

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



IN THE MATTER OF THE *TRUSTEE ACT*,
RSA 2000, c T-8, AS AMENDED, 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")

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

DOCUMENT **BOOK OF DOCUMENTS FOR
SAWRIDGE FIRST NATION'S
ORAL REPLY ON ITS
APPLICATION FOR INTERVENOR
STATUS IN THE JURISDICTION
APPLICATIONS**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT Parlee McLaws LLP
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1700 Enbridge Centre
10175-101 Street
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File No.: 64203-7/EHM

COURT FILE NUMBER 1103 14112

Clerk's Stamp

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TAB 1

Canada Federal Statutes
Indian Oil and Gas Act
Royalties [Heading added 2009, c. 7, s. 1.]

R.S.C. 1985, c. I-7, s. 4

s 4.

Currency

4.

4(1)Royalties

Despite the provisions of any contract but subject to subsection (2), whenever oil or gas is recovered from first nation lands, there is reserved to Her Majesty in right of Canada in trust for the first nation concerned a royalty consisting of the share of the oil or gas determined under the regulations, which the contract holder shall pay to Her Majesty in right of Canada in trust for the first nation in accordance with the regulations.

4(2)Special agreements

The Minister may, with the approval of the council of a first nation, enter into a special agreement with any person, for any period and subject to any conditions set out in the agreement, for a reduction or increase in the royalty otherwise payable under subsection (1) or a variation in the method of determining that royalty.

Amendment History

2009, c. 7, s. 1

Currency

Federal English Statutes reflect amendments current to September 4, 2019

Federal English Regulations are current to Gazette Vol. 153:13 (June 26, 2019)

TAB 2

Clerk's Stamp:



COURT FILE NUMBER:

1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

**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

(RESPONDENTS, in this Application)

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

(APPLICANT in this Application)

OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA

**(Additional RESPONDENT
in this Application)**

THE SAWRIDGE BAND

DOCUMENT

**AMENDED APPLICATION BY THE OFFICE
OF THE PUBLIC TRUSTEE OF ALBERTA**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#155, 10403 – 122 Street
Edmonton, AB T5N 4C1

Attention: **Janet L. Hutchison**
Telephone: (780) 423-3661 ext.225
Fax: (780) 426-1293
File: 51433 JLH

NOTICE TO RESPONDENTS

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

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

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

Date: June 30, 2015 (adjourned to September 2 and 3, 2015)

Time: 2:00PM (10:00AM on September 2 and 3, 2015)

Where: Law Courts Building

1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

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

Remedy claimed or sought:

I. Production of Records

1. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees to file an Affidavit of Records, in accordance with the provisions of Part 5 of the *Alberta Rules of Court* and provide all records in their power and possession, or which the Sawridge Trustees have reviewed or otherwise accessed, and that are relevant and material to the issues in the within proceeding, including, but not limited to:
 - i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:
 - a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;
 - b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;
 - c.) Complete and incomplete Sawridge Band membership applications;
 - d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and

Council or the Membership Appeal Committee in relation to membership applications;

- e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;
- f.) Records from Federal Court Action T-66-86A or T-66-86B that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, and which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes;
- g.) Records from Federal Court Action T-2655-89 that are in the power or possession of the Sawridge Trustees, or which the Trustees have reviewed or otherwise accessed, which are relevant and material to the Sawridge Band membership criteria, membership applications, or membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;
- h.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.
- ii.) Records relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;
- iii.) Any other relevant and material records available to counsel for the Sawridge Trustees as a result of Court of QB Action No. 1403 04885;
- iv.) Records relevant to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band's the Sawridge Band membership criteria, membership applications, or membership decision-making processes as they affect the Trust's beneficiary identification process;
- v.) Records relevant to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within the Sawridge Band government and as decision makers within in the Sawridge Band membership process;
- vi.) Records providing the details and listing of any assets held in trust by individuals for the Sawridge Band prior to 1982; the details and listing of any assets

transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;

2. An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Band to file Affidavits of Records in accordance with the provisions of Part 5 of the *Alberta Rules of Court*, or in the alternative, an Order pursuant to Rule 5.13 of the *Alberta Rules of Court*, requiring Sawridge Band to provide all records in their power and possession that are relevant and material to the issues in the within proceeding, including, but not limited to:
 - i.) The Sawridge Band membership criteria, membership application process and membership decision-making processes from 1985-present, including:
 - a.) All inquiries received about Sawridge Band membership or the process to apply for Sawridge Band membership and the responses to said inquiries;
 - b.) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge Band membership, whether or not the inquiry was treated by Sawridge Band as an actual membership application;
 - c.) Complete and incomplete Sawridge Band membership applications;
 - d.) Sawridge Band membership recommendations, membership decisions by Chief and Council and membership appeal decisions, including any and all information considered by the Membership Review Committee, Chief and Council or the Membership Appeal Committee in relation to membership applications;
 - e.) Any information that would assist in identification of the minor dependants of individuals who have attempted to apply, are in the process of applying or have applied for Sawridge Band membership;
 - f.) Any other records that would assist in assessing whether or not the Sawridge Band membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice.
 - ii.) Records from Federal Court Action T-66-86A or T-66-86B, which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes
 - iii.) Records from Federal Court Action T-2655-89 which are relevant and material to the Sawridge Band membership criteria, membership application process and membership decision-making processes, including the entire document collection the Sawridge Band made available to the Sawridge Trustees;

- iv.) Records in the power and possession of the Sawridge Band relevant and material to the issues set out as E.1, E.3, E.4 or E.6, in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014, and filed in Court of QB Action No. 1403 04885, including Catherine Twinn's sworn but unfiled affidavit, if it references said issues;
 - v.) Records in the possession or control of the Sawridge Band, and relevant or material to the Sawridge Trustee's proposals to establish a tribunal to determine beneficiary status, including information regarding any concerns around the Sawridge Band membership process affecting the Trust's beneficiary identification process;
 - vi.) Records in the possession or control of the Sawridge Band and relevant or material to conflict of interest issues arising from the multiple roles of Sawridge Trustees, including their roles as Band members, beneficiaries, within Sawridge Band government and in the Sawridge membership process;
 - vii.) Records relevant and material to the details and listing of any assets held in trust by individuals for Sawridge Band prior to 1982; the details and listing of any assets transferred from individuals to the 1982 Trust; and the details and listing of the assets transferred into the 1985 Trust;
- 3. An Order, directed to the Sawridge Trustees and the Sawridge Band, confirming that bare assertions of confidentiality and privacy over Sawridge Band membership information and Sawridge Band membership application documentation does not supercede the Court's June 12, 2012 Order, absent application by the Sawridge Band or the Sawridge Trustees to establish the documents are subject to a recognized ground of legal privilege.
 - 4. In the alternative, should the Court conclude this issue is beyond the scope of the June 12, 2012 order, and if the parties cannot arrive at agreement on further and better production within 30 days, the matter should be set down for a special chambers hearing.
 - 5. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraphs 1-34.

II. Queen's Bench Action No. 1403 04885,

- 6. An order requiring the parties in the within proceeding and Queen's Bench Action No. 1403 04885 to provide the Court with a mutually agreeable written update, or if agreement on said update is not possible, to schedule a further case management conference within 60 days of the production requested in paragraphs 1 and 2.
- 7. Specifically, the parties will update the Court on matters including:

- i.) The merits of consolidation of the two actions, or alternatives such as concurrent or consecutive hearings.
 - ii.) The merits of a further order under Part 5 to permit questioning of individual Trustees, members of the Membership Review Committee or members of Sawridge Band government on matters relevant and material to the within action.
8. Any proposed or adopted litigation plan should be amended to reflect the relief requested in paragraph 5 and 6.

