

Action No. 1103-14112
E-File Name: EVQ19TWINNR
Appeal No. _____



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

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

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

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

Applicants

PROCEEDINGS

Edmonton, Alberta
April 25, 2019

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

2

3

4 April 25, 2019

Afternoon Session

5

6 The Honourable

Court of Queen's Bench

7 Mr. Justice Henderson

of Alberta

8

9 D.C.E. Bonora

For R. Twinn, M. Ward, B. L'Hirondelle, E.

10

Twinn, and D. Majeski

11 M.S. Sestito

For R. Twinn, M. Ward, B. L'Hirondelle, E.

12

Twinn, and D. Majeski

13 C. Osualdini

For Catherine Twinn

14 D.D. Risling

For Catherine Twinn

15 J.L. Hutchison

For the Office of the Public Trustee

16 R.J. Faulds, Q.C.

For the Office of the Public Trustee

17 N. Varevac

Court Clerk

18

19

20 **Discussion**

21

22 THE COURT:

Good afternoon, please be seated. Okay.

23

24 MS. BONORA:

Good afternoon, Sir. Perhaps I'll just start with

25 some introductions.

26

27 THE COURT:

Sure.

28

29 MS. BONORA:

So Doris Bonora on behalf of the trustees with

30 my partner Michael Sestito. And then for Catherine Twinn is Crista Osualdini and Dave

31 Risling. And then for the Office of the Public Trustee and Guardian Janet Hutchison and

32 John Faulds.

33

34 THE COURT:

Okay, good.

35

36 MS. BONORA:

Sir, you've asked us to address a foundational

37 question --

38

39 THE COURT:

Yes.

40

41 MS. BONORA:

-- by email and there have been some discussions

1 around the issue.

2

3 THE COURT: Yes.

4

5 MS. BONORA: And I also in my discussions with Ms. Osualdini
6 was reminded that Mr. Molstad was also involved in that matter so I also called him.

7

8 I thought I'd just address a couple of points but I will tell you that Ms. Hutchison and Mr.
9 Faulds have advised that they would like time to consider this issue. Mr. Molstad has also
10 asked for some time. And I think all of the parties might benefit from some advice from
11 you in respect of exactly how it collides with the jurisdictional issue.

12

13 THE COURT: Sure. Would you like me to speak to that?

14

15 MS. BONORA: Sure.

16

17 THE COURT: Let me start by saying I've approached this case
18 with a fresh set of eyes. So the way I view it may not be the way you view it or the way
19 other parties have viewed it or the way other judges have viewed it. So I've approached it
20 from a fresh perspective with a view to ensuring that I have sufficient information available
21 to come to a correct decision with respect to the jurisdictional issue that you've properly
22 raised.

23

24 So I went back to the original documentation, the 1982 trust deed, and I compared it to the
25 1985 trust deed, Declaration of Trust, and I guess I was a little surprised to see the close
26 parallels between the two. And I also would premise all of my comments on this: I've not
27 made any decision about anything. I'm raising concerns that I have. I'm sure we've got
28 more than enough capable lawyers here to sort out my concerns. These are my concerns
29 and I can tell you they're genuine, otherwise, I wouldn't be taking your time with them.

30

31 So I compared these two trust deeds and I said to myself, my goodness, this isn't really
32 what I expected to see. I saw such close parallels that really the only fundamental difference
33 between 1982 and 1985 from my perspective, other than some flowery language in some
34 portions which is largely irrelevant -- the only difference is the definition of beneficiaries.
35 I did also see a prohibition on -- in the 1982 trust deed, a prohibition on the use or diverting
36 any of the trust assets for any purpose other than for the purposes identified in the trust, i.e.
37 for the benefit of the beneficiaries who are defined to be present and future members of the
38 band.

