

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 **BRIEF OF THE SAWRIDGE TRUSTEES**
INTERVENOR APPLICATIONS RETURNABLE OCTOBER
30, 2019

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

Attention: Doris C.E. Bonora / Michael S Sestito
Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

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

Attention: Janet L. Hutchison

Email: jhutchison@jlh

Counsel for the Office of the Public Guardian
and Trustee

Parlee McLaws LLP
1700 Enbridge Centre
10175 – 101 Street, NW
Edmonton, AB T5J 0H3

Attention: Edward H. Molstad/Ellery Sopko

Email: emolstad@parlee.com

Counsel for the Sawridge First Nation

Shelby Twinn
9918 – 115 Street
Edmonton, AB T5K 1S7

Email: s.twinn@live.ca

Self-Represented Party

Field Law
#2500, 10175 – 101 Street
Edmonton, AB T5J 0H3

Attention: P. Jonathan Faulds

Email: jfaulds@filedlaw.com

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/David Risling

Email: cosualdini@mross.com

Counsel for Catherine Twinn

TABLE OF CONTENTS

I. INTRODUCTION:3

II. FACTS:3

III. ISSUES4

- *Should SFN be granted Intervenor status?*4
- *Should Shelby Twinn be granted Intervenor status?*4
- *Should Shelby be entitled to costs?*4

IV. ANALYSIS4

V. CONCLUSION5

VI. LIST OF AUTHORITIES AND EVIDENCE.....6

I. INTRODUCTION:

1. On September 26, 2019, the Sawridge First Nation ("**SFN**") filed an application for status to intervene in the hearing on the jurisdictional question before the court and on the application in relation to the effect of transfer of assets from the 1982 Sawridge Trust to the 1985 Sawridge Trust ("**Transfer Issue**") which was the subject of an order made on August 24, 2016.
2. On the suggestion of the court, the Sawridge Trustees ("**Trustees**") of the Sawridge Band Inter Vivos Settlement ("**1985 Trust**") filed an application regarding the Transfer Issue on September 13, 2019.
3. On October 16, 2019, Ms. Shelby Twinn ("**Shelby**") also filed an application, returnable October 30, 2019, for intervenor status in the Transfer Application and the Jurisdiction Application and for costs of her application ("**Shelby Twinn Application**").
4. On December 21, 2018, an order was granted to allow Shelby Twinn and others rights of participation in this action (the "**Participation Order**").¹
5. The Trustees do not oppose the application of SFN for intervenor status.
6. While the Trustees do not oppose Shelby Twinn's Application with respect to intervenor status, the Trustees note that Shelby Twinn's rights as a participant are already provided for in the Participation Order.

II. FACTS:

7. SFN:
 - (a) In the Sawridge Band Trust ("1982 Trust"), Chief and Council of SFN are the trustees and the beneficiaries are the members of the SFN. There are no parties who represent Chief and Council of SFN nor the unique group of the members of SFN. However, there would be overlap with respect to members of SFN and other individuals that are represented by the Trustees, the Office of the Public Guardian and Trustee and Catherine Twinn.
8. Shelby Twinn
 - (a) On August 17, **2016**, Shelby and two other applicants filed an application and supporting affidavits seeking to be added as full parties to this Action and seeking advance costs. This Court dismissed the application and awarded costs on a solicitor client basis.² Shelby appealed the decision and the decision was upheld on appeal with the exception that costs were reduced from solicitor client costs to party and party costs.³
9. Shelby is the step-granddaughter of Catherine Twinn. Shelby's status as a beneficiary is recognized by the Trustees and by order of this Court.⁴ Shelby and her sister Kaitlin Twinn have identical interests in the trusts and Shelby's sister is represented by the Office of the Public Guardian and Trustee (the "**OPGT**").⁵ The representation of Shelby's sister by the OPGT is subject

¹ **Participation Order of Justice J.T. Henderson dated December 21, 2018, filed January 22, 2019 [TAB 1]**

² **1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377 [Sawridge#5] at para 22 [TAB 2]**

³ **Twinn v Twinn, 2017 ABCA 419 [Twinn] at para 20 [TAB 3]**

⁴ **Participation Order [TAB 1]**

⁵ **Sawridge#5 at paras 34, 35, and 36 [TAB 2].**

to existing indemnity and costs exemption orders.⁶ As Shelby is a beneficiary, her interests are also represented by the Trustees.⁷

III. ISSUES

- Should SFN be granted Intervenor status?
- Should Shelby be granted Intervenor status?
- Should Shelby be entitled to costs?