III. Advice and Direction

9. An Order providing the Court's advice and directions on the following matters:
- i.) Confirmation of the ability of counsel in the within proceeding to communicate with any or all counsel in Queen's Bench Action No. 1403 04885 whether individually or as a group on any matters related to:
 - a.) The evidence produced pursuant to the order requested in paragraph 1 (ii) and (iii);
 - b.) The real issues in dispute in either proceeding;
 - c.) The merits of consolidation, or concurrent hearings, of the two proceedings;
 - d.) The most efficient way to resolve the issues that overlap as between the two proceedings; or
 - e.) Any other matter consistent with the purposes of the *Alberta Rules of Court*.
 - ii.) Confirmation that the Court's costs order of June 12, 2012 (as upheld by the Court of Appeal), includes indemnification of the Public Trustee for costs associated with legal agency services that may be incurred from time to time.

Grounds for making this application:

I. Production of Records

10. The June 12, 2012 Reasons for judgment acknowledge the relevance and materiality of information that permit assessment of the Sawridge Band membership process. The need for information to assist the Public Trustee in identifying potential minor beneficiaries was also acknowledged.
11. Neither the Sawridge Trustees nor the Sawridge Band are currently subject to a general obligation to produce all relevant and material evidence. This has created the potential for selective production that does not support the purposes of the *Alberta Rules of Court* or serve the interests of the administration of justice.

12. The existence of actual, or potential, conflicts of interest around the Sawridge Band membership process requires more extensive production than normally applied to originating applications.
13. The Public Trustee cannot effectively represent, or protect the interests of, minor beneficiaries without full disclosure of relevant and material evidence. In particular, the Public Trustee cannot adequately identify the potential minor beneficiaries without full disclosure.
14. Currently, the Public Trustee does not have access to the same relevant and material evidence that is available to the Sawridge Trustees and Sawridge Band regarding that proceeding. Full and objective disclosure is required to remedy that imbalance.
15. Only full and fair pre-hearing disclosure will permit the parties to do the work required to effectively narrow the issues for hearing.
16. The Court has the discretion to apply all, or part, of the rules of production in Part 5 of the *Alberta Rules of Court* to applications, where appropriate. Requiring the Sawridge Trustees and Sawridge Band to file Affidavits of Records would remedy the production issues that are arising in the within proceedings.
17. In relation to relevance and materiality of evidence regarding the Sawridge Band membership process, the Court's June 12, 2012 Reasons for Judgement found those matters were relevant and that the Public Trustee could explore those matters, including, information that would assist in identifying potential minor beneficiaries.
18. The Court has discretion to compel production of relevant and material Records from Sawridge Band whether it is a party in the within proceeding or not, pursuant to Rule 5.13.
19. The Sawridge Band, through answers to undertakings from the Sawridge Trustees, has refused to produce membership files and documents relevant to the membership decision-making process. The refusal is based on a bare assertion of confidentiality and privacy, without substantive grounds to demonstrate a recognized legal privilege.
20. If this issue goes beyond the scope of the June 12, 2012 order, and absent agreement amongst the parties, an application for further and better production will be required.

II. Queen's Bench Action No. 1403 04885,

21. The Public Trustee was previously unaware of the December 17, 2014 court appearance in QB Action No. 1403 04885. The Public Trustee has not had an opportunity to address the Court in relation to the overlap of the legal and factual issues raised in proceedings.

22. While more information is required, the pleadings indicate demonstrable overlaps on key issues:

SIMILARITIES	
<u>Issue #1: Who qualifies as Band Member/ Beneficiary-identification</u>	
<u>QB 1103 14112:</u> <ul style="list-style-type: none"> • “The Public Trustee seeks to investigate these issues... to reassure itself (and the Court) that the beneficiary class can and has been adequately defined. [para 46, Justice D.R.G. Thomas, June 12, 2012 Reasons for Judgment (“Reasons”)] • “... it would be peculiar if, in varying the definition of “Beneficiaries” in the trust documents, that the Court did not make some sort of inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway” [para 48, Reasons] • “This Court has an obligation to make inquiries as to the procedure and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be “ascertained” [para 49, Reasons] • “The Trustees seek this Court’s direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to: (a) Determining the Beneficiaries of the 1985 Trust” [para 14(a), Affidavit of Paul Bujold, August 30, 2011] 	<u>QB 1403 04885:</u> <ul style="list-style-type: none"> • “Examination of and ensuring that the system for ascertaining beneficiaries of the Trusts is fair, reasonable, timely, unbiased and in accordance with <i>Charter</i> principles and natural justice;” [Exhibit J, para E(3), Affidavit of Ms. Twinn, December 8, 2014]
<u>Issue #2: Existence of Conflicts of Interest affecting Membership process, Trustees, or both</u>	
<u>QB 1103 14112:</u> <ul style="list-style-type: none"> • “...the Sawridge Trustees are personally affected by the assignment of persons inside and outside the Trust.” [para 23, Reasons] • “...the key players in both the administration of the Sawridge Trust and of the Sawridge 	<u>QB 1403 04885:</u> <ul style="list-style-type: none"> • “Seeks advice and direction regarding the proper composition of the Board of trustees, including elimination or reduction of the number of elected officials of the Sawridge Indian Band.” [Application for Advice and

<p>Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.” [para 25, Reasons]</p> <ul style="list-style-type: none"> • “I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances.” [para 26, Reasons] • “The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries” [para 28, Reasons] • “The Public Trustee’s role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation.” [para 42, Reasons] 	<p>Direction, September 26, 2014]</p> <ul style="list-style-type: none"> • “Trustee selection and succession, including issues of conflict of interest now and in the future, including examination of a separated model to remove conflict of interest, be it actual, structural or of the appearance of conflict of interest;” [Exhibit J, para E(1), Affidavit of Ms. Twinn, December 8, 2014]
<p align="center"><u>Issue #3: Transfer of Assets to 1985 Trust</u></p>	
<p><u>QB 1103 14112:</u></p> <ul style="list-style-type: none"> • “To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust” [para 1(b), Order by Justice D.R.G. Thomas, September 6, 2011] 	<p><u>QB 1403 04885:</u></p> <ul style="list-style-type: none"> • “Determination of how assets were held and transferred from Trust inception to the present day;” [Exhibit J, para E(6), Affidavit of Ms. Twinn, December 8, 2014]
<p align="center"><u>Issue #4: Administration and Management of 1985 Trust</u></p>	
<p><u>QB 1103 14112:</u></p> <ul style="list-style-type: none"> • “An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to 	<p><u>QB 1403 04885:</u></p> <ul style="list-style-type: none"> • “I have serious concerns regarding the administration of the Trusts and it is my belief that it is important and my duty that this information be brought to the attention of the Court. It is my intention to provide a copy of my Affidavit, unfiled, to the Court at the

as the "Advice and Direction Application")." [para 1, Order by Justice D.R.G. Thomas, September 6, 2011]

- The Public Trustee of Alberta must protect the interests of any minor beneficiaries or potential beneficiaries in relation to the 1985 Trust. [*Public Trustee Act*, s.21 and s.22]

hearing of this application so that the confidentiality of the subject matter of my Affidavit can be maintained pending further direction from this Honourable Court on how to proceed in this regard." [para 16, Affidavit of Ms. Twinn, December 8, 2014]

