Clerk's Stamp:

COURT FILE NUMBER:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000, C. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;
DOCUMENT	**REPLY BRIEF OF THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE ("OPGT")** **APPLICATION ON TRANSFER ISSUE AS DIRECTED BY THE COURT RETURNABLE NOVEMBER 27, 2019**

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I. INTRODUCTION

1. The primary issue on this application is the interpretation of the Asset Transfer Order ("ATO"), and whether it determines the terms on which the transferred assets are held. However, neither the 1985 Trustees ("the Trustees") nor the Sawridge First Nation ("the SFN") address this issue in their submissions.

2. Their briefs contain no reference to the well-established test for the construction of a court order as set out in *Campbell* and *Manseau*[1], or the application of that test to the ATO. Neither makes any submission as to the meaning or effect of the ATO, as determined by the pleadings, circumstances, evidence, or its terms.

3. Instead, the minimalist brief of the Trustees proceeds as though the question before the Court is whether or not the transferred assets are subject to the 1982 Trust. The SFN goes further and seeks a "remedy" that the transferred assets are subject to the 1982 Trust. In doing so, the SFN contradicts its past support for the ATO, which it now attacks. Both submissions go beyond the issue on this application. In the case of the SFN, they seek final relief which is inconsistent both with their limited role as intervenor and the interlocutory nature of the application in a case management context.

4. The SFN and Trustees' submissions also miss the point. Upon application of the principles from *Campbell* and *Manseau*, it is manifest the ATO approved the transfer of assets from the 1982 Trust to the 1985 Trust, and that they are held subject to the 1985 Trust terms. The ATO was sought and granted to facilitate the distribution of the assets of the 1985 Trust, including those transferred from the 1982 Trust, to the 1985 beneficiaries. This purpose was declared by the Trustees at the outset of these proceedings in 2011, and was affirmed by the SFN and the Trustees in their materials and submissions to the Court at the 2016 ATO hearing.

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[1] *Campbell* v. *Campbell*, [2016] S.J. No. 149 (S.C.A.) [Authorities Tab 2, Responding Brief of the OPGT, filed November 15, 2019]; *Manseau & Perron Inc. v. ThyssenKrupp*, [2018] A.J. No. 1382 (Q.B.) at para 31 [Authorities Tab 8, Responding Brief of the OPGT, filed November 15, 2019]

II. REPLY TO THE 1985 TRUSTEES' SUBMISSIONS

5. The actual purpose of this application is to determine what was decided by the ATO, an Order of the Court which in fact has been neither challenged nor appealed, and which stated:

> The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ('1985 Trust") is approved *nunc pro tunc.*

This is an issue on which one would expect to hear from the Trustees. As the Applicants for and authors of the ATO, as well as the Applicants in this Advice and Direction proceedings as a whole, the circumstances and objective of the ATO were and remain well-known to them.

6. Notwithstanding this, the Trustees' submissions do not address the well accepted test for the analysis of an order. The submissions are also silent regarding:

   a. the purpose and intent of their own order;
   b. their pleadings in this proceeding, and in particular regarding the ATO; and
   c. the circumstances surrounding the application for and granting of the ATO.

7. Nonetheless, a review of the pleadings, evidence and circumstances demonstrate that from the outset of these proceedings the ATO was a critical element of the Trustees' overall objective to distribute the assets of the 1985 Trust to the 1985 Trust beneficiaries. The strategy to achieve that objective had three elements:

   a. first, the Trustees it sought to remove any doubt concerning the effectiveness of the asset transfer and to confirm the assets were held by the 1985 Trust for its beneficiaries;

   b. second, the Trustees it sought to amend the beneficiary definition of the 1985 to include all SFN members; and

   c. third, the Trustees it sought approval of a distribution plan to those beneficiaries.

This approach was clearly understood by all parties to the proceeding as well as to the SFN and the Court.

8. Any suggestion that the ATO made the transferred assets subject to the 1982 Trust is in direct conflict with the Trustees' stated objectives and strategy and with what was put before the Court when the ATO was granted. Nothing in the language of the ATO, the pleadings from which it arose, or the circumstances and evidence before the Court provides any support for such a suggestion. On the contrary, the Trustees' brief in support of the ATO stated:

> *"The Trustees have advised all parties that the approval of the transfer of assets from the 1982 Trust to the 1985 Trust is sought for certainty, and to protect the assets of the 1985 Trust for benefit of the beneficiaries. To unravel the assets of the 1985 Trust after 30 years would create undue costs and would have the potential impact of destroying the trust."*[2]

9. The Trustees say they have nothing to add to their brief in support of granting the ATO. This can only be construed as an acknowledgement the ATO does precisely what the Trustees told the Court and the parties it was meant to do. The Trustees can scarcely advocate otherwise, without contradicting their own pleadings, evidence and previous submissions to the Court.