IV. ANALYSIS

SFN Intervenor Status:

10. As previously advised, the Sawridge Trustees do not oppose the Intervenor Status of SFN.

Shelby Twinn Intervenor Status:

11. The Sawridge Trustees do not oppose the intervenor status of Shelby Twinn despite the previous court orders denying her party status and the Participation Order which allows her access in writing. The only material difference between intervenor status and the Participation Order is that Shelby does not have the right to make oral submissions.
12. The Sawridge Trustees suggest that the best approach to save costs for all potential participants including Shelby Twinn would be to amend the Participation Order to allow any Participant to make oral submissions, with permission of the court, which would be requested on an application by application basis. This would obviate the need for further intervenor applications by beneficiaries or potential beneficiaries and decrease the costs of the litigation.
13. The Sawridge Trustees also make two comments with respect to the affidavit sworn in support of Shelby's application. Firstly, the Sawridge Trustees note that Shelby's affidavit does not discuss the Transfer Issue. In addition, it does not differentiate between the instant circumstances and those that were before the court previously in *Sawridge #5*. Rather, the affidavit mainly focuses on criticisms of the Sawridge Trustees and their involvement in this litigation. The Sawridge Trustees do not accept those criticisms as valid and will not, in this forum, engage in a protracted response to issues that are not appropriately before the court and irrelevant to the Transfer issue and irrelevant to the Transfer Issue.
14. The Sawridge Trustees note the comments of the Alberta Court of Appeal:

"[18] *In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interest of the Beneficiaries, who include Patrick and Shelby Twinn, Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and*

⁶ *Sawridge#5* at paras 34, 35, 36 and 55 [TAB 2].

⁷ *Sawridge#5* at para 55 [TAB 2].

*will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary)."*⁸

15. Secondly, the Sawridge Trustees note that Shelby's affidavit contains many references to the membership process and criticisms of that process. On this point, the Sawridge Trustees draw the court's attention to the finding of this Court that the membership process of a sovereign First Nation falls within the exclusive jurisdiction of the federal court and is not an appropriate subject for evaluation in this litigation.⁹

Should Shelby Be Entitled To Costs?

16. It is unclear if Shelby is asking for costs for the application to be determined at the conclusion of the application or whether she is seeking advance costs. She has provided no evidence or grounds for advance costs and thus we assume this is a request for costs that can be argued at the conclusion of the application.
17. That said, this Court has previously held that, even if Shelby was an appropriate litigation participant, it would not be appropriate to allow her to offload her litigation costs on the Trust.¹⁰ In fact, costs were awarded against Shelby Twinn.
18. This Court previously expressed concern regarding the deleterious effect of Shelby's participation in this litigation and costs on the 1985 Trust Fund.¹¹
19. Furthermore, the Trustees note that they are not paying for the costs of SFN's intervention.

V. CONCLUSION

20. The Trustees do not oppose SFN being granted intervenor status.
21. The Trustees do not oppose Shelby Twinn's intervenor application but suggest that her participation is already protected in the Participation Order and any increase in her participation can be dealt with by an amendment of that order.
22. The Trustees request that costs be addressed at the conclusion of the intervenor application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF OCTOBER, 2019.

Dentons Canada LLP

PER: 

DORIS BONORA
MICHAEL SESTITO
Solicitors for the Sawridge Trustees

⁸ Twinn at para 18 [TAB 3].

⁹ 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB [Sawridge #3] at paras 32 to 35 [Tab 4]

¹⁰ Sawridge#5, at para 47 [TAB 2].

¹¹ Sawridge#5, at paras 47, 49 and 50 [TAB 2].

VI. LIST OF AUTHORITIES AND EVIDENCE

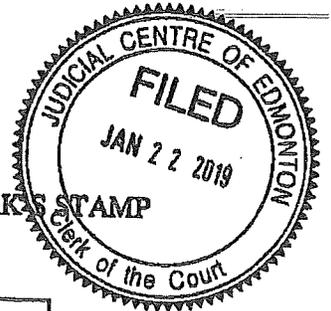
TAB NO.	DESCRIPTION
TAB 1	Participation Order of Justice J.T. Henderson dated December 21, 2018, filed January 22, 2019
TAB 2	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2017 ABQB 377
TAB 3	<i>Twinn v Twinn</i> , 2017 ABCA 419
TAB 9	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2015 ABQB 799

TAB 1

I hereby certify this to be a true copy of the original.


Clerk of the Court

CLERK'S STAMP



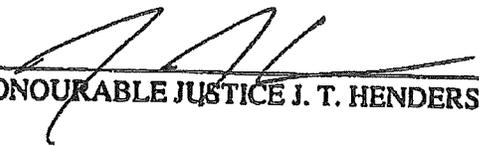
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID MAJESKI AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST;
DOCUMENT	CONSENT ORDER
DATE ORDER PRONOUNCED	DECEMBER 21, 2018
LOCATION WHERE ORDER PRONOUNCED	EDMONTON, ALBERTA
NAME OF JUSTICE WHO MADE THIS ORDER	HONOURABLE JUSTICE J.T. HENDERSON
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BIAMONTE LLP FRANÇOISE H. BELZIL 1600, 10025 - 102A AVENUE EDMONTON, AB T5J 2Z2 P: (780) 425-5806 / F: (780) 426-1600 File No. 89306 FHB

Upon the Application of Shelby Twinn and Patrick Twinn, beneficiaries of the Sawridge Band Inter Vivos Settlement ("1985 Trust");

And whereas current and potential beneficiaries of the 1985 Trust have an interest in these proceedings

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Current and potential beneficiaries of the 1985 Trust (the "Beneficiaries") may participate in the Proceedings in Action 1103 14112 as set out below.
2. The participation of the Beneficiaries in the Application scheduled for April 25, 2019 shall be restricted to each Beneficiary filing and serving written arguments not to exceed five pages, excluding authorities, if they so elect.
3. The participation of the Beneficiaries in future steps and at trial shall be as agreed upon by counsel or as directed by the Case Management Justice.
4. This Order is without prejudice to the rights of any Beneficiary to make application to the Court for greater participation at the April 25, 2019 application than contemplated by paragraph 2 of this Order.