- "...I have raised the issues of trustee succession, accountability, beneficiary determination, undue influence and conflict of interest on numerous occasions, including putting forward a proposal in writing shortly after the June 12, 2012 decision issued by Justice Thomas in QB Action No. 1103-14112, but have been unable to obtain any results." A recent example of this is in May 2014 when I provided a Binding Issue Resolution Process Agreement to the other trustees for their review and comment in order to set out a process in which to discuss and resolve the issues that are the subject matter of the Application. The other trustees refused and/or willfully failed to engage in this or any process. I believe that I have exhausted my ability to address these matters internally and that adjudication by the Courts has become the only avenue available to address and resolve these matters. Attached as Exhibit "J" to my Affidavit is a copy of the Binding Issue Process Agreement I circulated." [para 23, Affidavit of Ms. Twinn, December 8, 2014]

DISSIMILARITIES

QB 1103 14112:

- "To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries"." [para 1(a), Order by Justice D.R.G. Thomas, September 6, 2011]

- Not in issue

QB 1403 04885:

- Not in issue

- Approval of appointment of individual Trustees

23. Once all parties are on an even playing field in relation to relevant and material evidence, consolidation must be considered to assess whether it would best serve the interests of the administration of justice, save time and resources, and reduce the combined time for hearing the applications, without creating undue prejudice to any party.
24. The parties should update the case management judge on this issue within a reasonable time after the additional document production contemplated by paragraph 1 is received.

III. Advice and Direction

i.) Communication Between Counsel

25. Communications as between counsel in a proceeding and in related proceedings is a normal occurrence. Such communications can serve to narrow issues in dispute and avoid duplication of effort. Such communications increase the opportunities for settlement and pre-trial resolution and focus all parties on issues that actually require the assistance of the Court.
26. Communication between counsel acting in the within proceeding and counsel acting in QB Action No. 1403 04885, particularly given the overlapping issues, should be encouraged rather than circumscribed.

ii.) Costs

27. The Court ordered the Sawridge Trustees to provide the Public Trustee for “full and advance indemnification” for its costs to participate in the within proceeding. The plain meaning of indemnification applies and should include all reasonable costs incurred by the Public Trustee.
28. The Sawridge Trustees object to the Public Trustees incurring costs related to the use of agent counsel who may work with existing counsel from time to time to move this proceeding forward.
29. The Public Trustee has taken care to propose agent counsel who is already highly experienced in the relevant areas of law and has specific experience on matters related to Sawridge Band membership issues. As such, agent counsel that have been proposed are in a position to provide more cost effective services than agent counsel lacking this background.
30. The Public Trustee’s requests for resources in order to fulfill its role in this proceeding have been, and remain, reasonable and certainly less extensive than the resources available to the Applicants.

Material or evidence to be relied upon:

1. Excerpts from the transcript from the Questioning of Paul Bujold, held May 27 & 28, 2014;
2. Excerpts from the transcripts from the Questioning of Elizabeth Poitras, held May 29, 2014 and April 9, 2015;
3. Exhibits from the Questioning of Paul Bujold;
4. Exhibits from the Questioning of Elizabeth Poitras;
5. Excerpts from the Answers to Undertakings of Paul Bujold, received December 1, 2014;
6. Affidavit of Roman Bombak, dated June 12, 2015
7. Pleadings filed in Queen's Bench Action No. 1403 04885
8. Pleadings filed in Queen's Bench Action No. 1103 14112
9. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

10. *Alberta Rules of Court* 1.2, 1.4, 3.10, 3.14, 3.72, 4.11, 5.1, 5.2, 6.3, and 6.11

Applicable Acts and regulation:

11. *Public Trustee Act*, S.A. 2004, c. P-44.1 s. 5, 21 and 22

Any irregularity complained of or objection relied on:

12. The Sawridge Band, through the Sawridge Trustees, has refused to produce relevant and material evidence regarding the Sawridge Band membership process. This is impeding the Public Trustee's ability to effectively represent the interests of minor beneficiaries, and potential minor beneficiaries.

How the application is proposed to be heard or considered:

13. The application is to be heard in Chambers before the Justice D.R.G. Thomas on June 30, 2015, at 2:00PM. (now adjourned to September 2 and 3, 2015)

WARNING

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

TAB 3

2015 ABQB 799
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2015 CarswellAlta 2373, 2015 ABQB 799, [2016] A.W.L.D. 313, 262 A.C.W.S. (3d) 1

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

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

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

D.R.G. Thomas J.

Heard: September 2, 2015; September 3, 2015

Judgment: December 17, 2015

Docket: Edmonton 1103-14112

Counsel: Janet Hutchison, Eugene Meehan, Q.C., for Applicant, Public Trustee of Alberta
Edward H. Molstad, Q.C., for Respondent, Sawridge First Nation
Doris Bonora, Marco S. Poretti, for Respondents, 1985 Sawridge Trustees
J.J. Kueber, Q.C., for Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara
Midbo
Karen Platten, Q.C., for Catherine Twinn

Subject: Civil Practice and Procedure; Constitutional; Estates and Trusts; Public; Human
Rights

Headnote

Aboriginal law --- Practice and procedure — Discovery — Miscellaneous

Band set up trust to hold Band property on behalf of its members — Trustees sought
court advice and direction with respect to proposed definition to term "beneficiaries"
of trust — Public Trustee brought successful application to be appointed litigation
representative of interested minors, on condition that costs would be paid by trust
and that it would be shielded from any costs liability — Public Trustee brought
application for production of records and information from band — Information sought

concerned band membership, members who had or were seeking band membership, processes involved to determine whether individuals may become part of band, records of application processes and associated litigation, and how assets ended up in trust — Band resisted application — Application dismissed — Public Trustee used legally incorrect mechanism to seek materials from Band — Band was third party to litigation and therefore was not subject to same disclosure proceedings as trustees, who were parties — Proximal relationships were not to be used as bridge for disclosure obligations — Only documents which were potentially disclosable in Public Trustee's application were those that were relevant and material to issue before court — It was further necessary to refocus proceedings and provide well-defined process to achieve fair and just distribution of trust assets — Future role of Public Trustee was to be limited to representing interests of existing and potential minor beneficiaries, examining manner in which property was placed in trust on behalf of minor beneficiaries, identifying potential but not yet identified minors who were children of band members or membership candidates, and supervising distribution process — Public trustee was to have until March 15, 2016, to prepare and serve application on band which identified documents it believed to be relevant and material to test fairness of proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries — Public Trustee was to have until January 29, 2016 to prepare and serve application on band identifying specific documents relevant and material to issue of assets settled in trust — Public Trustee may seek materials and information from Band, but only in relation to specific issues and subjects — Public Trustee had no right to engage, and was not to engage, in collateral attacks on membership processes of band and trustees had no right to engage in collateral attacks on band's membership processes.

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Pt. V — referred to

R. 5.2 — referred to

R. 5.5-5.9 — referred to

R. 5.13 — considered

R. 5.13(1) — considered

R. 6.3 — considered

R. 9.19 — considered

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APPLICATION by Public Trustee for production of records and information from band.

D.R.G. Thomas J.:

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 (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365 (Alta. Q.B.) ["*Sawridge #1*"], (2012), 543 A.R. 90 (Alta. Q.B.) affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. C.A.) ["*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 A.R. 371 (Alta. Q.B.); *Wasylyshen v. Canadian Broadcasting Corp.*, [2006] A.J. No. 1169 (Alta. Q.B.).

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 A.R. 17, 63 Alta. L.R. (2d) 189 (Alta. Q.B.)) or compel disclosure (*Gainers Inc. v. Pocklington Holdings Inc.* (1995), 169 A.R. 288, 30 Alta. L.R. (3d) 273 (Alta. C.A.)). Items sought must be particularized, and this process is not a form of discovery: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1989), 98 A.R. 374, 16 A.C.W.S. (3d) 286 (Alta. Q.B.).