10. The Trustees acknowledge that as fiduciaries, they cannot advocate for a result that would make the assets held in the 1985 Trust subject to the terms of the 1982 Trust. Notwithstanding this, they say such a finding would remedy any concern about discrimination in the 1985 Trust beneficiary definition. With respect, this has the appearance of an inviting the Court to do precisely what the Trustees say they cannot advocate for. Any such invitation must be rejected. The ATO must be interpreted and applied on the basis originally proposed, and advocated for, by the Trustees.

11. The Trustees further submit that if what they "cannot" advocate were in fact found by the Court – namely that the 1982 beneficiary definition applies – then they would seek direction to "grandfather" the current 1985 beneficiaries who are not SFN members in the 1982 Trust.

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[2] Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust dated August 17, 2016 and filed August 17, 2016 at para.17 [Tab A, Brief of the Sawridge Trustees filed November 1, 2019]

The OPGT notes any such request for direction would face the same jurisdictional hurdles the parties face in the main Jurisdiction Application, issues which have yet to be argued.

12. In summary, the OPGT submits the brief of the Trustees is of limited assistance, and should be given limited weight, in resolving the issue before the Court concerning the effect of the ATO.

III. REPLY TO THE SFN SUBMISSIONS

13. The SFN's submissions must, in all respects, be considered in their context of the SFN's role as an Intervenor. The SFN chose not to seek party status or to bring an application seeking to set aside the ATO, but sought intervention status only. The SFN was given leave to intervene to provide the Court with assistance in understanding the effect of the ATO. Contrary to that, the SFN:

    a. fails to engage in any analysis of the ATO;

    b. seeks to inappropriately broaden the issues in this application by claiming a "remedy" that is beyond the scope of the issue before the Court;

    c. seeks a "remedy" for the alleged improper transfer of assets, which is the very act the ATO approved. This constitutes a collateral attack on a valid Court order, which is usually considered a form of abuse of process;[3]

    d. seeks relief that is beyond its role as an intervenor; and [4]

    e. contradicts its earlier position in support of the ATO;[5]

    f. fails to provide any convincing rationale for their allegation the asset transfer.

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[3] *Behn* v. *Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 [Authorities Tab 1]; *Hoffman Estate (Re)*, 2019 ABQB 473 (Q.B.) [Authorities Tab 2]

[4] *Stratum Projects Alberta Inc* v *Aman Building Corporation*, 2017 ABQB 351 [Attached to McLennan Ross' November 20, 2019 letter]

[5] see Responding Brief of the OPGT, filed November 15, 2019, para. 12 and 33-37

14. The submissions of the SFN acknowledge that the ATO approved the transfer of the assets from the 1982 to the 1985 Trust and that the assets are in fact held in the 1985 Trust. (paragraph 101). They then go on to argue (at paragraph 55) that the ATO "does not **expressly** address the terms pursuant to which those transferred assets are held. (emphasis added).

15. Rather than proceeding to then apply the rules for construction of the ATO to consider whether the terms on which the assets are held can be determined, the SFN instead launches into an attack on the ATO on various grounds. These include: that the transfer did not meet the necessary requirements (para 57); that the transfer was "not permitted" by the relevant law (paragraph 87); and that the transfer was an impermissible variation of the 1982 Trust (paragraph 89).

16. Besides being tantamount to a collateral attack upon a duly granted order which has not been challenged or appealed, these submissions are striking for the fact they were not made by the SFN when the ATO was granted.[6] The SFN was well aware of the terms of the ATO and the legal basis on which it was being sought. It did not seek status to make submissions challenging the proposed ATO and offered no criticism of the ATO when asked by the Court if it had any comments.

17. On the contrary, as described in the OPGT's Responding Brief (at paragraphs 55 and 76) and in the OPGT's brief responding to the SFN intervention application (at paragraphs 12 and 34) the SFN urged the OPGT to consent to the ATO on pain of costs in another proceeding, and spoke favorably of the ATO to the Court after it was granted.[7]

18. The SFN cannot claim ignorance of the purpose of the ATO. The Trustees' submissions setting out the intended effect of the ATO and the legal arguments in its support were filed a week before the ATO hearing. The SFN had ample opportunity to object but did not do so. The SFN also demonstrated its full knowledge of the intended effect of the ATO in their

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[6] *Behn* v. *Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 [Authorities Tab 1]; *Hoffman Estate (Re)*, 2019 ABQB 473 (Q.B.) [Authorities Tab 2]