39

40 So I then began to look to see how we transition from 1982 to 1985. Saw very little
41 information but I was able to locate the August 2016 materials and I read your materials. I

1 saw that there was limited evidence available to provide an explanation for what had
2 transpired. But we do also have other background information of a circumstantial nature
3 that does assist in understanding what went on and we know, at least one can infer -- and
4 I'm happy to hear if you don't accept the inferences or where I'm headed but we do see
5 that the 1985 trust was created for a very specific purpose. That purpose was to ensure that
6 the trust assets were not going to be shared with a group of people who were likely to
7 become members of the band as a result of proposed modifications to the *Indian Act* in
8 1985, which were imminent, and which would permit women, primarily, to re-join the band
9 as members. And, therefore, if that happened without the trust being changed, they would
10 then become beneficiaries of the trust.

11
12 So I confess that I had some concern with respect to what I was seeing. I asked myself how
13 it could possibly be that we had really substantial assets -- I don't know, there's evidence
14 or numbers kicking around 70 million or 220 million or whatever they are -- whatever the
15 number is, it's a lot of money. So I had concerns with respect to how we were seeing a
16 modification of a trust without any judicial approval, without any compliance with section
17 42, without anything other than simply the creation of a new trust. So I questioned -- and I
18 could totally be wrong about this and I'm more than happy to hear all of you out -- I
19 question the legitimacy of the 1985 trust declaration at all.

20
21 I did consider Justice Thomas' order -- a consent order of August 24th, 2016. You may
22 consider that to be the total answer to all of the problems and you could well be right and
23 I'm happy to hear you on that. On the surface I don't accept that but I'm open minded and
24 I'm happy to hear from you. But I can tell you that I have fundamental concerns. So how
25 does that relate to the issue that the parties together have defined for today the jurisdictional
26 issue. I think you are all on board that there are three ways in which a trust can be varied.
27 One is the reservation in the trust declaration. All of you are in agreement that that's not
28 the case here so we put that aside.

29
30 Secondly is section 42 of the *Trustee Act*. We all agree that that's properly enforced and
31 must be complied with. There's some disagreement with respect to whether enough effort
32 has been made to try to comply but I would say -- again, without hearing more argument -
33 - that section 42 is definitely available. Whether it is practically available is really the issue
34 and because we have competing interests the likelihood of getting a hundred percent
35 approval is slim to nil and I would think nil is probably closer than slim. So practically
36 speaking, section 42 doesn't look like a way to achieve the result that everyone would like.

37
38 Which leads to the ability of the Court at common law through the exercise of discretion
39 to amend the terms of the trust apart from section 42 of the *Trustee Act*. And I think it's
40 fair to say that the law in terms of my ability -- any Court's ability to modify the terms of
41 a trust on that basis is quite limited. And to achieve that result through the common law or

1 through the exercise of my discretion as a result of the inherent powers that the Court may
2 have is limited and I would have to go probably further to achieve that in this case than the
3 law has gone to date, which means that I would need to proceed very cautiously. Not that
4 I wouldn't proceed -- not that I wouldn't proceed cautiously but I would need to proceed
5 cautiously.

6
7 If I am going to go down a path where I need to consider whether or not to exercise my
8 discretion to develop the common law in a way that it hasn't quite been developed before,
9 I need to consider as part of that analysis the other alternatives. What other alternatives are
10 available that would make it unnecessary for me to go down the path which would extend
11 the law beyond where it is today. One of the possibilities -- and again, I want to emphasize
12 I've not made any decisions on any of this, I'm at the moment just talking so that you will
13 collectively have an understanding as to what my level of concern is here and what the
14 concern is.

15
16 One of the options here that is easily available is this 1985 trust doesn't have anything to
17 do with anything we're talking about here today. The assets, while they may be situated in
18 the 1985 trust -- because Justice Thomas said that they were -- are still subject to the 1982
19 trust terms. The definition of beneficiaries is members or future members of the band, that's
20 the end of it. There still is some discrimination in the 1982 trust, which we would need to
21 deal with because it -- it does contain identical language to the 1985 trust which deals with
22 illegitimate children. So we would still have that hurdle but I see that as a much smaller
23 hurdle than sort of the broader picture.