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 A.R. 180 (Alta. Q.B.).

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 (Ont. C.A.) at paras 97, (2014), 123 O.R. (3d) 401 (Ont. C.A.) ; *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: *Doucette (Litigation Guardian of) v. Wee Watch Day Care Systems Inc.*, 2008 SCC 8, [2008] 1 S.C.R. 157 (S.C.C.). 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 F.T.R. 253 (Eng.) (F.C.). Further, the membership criteria used by the SFN operate until they are found to be invalid: *Huzar v. Canada*, [2000] F.C.J. No. 873 (Fed. C.A.) at para 5, (2000), 258 N.R. 246 (Fed. C.A.). 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 A.R. 172 (Alta. Master); Z. (H.) v. Unger, 2013 ABQB 639, 573 A.R. 391 (Alta. Q.B.). 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: *Kaddoura v. Hanson*, 2015 ABCA 154 (Alta. C.A.) at para 15, (2015), 15 Alta. L.R. (6th) 37 (Alta. C.A.).

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 D.L.R. (4th) 56 (Alta. C.A.), 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 (S.C.C.), 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. Sawridge Band*, 2013 FC 910, 438 F.T.R. 264 (Eng.) (F.C.), "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

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

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

and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

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

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

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

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

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

57 The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 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.

Application dismissed.

End of Document

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TAB 4

COURT FILE NUMBER

1103 14112

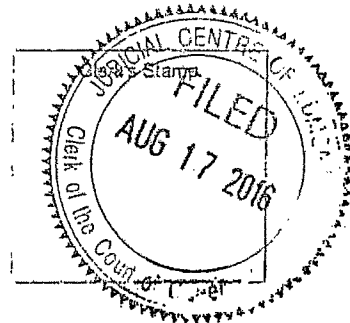
COURT:

COURT OF QUEEN'S BENCH OF
ALBERTA

JUDICIAL CENTRE:

EDMONTON

IN THE MATTER OF THE TRUSTEE
ACT, RSA 2000, c T-8, AS
AMENDED



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

APPLICANTS:

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

DOCUMENT

ORDER

ADDRESS FOR SERVICE
AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

Dentons Canada LLP
2900, 10180 101 Street
Edmonton, AB T5J 3V5
Attention: Doris Bonora
Telephone: (780) 423-7188
Facsimile: (780) 423-7276
File No.: 551880 -1

DATE ON WHICH ORDER WAS
PRONOUNCED:

December 17, 2015

LOCATION WHERE ORDER WAS
PRONOUNCED:

Edmonton, Alberta

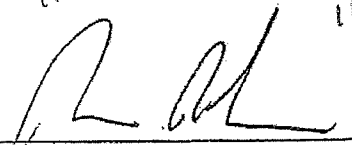
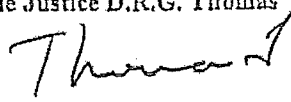
NAME OF JUSTICE WHO MADE THIS ORDER: Honourable Justice D.R.G. Thomas

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

IT IS HEREBY ORDERED THAT:

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

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


Honourable Justice D.R.G. Thomas


APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Dentons Canada LLP

Per: _____

Marco Poretti, Counsel for the Sawridge
Trustees

Per: _____

Doris Bonora, Counsel for the Sawridge
Trustees

Hutchison Law

Per: _____

Janet L. Hutchison, Counsel for the Office the
Public Guardian and Trustee

Parlee McLaws LLP

Per: _____

Edward H. Molstad QC, Counsel for Sawridge
First Nation

Bryan & Co. LLP

Per: _____

Nancy E Cumming QC and Joseph Kueber QC, Counsel for Roland Twinn, Bertha
L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per: _____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Dentons Canada LLP

Per: _____

Marco Poretti, Counsel for the Sawridge
Trustees

Per: _____

Doris Bonora, Counsel for the Sawridge
Trustees

Hutchison Law

Per: _____

Janet L. Hutchison, Counsel for the Office the
Public Guardian and Trustee

Parlee McLaws LLP

Per: _____

Edward H. Molstad QC, Counsel for Sawridge
First Nation

Bryan & Co. LLP

Per: _____

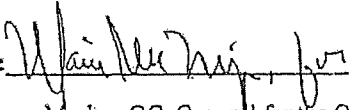
Nancy E Cumming QC and Joseph Kueber QC, Counsel for Roland Twinn, Bertha
L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per: _____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

Supreme Advocacy LLP

Per: 

Eugene Meehan QC, Counsel for the Office the Public Guardian and Trustee

20781457_1|NATDOCS

TAB 5



Our File: 51433 JLH

TELECOPIER COVER SHEET

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Edward Molstad

FIRM: Parlee McLaws LLP

TELECOPIER NUMBER: 780-423-2870

FROM: JANET HUTCHISON

DATE: January 29, 2016

NUMBER OF PAGES: 12 INCLUDING COVER PAGE

(If you do not receive all pages, please call 417-7871 as soon as possible)

**RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103
14112**

CONFIDENTIALITY WARNING

The documents accompanying this transmission contain confidential information intended for a specific individual and purpose. The information is private, and is legally protected by law. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you have received this communication in error, please notify us immediately by collect telephone (780) 417-7871 and return the original to us by regular mail. Thank you.



Our File: 51433 JLH

DELIVERED BY EMAIL AND FAX

January 29, 2016

Reynolds Mirth Richards & Farmer LLP
Suite 3200 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Marco Poretti

Dentons LLP
Suite 2900 Manulife Place
10180 - 101 Street
Edmonton, Alberta T5J 3W8

Attention: Doris Bonora

Bryan & Company
#2600 Manulife Place
10180 - 101 Street
Edmonton, Alberta
T5J 3Y2

Attention: Nancy Cumming, Q.C.

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

Attention: Karen Platten, Q.C.

Parlee McLaws LLP
1500 Manulife Place
10180-101 Street
Edmonton, Alberta
T5J 4K1

Attention: Edward Molstad, Q.C.

DLA Piper
Suite 1201, Scotia Tower 2
10060 Jasper Ave
Edmonton, Alberta
T5J 4E5

Attention: Priscilla Kennedy

Dear Sir and Mesdames:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust); QB Action No. 1103 14112

Please find enclosed for service upon you:

- i.) The 5.13 Application as directed by para. 45 and 46 of the December 17, 2015 Reasons

for Judgment; and

- ii.) The 5.13 Application as directed by para. 61 of the December 17, 2015 Reasons for Judgment.

Please note these applications have been filed by fax with the Court of Queen's Bench. If we receive stamped copies back before close of business, we will forward them onto you. We would appreciate confirmation you will accept service by email or fax.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON

JLH/cm

Enclosure

cc: Client

cc: E. Meehan, Q.C., Supreme Advocacy LLP.

Transmission Report

Date/Time
Local ID 1

01-29-2016
780-426-1293

02:53:31 p.m.

Transmit Header Text
Local Name 1

Chamberlain Hutchison

This document : Confirmed
(reduced sample and details below)
Document size : A4

Government
of Alberta

Fax Document Filing Request

Court Services

Please submit only one Document Filing Request per Court File

Submitted by: Hutchison Law

Account No. 1103 14112

City/Town: Sherwood Park

Your File No. 51433

Office Phone: 780-417-7871

No. of Pages: 9

Fax Number: 780-417-7871

Action No.

1103 14112

Style of Cause

Poland Twin, Catherine Twin, Walter Felix Twin, Bertha
Hutchison, Respondents
vs.
Hirondelle and Ciro Miro, As Trustees in the 1945 Sauridge Trust

Defendant(s)
Applicant
Instructions

Public Trustee of Alberta

Please file the two attached Applications by the Public Trustee of Alberta.

