is appropriate against criminal defence counsel. At para 56, Justice Gascon explicitly links court discipline of abusive lawyers to the "culture of complacency" condemned in *R v Jordan* and *R v Cody*. Costs awards are a way to help control this misconduct, and are a tool to help achieve the badly needed "culture shift" in civil and criminal litigation.

[72] I pause at this point to note that *Jodoin* focuses on *criminal* litigation, where the Courts have traditionally been cautious to order costs against defence counsel "in light of the special role played by defence lawyers and the rights of accused persons they represent": para 1.

[73] At paras 16-24 Justice Gascon discusses the issue of costs awards against lawyers in a more general manner:

The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them ... A court therefore has an inherent power to control abuse in this regard ... and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" ...

It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts ... It is therefore not reserved to superior courts but, rather, has its basis in the common law ...

There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the

courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct ...

The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. ...

... although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court ... the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...

In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

[Emphasis added, citations omitted.]

[74] This costs authority operates in a parallel but separate manner from the disciplinary and lawyer control functions of law societies: paras 22-23. Cost awards against a lawyer are potentially triggered by either:

1. "an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer", or
2. "dishonest or malicious misconduct on his or her part, that is deliberate".

[*Jodoin*, para 29]

[75] The Court stresses that an investigation of a particular instance of potential litigation misconduct should be restricted to the specific identified litigation misconduct and not put the lawyer's "career[,] on trial": para 33. This investigation is not of the lawyer's "entire body of work", though external facts can be relevant in certain circumstances: paras 33-34.

[76] The lawyer who is potentially personally subject to a costs sanction must receive notice of that, along with the relevant facts: para 36. This normally would occur after the end of litigation, once "... the proceeding has been resolved on its merits.": para 36.

[77] I conclude this is one such occasion where a costs award against a lawyer is potentially warranted. Maurice Stoney's attempted participation in the Advice and Direction Application has ended, so now is the point where this issue may be addressed. I consider the impending vexatious litigant analysis a separate matter, though also exercised under the Court's inherent jurisdiction. I do not think this is an appropriate point at which to make any comment on whether Ms. Kennedy should or should not be involved in that separate vexatious litigant analysis, given her litigation representative activities to this point.

[78] I have concluded that Maurice Stoney's lawyer, Priscilla Kennedy, has advanced a futile application on behalf of her client. I have identified the abusive and vexatious nature of that application above. This step is potentially a "serious abuse of the judicial system" given:

1. the nature of interests in question;
2. this litigation was by a third party attempting to intrude into an aboriginal community which has *sui generis* characteristics;
3. that the applicant sought to indemnify himself via a costs claim that would dissipate the resources of aboriginal community trust property;
4. the application was obviously futile on multiple bases; and
5. the attempts to involve other third parties on a "busybody" basis, with potential serious implications to those persons' rights.

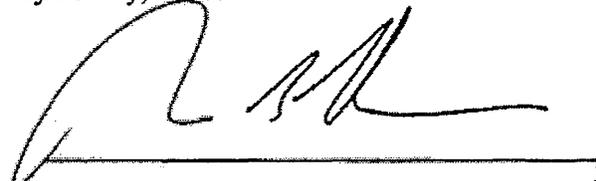
[79] I therefore order that Priscilla Kennedy appear before me at 2:00 pm on Friday, July 28, 2017, to make submissions on why she should not be personally responsible for some or all of the costs awards against her client, Maurice Stoney.

[80] I note that in *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409, Graesser J. applied *Rule 10.50* and *Jodoin* to order costs against a lawyer who conducted litigation without obtaining consent of the named plaintiffs. Justice Graesser concludes at para 27 that a lawyer has an obligation to prove his or her authority to represent their clients. Here, that is a live issue for the "10 living brothers and sisters".

[81] *Jodoin* at para 38 indicates the limited basis on which the other litigants may participate in a hearing that evaluates a potential costs award against a lawyer. The Sawridge Band and Trustees may introduce evidence as indicated in paras 33-34 of that judgment. They should also appear on July 28th to comment on this issue.

Heard and decided on the basis of written materials described in paragraph 7 hereof.

Dated at the City of Edmonton, Alberta this 12th day of July, 2017.