24
25 So the easiest thing to do here is just to say you haven't satisfied me that this 1985 trust is
26 relevant. I'm not going to exercise my discretion to modify the definition of beneficiaries
27 in the 1985 trust. 1982 is where we're going, that's where we are. Let's deal with
28 illegitimate children. I'm not saying I've come to that conclusion but that -- that is an
29 avenue that is in my mind available subject to counsel telling me that there are roadblocks
30 that prevent that from happening. And I would say that I would not come to that conclusion,
31 if that is my conclusion ultimately -- I would not come to that conclusion lightly because I
32 am conscious of the fact that there are potential consequences that could flow from that
33 and that would obviously be troubling to me. But my primary responsibility is to determine
34 what the facts are and apply the law to those facts. And if that drives me in one direction
35 that none of the parties like, that's an unfortunate consequence.

36
37 So my plan is to figure out what the facts are, determine what the law is. I'm not afraid to
38 extend the common law if that's where we need to go. Incrementally all that's probably
39 something more appropriately done in the Court of Appeal or higher courts but I -- I say
40 all of this only to let you know that this is a concern for me. I see that you tried to clean it
41 up in 2016 but to me that isn't the answer. So that's where we are.

1
2 MS. BONORA: Sir, given those comments, I think certainly we
3 would like an opportunity to research this issue and come --
4
5 THE COURT: Yes, that's --
6
7 MS. BONORA: -- back to you.
8
9 THE COURT: Yes.
10
11 MS. BONORA: I think Mr. Molstad probably does as well, that's
12 what he told me on the phone.
13
14 THE COURT: Sure.
15
16 MS. BONORA: Certainly we need some instructions from our
17 client. And I feel that, you know, short of making a few more arguments on public policy
18 and quasi-community trusts, you've essentially said my argument on the jurisdictional
19 issue. So I feel that perhaps today we should adjourn so that we can all consider this issue
20 for you and come back. Perhaps we could set -- I'm guessing some written materials would
21 be helpful to you --
22
23 THE COURT: Yes, it would.
24
25 MS. BONORA: -- and perhaps we could set some dates for those
26 materials and find some time with you.
27
28 THE COURT: Sure, yes. And I apologize for sort of raising this
29 issue at the last minute but I can tell you that this has been an evolving process for me --
30
31 MS. BONORA: Yes.
32
33 THE COURT: -- as I've read your briefs and I chipped away at
34 the ten boxes of materials downstairs that are not well organized. So when I write to you
35 asking for materials, it's not because the materials aren't here, it's just that they're not
36 readily available to me.
37
38 MS. BONORA: We are so happy to provide those to you and we
39 thank you very much for your comments today. I mean, obviously, that issue of the transfer
40 between the two trusts was an issue identified. We thought we had solved it but we
41 obviously need to satisfy you better that that is in fact solved and perhaps in our

1 investigations we'll find some other law that hasn't solved that issue entirely so ...

2
3 THE COURT: Well, maybe it has been solved. I don't see it
4 right now but I'm looking with open eyes just to see what I can find. So I'm not sure if any
5 of the other counsel are concerned about the way we've gone but -- is everyone board with
6 simply adjourning the jurisdictional issue so that briefs can be filed to supplement what's
7 currently been filed to address some of the concerns that I've raised today?

8
9 UNIDENTIFIED SPEAKER: Yes, My Lord.

10
11 THE COURT: The problem that we're going to have, I tell you
12 this right now, is that you are not going to find time with my assistant any time soon. That's
13 -- you're certainly free to tell her that you need time quickly but there's -- the practical
14 reality is that you're going to have a hard time finding something until probably into
15 September.

16
17 MS. BONORA: Sir, maybe then we won't take more of the
18 Court's time this afternoon and we'll just speak with your assistant to try and find time.

19
20 THE COURT: Sure.