Thank you

Signature

Clerks' Office Use Only

Invoice No.

Filing Fee

Completed by

Certified Copies @10.00

Fax Fee pages @ \$1.00 per page

Clerk

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Judicial Centre

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for the following reasons:



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Office for the following reasons:



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CTS1717 (2011/11)

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Abbreviations:

HS: Host send
HR: Host receive
WS: Waiting send

PL: Polled local
PR: Polled remote
MS: Mailbox save

MP: Mailbox print
RP: Report
FF: Fax Forward

CP: Completed
FA: Fall
TU: Terminated by user

TS: Terminated by system
G3: Group 3
EC: Error Correct

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

**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,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985
Sawridge Trust

APPLICANT in this Application

OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA

RESPONDENT in this Application

THE SAWRIDGE FIRST NATION

DOCUMENT

**APPLICATION BY THE OFFICE OF THE
PUBLIC TRUSTEE OF ALBERTA FOR
PRODUCTION UNDER RULE 5.13.**

**ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT**

HUTCHISON LAW
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8A 3X1

Attention: **Janet L. Hutchison**
Telephone: (780) 417-7871
Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca
File: 51433 JLH

NOTICE TO THE RESPONDENT, SAWRIDGE FIRST NATION

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

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

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

Date: To be set by the Case Management Justice, but in any event prior to April 30, 2016 as directed in the Reasons for Judgment dated December 17, 2015

Time: To be set by the Case Management Justice

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

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

Remedy claimed or sought includes:

1. The OPGT requests the Sawridge First Nation ("SFN") provide it with the following types of documents, the OPGT believes may be relevant and material to the issue of which assets, were to be, and were settled in the 1985 Trust:
 - a.) Band Council meeting minutes, Band Council Resolutions, or documents presented to or before, or approved by, Band Council in the 1970's, including records of transfers or any transfer documents, when land, hotel and other business assets acquired by the SFN were registered in Chief Walter Twinn's, George Twin's, Walter Felix Twin's, Samuel Gilbert Twin's, and David Fennel's names to hold in trust for the members of SFN, which assets were to be transferred to the 1982 Trust and ultimately into the 1985 Trust. [Source: Affidavit of Paul Bujold, filed September 13, 2011, para. 8];
 - b.) Band Council meeting minutes, Band Council Resolutions or documents presented to or before, or approved by, Band Council in the June 1982 meeting held at the Sawridge Band Office to address the transfer of all property held by Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennel in trust for the present and future members of the 1982 Trust, which assets were ultimately to be transferred into the 1985 Trust, that contain any information about the assets held by the individuals and/or the transfer to the Trust, including records of transfers or any transfer documents. [Source- Affidavit of Paul Bujold, filed September 13, 2011, para. 10 and Exhibit B]

- c.) Band Council meeting minutes or documents presented to or before, or approved by, Band Council, including records of transfers or any transfer documents, at its April 15, 1985 Band Council meeting that would provide any greater detail or information regarding the transfer of assets from the 1982 Trust to the 1985 Trust, beyond that contained in the Band Council Resolution. [Source: Affidavit of Paul Bujold, filed September 13, 2011, Exhibit H]
- d.) Any documents SFN has in its possession or control, including records of transfers or any transfer documents, that would assist in identifying the specific additional assets that Mr. Bujold believes were later transferred from SFN or individuals holding the property in trust for SFN members and the dates and manner of transfer. [Source: Affidavit of Paul Bujold, filed September 13, 2011, para. 22]
- e.) Copies of SFN financial statements prepared prior to June 1, 1984 that would provide details of the assets which composed the transferred assets with a carrying value of \$17,951,590.00 as referred to in Note 16 to the June 1, 1984 Financial Statements provided at Undertaking #16 of Paul Bujold's Answers to Undertakings;
- f.) Further to item (e) above, any Band Council meeting minutes, Band Council resolutions or documents presented to or before, or approved by, Band Council, or minutes of meetings of Band members, including records of transfers or any transfer documents, or other documentation regarding the December 17, 1983 transfer of assets to the 1982 Trust, and ultimately 1985 Trust;
- g.) Any documentation that would assist in understanding if the 1985 Contribution from Beneficiaries related to any of the assets that were being held by individuals in trust for the SFN members and that were later settled in the Trust. [Source- Sawridge Trust Financial statements dated December 31, 1986 (produced as part of Paul Bujold's Answers to Undertakings, UT #16) which refers in Note 7 to a 1985 "contribution from beneficiaries"]
- h.) Copies of the series of demand promissory notes held in trust by Walter Twinn for the SFN band members, as referred to in the January 21, 1985 Demand Debenture, which was later transferred to the Trust, as well as any Band Council meeting minutes or documents presented to or before, or approved by, Band Council relating to the promissory notes or the 1985 Demand Debenture. [Source: Paul Bujold Answers to Undertakings, UT #16]
- i.) Band Council meeting minutes, Band Council resolutions, or documents presented to or before, or approved by, Band Council, including records of transfers or any transfer documents, in relation to the transfers of \$3,706,060.00 and \$17,951,590.00 to the Trust in 1985 and 1984 respectively, that would identify that specific assets that comprised the transfers, if not already produced in response to the above requests;

- j.) Any documentation in the SFN's possession and control that would assist in determining what assets were intended to be included in the Trust Settlement, the 1982 Trust, or the Declaration of Trust, or any documentation that would confirm the specific transfers from the 1982 Trust to the 1985 Trust. [Source – Paul Bujold Answer to Undertaking #18, Response from Justice Canada suggesting SFN would be the party that would best be able to locate the documents requested.]
2. The OPGT bases its request, including its assessment of whether SFN may have control of the requested records and their relevance and materiality, on the information available in the proceeding as of today's date. It must be noted that the OPGT has not had the benefit of questioning the Trustee's affiant, Paul Bujold, on the documents produced regarding assets, on his answers to undertakings or on his Affidavit of Records, dated November 2, 2015, as of the date of filing.

Grounds for making this application:

1. This application is made under direction of the Court as set out in the December 17, 2015 Reasons for Judgment. The Public Guardian and Trustee is filing its application under revised terms from the December 17, 2015 judgment, which is under appeal.
2. The Public Guardian and Trustee is also filing this application despite the fact that the Parties have also provided the Court with a signed consent order for an extension of time, to file the within application.
3. The OPGT reserves the right to file an amended application once its Questioning of Paul Bujold on asset documentation has actually been held and upon the result of Appeals 1603-0029AC and 1603-0026AC.

Material or evidence to be relied upon:

1. All relevant materials filed to date in Court of Queen's Bench Action 1103 14112, including all transcripts, affidavits, excerpts of evidence and answers to undertakings;
2. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

1. *Alberta Rules of Court*, Alta Reg 124/2010, Rule 5.13;
2. Such further and other rules as Counsel may advise.

Applicable Acts and regulation:

1. *Public Trustee Act*, SA 2004, c P-44.1
2. Such further and other Acts and regulation as Counsel may advise.

Any irregularity complained of or objection relied on:

How the application is proposed to be heard or considered:

In chambers before Justice Thomas, the case management justice assigned to this file.