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

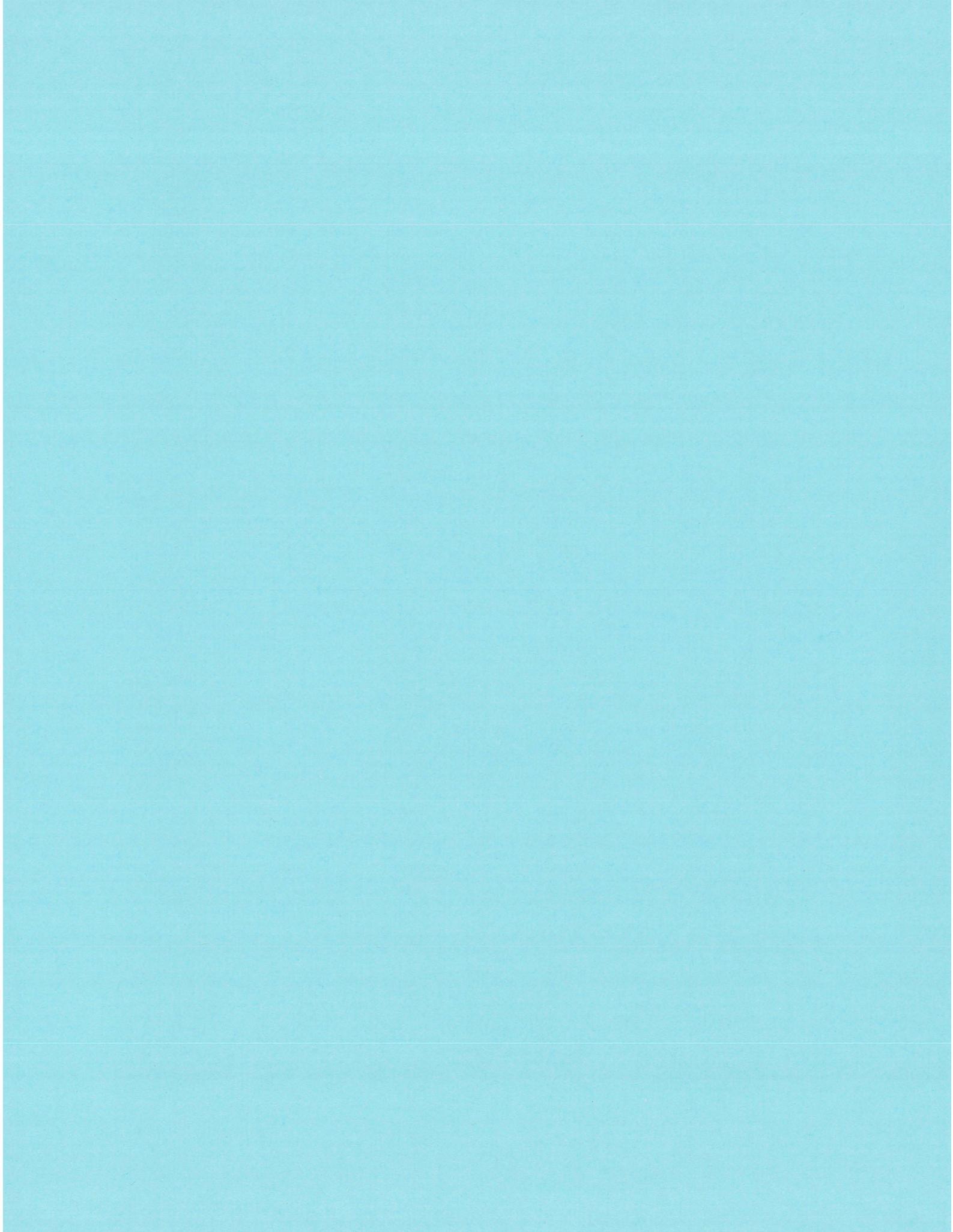
Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for 1985 Sawridge Trustees (Respondents)

J.L. Hutchison
Hutchison Law LLP
for the OPTG (Respondent)

Edward Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band (Intervenor)



Action No.: 1103 14112, 1403 04885
E-File No.: EVQ17SAWRIDGEBAND2
Appeal No.: _____

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

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)

IN THE MATTER OF THE SAWRIDGE TRUST CREATED BY CHIEF
WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND,
NO. 19 ON AUGUST 15, 1986 (the *1986 Trust)

AND BETWEEN:

CATHERINE TWINN as Trustee for the 1985 Trust and
the 1986 TRUST

Applicant

ROLAND TWINN, BERTHA L'HIRONDELLE, EVERETT JUSTIN
TWIN AND MARGARET WARD, as Trustees for the 1985 Trust
and the 1986 Trust

Respondents

PROCEEDINGS

Edmonton, Alberta
October 13, 2017

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

1 THE COURT:

All right. Anything further from either side?