21
22 MS. BONORA: We'll speak amongst ourselves in terms of
23 setting times for briefs, I'm sure that we can do that on our own, and perhaps even consider
24 the possibility of just writing to you and seeing if you will make a decision just on bases
25 of written materials. We'll speak amongst ourselves whether that's a possibility as well.

26
27 THE COURT: If your written materials cover the waterfront, as
28 much as I'm happy to hear from you I could also deal with it in written form. The one other
29 thing I didn't say that I should say is I know that you presented a consent order to Justice
30 Thomas and he signed it and I know that all of you have agreed that that order should be
31 signed so it was truly a consent order. But you have to ask yourself a couple of questions
32 with respect to that order. One is how solid is that order in the sense that it is ex parte vis-
33 à-vis some potentially interested parties. I would not want to go down the path of spending
34 another year or two or three years of applications and spending money that's ultimately
35 coming out of the trust only to find that we have one individual who pops up and says,
36 well, just hold on a minute now. I was -- I was a band member in 1982, I got married in
37 1983. I lost my band membership. I was just ready to come back in and lo and behold I had
38 the rug pulled out from underneath me and I didn't hear about this application before
39 Justice Thomas. I want that set aside. And you know what, there's -- there's a good
40 argument to be made that it might be set aside there.

41

1 So you could spend a lot of time and effort going down a path which is premised on a
2 consent order which could fall and take you right back. Not wanting to alarm anyone but
3 it did occur to me that you've got people here who -- I mean, one, we've got enough lawyers
4 here to sink a ship but not all of the interests are properly cared for. Not everyone is
5 represented here. And I read someplace and I think it's quite appropriate, this is not a truly
6 adversarial process. This is a problem that we need solved. So it's a problem that needs to
7 be solved collectively but if we try to do that and we leave out one interested party who
8 steps up at the end of the day and says not for me and we have to unwind the whole thing,
9 we haven't advanced the situation very far. So in my mind we need to see if we can't do
10 this correctly the first time.

11
12 MS. BONORA: Well, and, Sir, that's why we raised the issue of
13 the transfer because we didn't want to go through this whole process --

14
15 THE COURT: Yes.

16
17 MS. BONORA: -- only to have somebody suggest that the
18 transfer wasn't proper right from the start.

19
20 THE COURT: Well, it looks like Justice Thomas said the
21 transfer is proper but what flows from that I don't know.

22
23 MS. BONORA: Right.

24
25 THE COURT: And I wouldn't, as I said earlier, immediately
26 conclude that what flows from that is that these trust assets are subject to the definition of
27 beneficiary in the 1985 trust.

28
29 MS. BONORA: So we'll address the issue of services as well for
30 you and whether it binds all people, certainly. Okay. So we will try and work out a
31 schedule. We'll try and find time before you or agree that it will be in writing, and we thank
32 you very much today. So subject to anything my friends might have to say, I think we're
33 perhaps concluded for today.

34
35 THE COURT: Okay.

36
37 MS. BONORA: So thank you.

38
39 THE COURT: Good. Anything else? No. Any concerns? No,
40 okay. All right. So we'll adjourn then and we will resume when we can.

41

1 MS. BONORA:

Thank you, Sir.

2

3 UNIDENTIFIED SPEAKER:

Thank you, My Lord.

4

5

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7 PROCEEDINGS ADJOURNED

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1 Certificate of Record

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I, Natalija Varevac, certify that this recording is the record made of the evidence of the proceedings in Court of Queen's Bench, held in courtroom 517 at Edmonton, Alberta, on the 25th day of April, 2019, and that I was the court official in charge of the sound recording machine during these proceedings.

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1 **Certificate of Transcript**

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3 I, Su Zaherie, certify that

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5 (a) I transcribed the record, which was recorded by a sound recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
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8

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

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18 TEZZ TRANSCRIPTION, Transcriber

19 Order Number: AL-JO-1003-0576

20 Dated: April 26, 2019

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