WARNING

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

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA EDMONTON
JUDICIAL CENTRE

**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,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985
Sawridge Trust

APPLICANT in this Application

OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA

RESPONDENT in this Application

THE SAWRIDGE FIRST NATION

DOCUMENT

**APPLICATION BY THE OFFICE OF THE
PUBLIC TRUSTEE OF ALBERTA FOR
PRODUCTION UNDER RULE 5.13.**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

HUTCHISON LAW
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB T8A 3X1

Attention: **Janet L. Hutchison**
Telephone: (780) 417-7871
Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca
File: 51433 JLH

NOTICE TO THE RESPONDENT, SAWRIDGE FIRST NATION

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

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

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

Date: To be set by the Case Management Justice, but in any event prior to April 30, 2016 as directed in the Reasons for Judgment dated December 17, 2015

Time: To be set by the Case Management Justice

Where: Law Courts Building
1A Sir Winston Churchill Square,
Edmonton, Alberta T5J 3Y2

Before: Justice D.R.G. Thomas in Chambers

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

Remedy claimed or sought includes:

1. In accordance with para. 61 of Justice Thomas' December 17, 2015 judgment, all documents in the possession of Sawridge First Nation that may assist in identifying current and possible minors who are children of members of the Sawridge First Nation. Information already provided by Paul Bujold on or about May 27, 2014 in response to Undertaking 31 excluded.
2. The OPGT bases its request, including its assessment of whether SFN may have control of the requested records and their relevance and materiality, on the information available in the proceeding as of today's date. It must be noted that the OPGT has not had the benefit of questioning the Trustee's witnesses, or of having leave to make additional production requests, in relation to the SFN's response dated January 18, 2016.

Grounds for making this application:

1. This application is made under direction of the Court as set out in the December 17, 2015 Reasons for Judgment. The Public Guardian and Trustee is filing its application under revised terms from the December 17, 2015 judgment, which is under appeal.
2. The Public Guardian and Trustee is also filing this application despite the fact that the Parties have also provided the Court with a signed consent order for an extension of time, to file the within application.

3. The OPGT reserves the right to file an amended application once further Questioning occurs and upon the result of Appeals 1603-0029AC and 1603-0026AC.

Material or evidence to be relied upon:

1. All relevant materials filed to date in Court of Queen's Bench Action 1103 14112, including all transcripts, affidavits, excerpts of evidence and answers to undertakings;
2. Such further and other materials as Counsel may advise and this Honourable Court may allow.

Applicable rules:

1. *Alberta Rules of Court*, Alta Reg 124/2010, Rule 5.13;
2. Such further and other rules as Counsel may advise.

Applicable Acts and regulation:

1. *Public Trustee Act*, SA 2004, c P-44.1
2. Such further and other Acts and regulation as Counsel may advise.

Any irregularity complained of or objection relied on:

N/A

How the application is proposed to be heard or considered:

In chambers before Justice Thomas, the case management justice assigned to this file.

WARNING

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

TAB 6

2017 ABQB 299
Alberta Court of Queen's Bench

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)

2017 CarswellAlta 745, 2017 ABQB 299, [2017] A.W.L.D.
2283, [2017] A.W.L.D. 2298, 279 A.C.W.S. (3d) 670

**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")**

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha
L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge
Trust (Original Applicants) and Public Trustee of Alberta (Applicant /
Respondent) and Sawridge First Nation (Respondent / Applicant)

D.R.G. Thomas J.

Heard: August 24, 2016

Judgment: April 28, 2017

Docket: Edmonton 1103-14112

Counsel: D.C. Bonora and A. Loparco, Q.C., for 1985 Sawridge Trustees
J.L. Hutchison, for Public Trustee of Alberta
E. H. Molstad, Q.C., G. Joshee-Arnal, for Sawridge First Nation

Subject: Civil Practice and Procedure; Public

Headnote

Aboriginal law --- Practice and procedure — Evidence — Burden of proof

Trust — Trust was established by First Nation as attempt to shield Band property from persons excluded from membership — Trustees brought applications to court for advice on how to identify beneficiaries and create equitable distribution scheme — Public Trustee was invited to participate and beneficiary identification issues were moved to trial — Decision was issued that authorized Public Trustee to prepare and serve applications on Band pursuant to R. 5.13 of Alberta Rules of Court in relation to specific membership and trust asset-related questions — Band provided information on two of three issues and Public Trustee did not proceed on R. 5.13 application relating to fairness

of proposed distribution scheme — Public Trustee brought application for directions on whether information provided by Band satisfied R. 5.13 inquiry — Information provided by Band was sufficient — Band provided list of minor children that satisfied evidentiary requirement for category of minors — Bank provided list of adults who had pending applications, which met evidentiary requirement for those with unresolved but completed applications — Categories of rejected and unresolved applications were synonymous, and Band's information there were not outstanding appeals or judicial reviews was sufficient.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party

Against Public Trustee — Trust was established by First Nation as attempt to shield Band property from persons excluded from membership — Trustees brought applications to court for advice on how to identify beneficiaries and create equitable distribution scheme — Public Trustee was invited to participate and beneficiary identification issues were moved to trial — Decision was issued that authorized Public Trustee to prepare and serve applications on Band pursuant to R. 5.13 of Alberta Rules of Court in relation to specific membership and trust asset-related questions — Band brought application for costs from Public Trustee for its refusal to consent to adjournment and its abandoned R. 5.13 application — Application dismissed — Previous order was made that prohibited Public Trustee from paying costs of other parties to proceeding — Band did not fall outside scope of order; while it was not party to proceeding, it was clearly participant — Court retained jurisdiction to make costs order against Public Trustee — Litigation was ultimately intended to benefit those who would receive shares in trust and was not adversarial process — Public Trustee was court-sanctioned participant undertaking statutory function and, while degree of court management was required, costs were not warranted — R. 5.13(2) requirement that person requesting record must pay amount determined by court was not basis to award costs — Payment of amount determined by court was not same as costs, and trust had been indemnifying Band for its activities in relation to proceeding.

Table of Authorities

Cases considered by *D.R.G. Thomas J.*:

Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.) (2004), 2004 CarswellOnt 390, 46 R.F.L. (5th) 330 (Ont. C.J.) — followed

Endean v. British Columbia (2016), 2016 SCC 42, 2016 CSC 42, 2016 CarswellBC 2891, 2016 CarswellBC 2892, 88 B.C.L.R. (5th) 1, 401 D.L.R. (4th) 577, 91 C.P.C.

(7th) 1, [2016] 12 W.W.R. 1, (sub nom. *Endean v. Canadian Red Cross Society*) 488 N.R. 246, [2016] 2 S.C.R. 162 (S.C.C.) — considered

Stoney v. Twinn (2016), 2016 ABCA 51, 2016 CarswellAlta 238, (sub nom. *Twinn v. Public Trustee (Alta.)*) 616 A.R. 176, (sub nom. *Twinn v. Public Trustee (Alta.)*) 672 W.A.C. 176 (Alta. C.A.) — referred to

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2012), 2012 ABQB 365, 2012 CarswellAlta 1042, 75 Alta. L.R. (5th) 188, (sub nom. *Twinn v. Public Trustee (Alta.)*) 543 A.R. 90, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 395 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2015), 2015 ABQB 799, 2015 CarswellAlta 2373 (Alta. Q.B.) — considered

1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) (2013), 2013 ABCA 226, 2013 CarswellAlta 1015, (sub nom. *1985 Sawridge Trust v. Alberta (Public Trustee)*) [2013] 3 C.N.L.R. 411, 85 Alta. L.R. (5th) 165, (sub nom. *Twinn v. Alberta (Public Trustee)*) 553 A.R. 324, (sub nom. *Twinn v. Alberta (Public Trustee)*) 583 W.A.C. 324 (Alta. C.A.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 1.1 — referred to

R. 1.2 — referred to

R. 5.13 — considered

R. 5.13(2) — considered

R. 10.29(1) — referred to

R. 10.31 — considered

R. 10.33 — considered

APPLICATION by Public Trustee for directions with respect to sufficiency of Band's disclosure; APPLICATION by Band for costs against Public Trustee.