2
3 MR. HALUSCHAK:

No. Thank you, Sir.

4
5 **Decision**

6
7 THE COURT:

I'm going to deliver a very brief oral decision

8 here. I repeat what I said at the outset this morning that I spent a goodly number of hours
9 reviewing the briefs prior to court this morning. I want to compliment counsel on both
10 sides for the quality of the briefs. I thought they were excellent. And I spent many, many
11 hours reading the material. It was well set out on both sides.

12
13 I also want to reiterate what I said at the outset this morning that I'm walking a fine
14 judicial line this morning in that I am not the judge who is dealing with the substantive
15 application in the 1103 matter. I'm dealing with one discreet issue only and, thus, I am
16 deliberately abbreviating what otherwise might've been more extensive reasons. And the
17 reason that I'm doing that is that I do not want to have anything I say somehow impede
18 the discretion of the judge who ultimately hears the matter from deciding what he or she
19 thinks is appropriate on the evidence and after argument from counsel.

20
21 It is significant to me that no legal authority has been cited for the proposition being
22 advanced by the applicant. I have no doubt that there was very extensive research done on
23 both sides. The briefs reflect that. This is not a criticism of counsel. I think it's a situation
24 where the authorities simply don't exist. And, to my mind, that is significant.

25
26 I also want to make it clear that I accept without hesitation that Catherine Twinn
27 genuinely and bone fide believes the position she is adopting and has advanced through
28 counsel. That, for me, is not an issue this morning.

29
30 What is an issue is the legal effect of that. When one reduces the applicant's argument to
31 its essence, it is that because Catherine Twinn genuinely believes that she's acting in the
32 best interests of an unidentified pool of individuals who may ultimately be found not to
33 be beneficiaries, that this then justifies the position being advanced this morning which is
34 that she is entitled to indemnification of legal fees incurred to date on a solicitor-client
35 basis. And, prospectively, again on the solicitor-client basis, fees that may be incurred in
36 the future. Which I suspect will be substantial.

37
38 There is no legal authority that I'm aware of that justifies that position. In other words,
39 the fact that a party genuinely and bona fide believes something, does not necessarily
40 create legal rights which otherwise do not exist. They either exist or they do not exist. In
my view, when I look at paragraph of the trustees which is the indemnification provision,

1 it is not clear on its face that a dissenting trustee, in this case one dissenting trustee who
2 voluntarily elects to incur legal fees, is necessarily entitled to be indemnified pursuant to
3 that provision. That is a live issue which will be argued ultimately before the judge who
4 hears the substantive application.

5
6 I repeat what I said during argument, it is not a slam dunk argument from Catherine
7 Twinn's position. It is an arguable point that will be decided.

8
9 In my view, absent any case law to date justifying this position and absent a clear
10 provision in the trustees, the application must be dismissed. However, I do so on the basis
11 that this is completely without prejudice to the right of Catherine Twinn in the substantive
12 application to advance these arguments. I think it was very fair that the respondents at
13 paragraph 126 of their very extensive brief made that as a suggestion. And I think that's
14 fair in the circumstances.

15
16 Having taken the position that I did, that it is not fair for me to make decisions about
17 credibility or what people have done or not done, it stands to reason that the judge who
18 ultimately hears the matter will make those decisions. And he or she will then be in a
19 position to make a proper decision on this cost application.

20
21 So, in the result, the application is dismissed. However, on a without prejudice basis.

22
23 And, again, I want to thank counsel for your representations on both sides. Very
24 interesting argument. All right. Anything further, counsel?

25
26 MR. HALUSCHAK: Costs, Sir?

27
28 THE COURT: What is your position?

29
30 **Submissions by Mr. Haluschak (Costs)**

31
32 MR. HALUSCHAK: Solicitor and client on a full indemnity basis.

33
34 THE COURT: Well, what if Catherine Twinn is found to be
35 correct in her positions ultimately determined?

36
37 MR. HALUSCHAK: Then I suppose the judge at that time can deal
38 with that. Take all of the proceedings and all of the costs awards to and against into
39 account.

40
41 THE COURT: Well, in other words, just reserve that to the