THE HONOURABLE JUSTICE J. T. HENDERSON

CONSENTED TO BY:

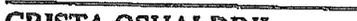
DENTONS CANADA LLP


DORIS BONORA
Counsel for Sawridge Trustees


HUTCHINSON LAW

JANET HUTCHINSON
Counsel for Office of Public Guardian and Trustee

McLENNAN ROSS LLP


CRISTA OSUALDINI
Counsel for Catherine Twinn

~~BIAMONTE LLP~~


FRANÇOISE H. BELZIL
Counsel for Shelby Twinn and
Patrick Twinn

TAB 2

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

2017 ABQB 377 (CanLII)

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**

Table of Contents

I	Introduction.....	3
II	Background	3
III	The Applicants	3
	A Patrick Twinn.....	3
	B Shelby Twinn	4
	C Deborah Serafinchon.....	4
IV	Positions of the Parties	4
V	Issues	4
VI	Disposition of the Application	5
	A Applicability of Rules 3.74 and 3.75 of the <i>Alberta Rules of Court</i> , Alta Reg 124/2010 ..	5
	B Is it necessary to add Patrick and Shelby Twinn as Parties?	6
	C Should Deborah Sarafinchon be added as a Party?	7
VII	Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such	7
	that they ought to be entitled to party status?	7
VIII	Should the Applicants be entitled to advance costs?	7
IX	Costs.....	7
	Schedule 'A'	10
	Part I - Materials filed by the participants in the Application by Patrick Twinn et al.	10
	Part II - List of Correspondence	12

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.

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

Schedule 'A'

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

FILING DATE	DESCRIPTION
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 – Borden Ladner Gervais (“BLG”).
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Serafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.
October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon – Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. – Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 – Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.

November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold – Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 – Dentons.

Part II - List of Correspondence

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

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

TAB 3

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

2017 ABCA 419 (CanLII)

Between:

Patrick Twinn, on his behalf, Shelby Twinn
and Deborah A. Serafinchon

Appellants
(Applicants)

- and -

Roland Twinn, Catherine Twinn, Walter Felix Twinn,
Bertha L'Hirondelle, and Clara Midbo,
as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents
(Respondents)

- and -

Public Trustee of Alberta ("OPTG")

Respondent
(Respondent)

- and -

Catherine Twinn

Respondent
(Respondent)

- and -

**Patrick Twinn, on behalf of his infant daughter,
Aspen Saya Twinn, and his wife Melissa Megley**

Not Parties to the Appeal
(Respondents)

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin**

Memorandum of Judgment

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

Memorandum of Judgment

The Court:

Introduction

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

Background to the Sawridge Trust Litigation

[2] In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

[3] The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination,

although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

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

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

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

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

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

[8] The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the

Trust and the assets held in it, and expand the issues beyond those identified during case management.

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

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

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

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

Standard of review

[13] Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge’s exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP*

Inc, 2017 ABCA 95 at para 3, [2017] AJ No 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

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

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

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

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

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

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

[18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented

by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

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

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

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

[22] During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential

beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

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

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

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

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

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

I have taken a “costs neutral” approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the

Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299 (Sawridge #4) at para 30.

[27] The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

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

Appeal heard on November 1, 2017

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

Paperny J.A.

Veldhuis J.A.

Martin J.A.

Appearances:

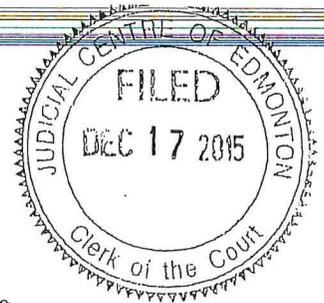
N.L. Golding, Q.C.
for the Appellants

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

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

D.D. Risling
for the Respondent Catherine Twinn

TAB 4



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

Table of Contents

I	Introduction.....	3
II.	Background	3
III.	The 1985 Sawridge Trust.....	5
IV.	The Current Situation.....	6
V.	Submissions and Argument	7
	A. The Public Trustee	7
	B. The SFN.....	7
	C. The Sawridge Trustees.....	8
VI.	Analysis.....	9
	A. Rule 5.13.....	9
	B. Refocussing the role of the Public Trustee	10
	Task 1 - Arriving at a fair distribution scheme	11
	Task 2 – Examining potential irregularities related to the settlement of assets to the Trust	11
	Task 3 - Identification of the pool of potential beneficiaries.....	12
	Task 4 - General and residual distributions	14
	C. Disagreement among the Sawridge Trustees.....	15
	D. Costs for the Public Trustee.....	15

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; *Wasylyshen 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 crystallized 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 and 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