D.R.G. Thomas J.:

1 This decision is the most recent step in a case management process which has the ultimate objective of distributing funds held in the 1985 Sawridge Trust [the "Trust"] to its beneficiaries. The initial step in this process is reported in *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2012 ABQB 365, 543 A.R. 90 (Alta. Q.B.) ["*Sawridge #1*"] affirmed 2013 ABCA 226, 553 A.R. 324 (Alta. Q.B.) ["*Sawridge #2*"]. The Trust was set up in 1985 by the Sawridge First Nation [the "SFN" or the "Band"] in an attempt to shelter Band property from persons who had been excluded from membership in the SFN because of their gender or the gender of their parent(s).

2 The proceeding began as an application to the Court by the Trustees for advice as to how to identify the beneficiaries of the Trust and create an equitable distribution scheme for the considerable assets of the Trust. That initial application has since metastasized into a number of areas of disagreement and has expanded as a succession of third parties have attempted to insert themselves into the process. At the outset, the Court invited the Public Trustee of Alberta [the "Public Trustee"] to participate in this proceeding and represent the interests of potential minor recipients of the proposed distribution of assets: *Sawridge #1*.

3 On December 17, 2015 I issued a decision which defined a process to identify who may qualify for a part of the distribution and how the distribution would then proceed: *1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee)*, 2015 ABQB 799 (Alta. Q.B.) ["*Sawridge #3*"]. *Sawridge #3* triggered at least three appeals (*Stoney v. Twinn*, 2016 ABCA 51 (Alta. C.A.) at para 3). Those appeals were apparently either discontinued or denied for late filing. The participants then returned to me for another case management hearing on August 24, 2016.

4 At that hearing I concluded the case management process was bogged down and, to some extent, futile, and that the best alternative was to move the beneficiary identification issue to trial. However, that conclusion still left a number of issues to be resolved.

5 This decision responds to two outstanding issues between the Public Trustee and the Band. As noted, the Public Trustee was brought into this proceeding to represent the interests of potential minor beneficiaries. In *Sawridge #1* I instructed the Trust to pay for the Public Trustee's litigation costs.

6 The SFN is not a party to this litigation but has nevertheless observed and participated throughout since Band membership (or being a child of a Band member) is a criterion for being a beneficiary of the Trust.

7 Sawridge #3 at paras 43, 46 and 61 authorized the Public Trustee to prepare and serve *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] s 5.13 applications on the Band in relation to specific membership and Trust asset-related questions. The Public Trustee engaged that procedure but, in the meantime, the Band has provided information that related to two of the three issues addressed in Sawridge #3. The Public Trustee did not proceed with the *Rule* 5.13 application which related to the fairness of a proposed distribution scheme.

8 These developments have left two remaining issues now addressed by this decision:

1. Does information provided by the Band concerning "current and possible" minor beneficiaries satisfy the *Rule* 5.13 inquiry mandated by Sawridge #3?
2. Should the Band receive costs as a consequence of an abandoned 2015 application and the discontinued *Rule* 5.13 motion?

II. "Current and Possible" Minor Beneficiaries

9 Sawridge #3 at paras 48-61 authorizes the Public Trustee to investigate and identify minor children of persons who have:

1. completed an application for admission to Band membership, and
2. applied for admission to Band membership, had that application denied, but are engaged in a review or appeal process.

10 The Public Trustee expresses concern on the form and meaning of language in Sawridge #3 that authorizes the Public Trustee's *Rule* 5.13 inquiries. This resolves to a number of questions on what kind of evidence is adequate to discharge the Public Trustee's obligation to identify and then represent potential minor child distribution recipients. At the hearing I suggested that while I could clarify my instructions in Sawridge #3, the sufficiency of information provided by the Band was a point better discussed by the parties and the Band, with my advice as a subsequent recourse. However, counsel for the Public Trustee clarified it is satisfied to rely on the Band as the best source of evidence on membership questions.

11 On that basis I make the following findings and instructions.

12 First, the Public Trustee inquires whether a list of minor children of Band members obtained on April 5, 2016 satisfies the evidentiary requirement for that category of minors. I confirm this information is adequate for that purpose.

13 Second, the Public Trustee expresses concern that the meaning of a "completed" Band application and/or a "rejected or unsuccessful" Band application is unclear. The Band on January 18, 2016 provided a list of adults with "pending" applications. The Public Trustee inquires whether this category meets the "unresolved" but "completed" Band applications. I confirm that it does. I am satisfied that if the Band deems an application "complete" but has not resolved that application then that individual belongs in "category 3", as defined in Sawridge #3, and their children, if any, fall into "category 4".

14 The third point on which the Public Trustee sought clarification is whether Sawridge #3 used "rejected" and "unsuccessful" to indicate two different categories. To be clear, this language is operationally synonymous. It captures:

1. persons who have made Band applications prior to this date, had that application rejected, but are challenging that outcome, and
2. persons who have filed completed and unresolved Band applications ("pending" Band applications), who are in the future rejected during the application process, and then challenge that outcome.

The Public Trustee's obligation is to identify these populations, and to also determine whether they have children. I note that both these subgroups will fall into category 5, though some at present may be in category 3.

15 The Public Trustee also inquires on whether the Band providing information that there are no outstanding appeals or judicial reviews of rejected Band applications is sufficient to define the current category 5 set. In light of the Public Trustee's concession on the Band's expertise and role I conclude that it is.

III. Costs

16 The Band seeks costs from the Public Trustee, and that these costs not be indemnified by the Trust. This relates to two steps.

17 First, on June 24, 2015 the Band sought and received an adjournment to applications in this proceeding that named the Band as a respondent. The Band took the position that the Public Trustee's refusal to consent to that adjournment was unreasonable, and should result in a costs award without indemnification.

18 Second, in the Sawridge #3 decision I directed the Public Trustee to proceed with the *Rule 5.13* applications, and reserved the question of costs to follow completion of those applications. The Band argues that it was forced to prepare written materials in response. However, the Public Trustee then abandoned a *Rule 5.13* application. The Band

also observes *Rule 5.13(2)* creates a mandatory obligation on the Public Trustee to pay for records produced via that procedure:

5.13(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

19 The Band takes the position that my earlier order which directed that the Public Trustee not be responsible to pay the costs of other parties to the proceedings does not apply to the Band. That is because the Band is not a party to this litigation: *Sawridge #3* at para 27. The Band therefore argues that as a non-party it is not captured in my previous instruction.

20 Beyond that, the Band argues as a general principle of law that this Court retains the jurisdiction to award costs against any party. It cites *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)* (2004), 46 R.F.L. (5th) 330 (Ont. C.J.) at paras 53-54, (2004), 128 A.C.W.S. (3d) 888 (Ont. C.J.) for the proposition that a party should never be "immunized from costs", since litigant accountability is necessary to avoid wasteful, ill-focused court processes. An award of costs is the lever to control that potential abuse.

21 The Band argues as the successful party the Band presumptively should receive a costs award (*Rule 10.29(1)*) and that the Court should apply the foundational *Rules 1.1-1.2* to encourage efficient litigation through costs. An award against the Public Trustee is warranted given the 2015 adjournment was inevitable, premature as the Public Trustee had alternative sources for the information it sought, and the Public Trustee took meritless steps including the abandoned *Rule 5.13* application. In this case the Band says that enhanced costs are warranted.

22 The Public Trustee responds that Alberta Court of Appeal in *Sawridge #2* at para 30 confirmed my conclusion that the Public Trustee should be immune from any liability for a costs award. The Band has been a *de facto* participant in this matter, no matter that its legal status is as a litigation third party. Ordering costs against the Public Trustee would subvert the basis for the Public Trustee's participation in this proceeding. The Public Trustee has always acted in good faith and adhered to the mandates set by the Court in *Sawridge #1* and then in *Sawridge #3*.

23 First, I reject the Band's argument that the SFN falls outside the scope of the order I issued which prohibited the Public Trustee from paying costs of "the other parties in the within proceeding", or the Court of Appeal's subsequent confirmation of that direction. The Band, while not a party, is far from a non-participant in this litigation. Further, this strict interpretation of the order that I issued defeats the objective of the framework in which the Public Trustee was invited and agreed to participate in this matter.

24 That said, I agree with the Band that I retain jurisdiction to make a costs award against the Public Trustee, both on the basis of the principle in *Children's Aid Society of St. Thomas (City) & Elgin (County) v. S. (L.)*, due to this Court having the ongoing jurisdiction to vary its orders, and also through the Court's inherent jurisdiction to control its own processes and potential abuse of that: I H Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems 23, most recently endorsed by the Supreme Court of Canada in *Endean v. British Columbia*, 2016 SCC 42 (S.C.C.) at para 23, [2016] 2 S.C.R. 162 (S.C.C.).

25 Although *Rule* 10.29(1) creates a presumption that the successful party will receive a payment of costs, courts have an exceptionally broad authority to make cost orders as they see fit: *Rules* 10.31, 10.33. Similarly, the very important role that costs awards serve to encourage efficient, timely, and responsive litigation, and create negative consequences for those who misuse the courts and abuse other court participants is well established.

26 I am going to approach the question of the Public Trustee's activities in a global sense, instead of parsing through individual applications and steps. That is consistent with the general purpose served by cost awards. As noted in *Sawridge #3* at paras 32-36, the Public Trustee's activities needed to be "re-focused". I now conclude that objective has been met. While I might otherwise have ordered costs of some kind, this litigation is ultimately intended to benefit the persons who will receive shares of the Trust. This is not so much an adversarial process than one where various organizations are moving to a common goal: to protect the rights of the Trust beneficiaries, and ensure an equitable result is obtained. This is not an instance where a third-party interloper is interfering with a smooth running process, but instead involves a Court-sanctioned participant conducting its statutory function, though that process did require a degree of court management. I therefore decline to order costs against the Public Trustee.

27 As for whether the *Rule* 5.13(2)'s requirement that "[t]he person requesting the record must pay . . . an amount determined by the Court" that is not a basis to order costs. This provision has not been the subject of judicial commentary. The *Rule* uses the words "an amount" to describe the payment that "must" be paid, rather than "costs". I conclude that the intention of *Rule* 5.13 is that where a third party (here the Band) is obliged by court order to produce documents or other materials, then that third party should experience minimal financial consequences from cooperating with the Court and litigants in the production of relevant evidence.

28 Normally, I would consider instructing payment of "an amount" under *Rule* 5.13 except for the fact that I have been informed that the Trust is indemnifying the Band for its activities in relation to this proceeding. This means one way or another the Trust will end up

'on the hook' for these litigation activities. Accordingly, I find there is no point in me ordering payment of "an amount" because of the Public Trustee's *Rule 5.13* activities.

IV. Conclusion

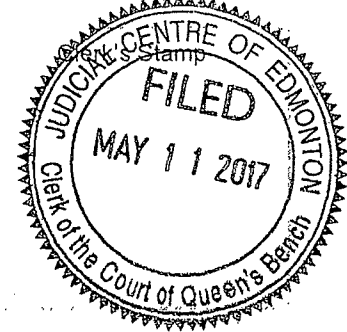
29 The Public Trustee has now received direction from me in relation to this litigation. The Band's application for costs without indemnification from the Public Trustee is denied.

30 I pause to add one further observation. 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.

Order accordingly.

TAB 7

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



IN THE MATTER OF THE TRUSTEE
ACT, RSA 2000, c T-8, AS
AMENDED

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

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

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

DOCUMENT **ORDER**

ADDRESS FOR SERVICE
AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

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

Attention: Janet L. Hutchison
Telephone: (780) 417-7871
Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca
File: 51433 JLH

DATE ON WHICH ORDER WAS
PRONOUNCED:

April 28, 2017

LOCATION WHERE ORDER WAS
PRONOUNCED:

Edmonton, Alberta

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

UPON THE APPLICATION of the Office of the Public Guardian and Trustee of Alberta ("Public Trustee"); AND UPON hearing from Counsel for Sawridge First Nation, the Public Trustee and the Sawridge Trustees; AND UPON being advised by the Public Trustee that the Public Trustee's Rule 5.13 Application as against Sawridge First Nation pertaining to additional information to assist the Court in addressing the Sawridge Trustee's application regarding the settlement of assets into the 1985 Trust is withdrawn; AND UPON being advised by the Public Trustee that the Public Trustee's Rule 5.13 Application as against Sawridge First Nation pertaining to membership was brought before the Court to ensure the parties have appropriately applied the decision of this Court in 1985 *Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 (*Sawridge #3*) and to confirm that the Court is satisfied all evidence required to identify the potential minor beneficiaries was before the Court in an acceptable form; AND UPON the decision of the Honourable Mr. Justice Dennis R. Thomas dated April 28, 2017;

IT IS HEREBY ORDERED THAT:

1. The Public Trustee's Application for production of records/information from Sawridge First Nation pertaining to membership is denied;
2. The list of minors provided by the Sawridge Trustees on April 5, 2016 is adequate for the Public Trustee to discharge its obligation to identify minors who are children of members of the Sawridge First Nation (Category 2, paragraph 56 of *Sawridge #3*).
3. The January 18, 2016 list provided to the Public Trustee by the Sawridge First Nation is sufficient to provide the Public Trustee with the identities of individuals with completed, but unresolved Sawridge First Nation membership applications, being the individuals contemplated by category 3 set out in paragraph 56 of *Sawridge #3*. The children, if any, of the category 3 individuals will fall into category 4 of the *Sawridge #3* decision.
4. The terms "rejected" and "unsuccessful" as used in *Sawridge #3* are operationally synonymous. The Public Trustee's obligation is to identify the following populations, and then determine if they have minor children:

- a) Persons who have made Band applications prior to this date, had that application rejected, but are challenging the outcome; and
- b) Persons who have filed completed and unresolved Band applications ("pending Band applications") who are in the future rejected during the application process, and then challenge the outcome.
5. The Sawridge First Nation's advice that there are no outstanding membership appeals or judicial reviews of Band applications is sufficient to define the current category 5 individuals, as defined in *Sawridge* #3.
6. The Sawridge First Nation's request for a costs award against the Public Trustee, without indemnification from the 1985 Sawridge Trust, is denied.
7. The costs neutral approach with respect to the Sawridge Trustees, the Sawridge First Nation and the Public Trustee will have 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.


Hon. Justice D.R.G. Thomas

**APPROVED AS BEING THE ORDER
GRANTED:**
Hutchison Law

Per: _____
Janet Hutchison, Counsel for the Office of the
Public Trustee

**APPROVED AS BEING THE ORDER
GRANTED:**
Dentons Canada LLP

Per: _____
Doris Bonora, Counsel for the Sawridge
Trustees

**APPROVED AS BEING THE ORDER
GRANTED:**
Parlee McLaws LLP

Per: _____
Edward H. Molstad, Q.C., Counsel for the
Sawridge First Nation