[7] The OPGT will rely upon paragraphs 12, 22-28 and 34 of its Responding Brief to the SFN Intervention application by way of further reply

related submissions which were before the Court at the same hearing as the ATO. The SFN submission quoted the September 12, 2011, affidavit of Mr. Bujold respecting the nature of the direction sought by the Trustees:

> 20. In the Affidavit of Mr. Bujold filed by the trustees of the 1985 Sawridge Trust In support of their application for advice and direction, Mr. Bujold noted the following regarding the advice and direction being sought:
>
> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper
> And that the assets of the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.[8]

19. The OPGT respectfully submits it is impermissible for the SFN to support the ATO at the time it was granted with full knowledge of its nature and effect, then turn around three years later and attack it as having been improperly granted in the guise of addressing its effect.[9]

20. In any event, the SFN's criticisms of the ATO are unconvincing:

    a. The SFN says (at paragraph 57), without authority, the transfer of assets could only be achieved by resettlement or variation of the 1982 Trust, the requirements of which were not met. But the point of the Trustees' brief in support of the ATO was that the transfer could be achieved by other means – namely a trust to trust transfer – under the conditions approved in *Pilkington*. The SFN did not challenge this authority in 2016. The Court accepted this authority in 2016 and granted the ATO on that basis;

    b. The SFN says (at paragraph 87) the transfer was impermissible because persons who might have become beneficiaries of the 1982 Trust in the future might not become beneficiaries of the 1985 Trust. The SFN argues this is a detriment to the beneficiaries which means *Pilkington* does not apply. This is not only wrong, it is the opposite of

[8] Written Submissions of the Sawridge First Nation, filed August 16, 2016 [Appendix A]
[9] *Behn* v. *Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 [Authorities Tab 1]

what the SFN said in 2016.[10] As of the date of the asset transfer, both the existing and future beneficiaries of the two Trusts were exactly the same. As such, *Pilkington* applies. Further, the 1982 and 1985 Trustees were acting to protect the interests of those beneficiaries from impending changes imposed by Canada, changes which the SFN opposed in 1985 as representing a breach of SFN members' constitutionally protected rights.

c. The question of impact on beneficiaries was directly addressed by the Trustees in their brief in support of the ATO. They submitted, and the Court accepted, that the principle permitting a trust to trust transfer in *Pilkington* was applicable because "the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets". The SFN was aware of those submissions and made no objection at the time. On the contrary, after the ATO was granted the SFN reinforced the Trustees' submissions. It submitted to the Court that the transfer had been in the interests of the 1982 beneficiaries because it had protected those interests from the claims of new members imposed on the SFN by Bill C-31.[11]

d. The SFN suggests (at paragraph 89) there is "some documentary evidence" that the establishment of the 1985 Trust and the transfer of assets to it was a purported variation of the 1982 Trust, which was never properly approved. The so-called "documentary evidence" is a note to the 1986 Financial Statements for the 1985 Trust which says during 1985 the Sawridge Band Trust (i.e. the 1982 Trust) "changed it name to 'The Sawridge Band Inter-Vivos Settlement Trust'". This is self-evidently nothing more than a misunderstanding on the part of the author of the note as to what had occurred. The SFN's submissions in this respect also flag the risks of considering these issues on the basis of an incomplete evidentiary record.

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[10] July 6, 2016 Letter from Parlee McLaws, Exhibit "G", Questioning of Darcy Twin, held October 18, 2019 [Appendix P, Responding Brief of the OPGT, filed November 15, 2019]; Transcript of Case Management Hearing, held August 24, 2016, p.39 [Appendix J, Responding Brief of the OPGT, filed November 15, 2019]

[11] Transcript of Case Management Hearing, held August 24, 2016, p.39 [Appendix J, Responding Brief of the OPGT, filed November 15, 2019]

21. The SFN concludes its submission (commencing at paragraph 102) with the assertion that the Court should declare the transferred assets are held on trust for the 1982 beneficiaries as a "remedy" arising from the Trustees' "conducting an unpermitted transfer to the 1985 Trust or an unpermitted variation of the 1982 Trust".

22. Any claim on the part of the SFN to any remedy falls far outside the scope of this application which is concerned with the legal issue of the effect of the ATO. It is also well beyond the scope of the SFN's role as an intervenor and seeks what is, essentially, final relief. Moreover, this claim further demonstrates the true nature of the SFN submissions to be a collateral attack on the ATO, which is impermissible.[12] What the SFN calls "an unpermitted transfer" is in fact a transfer approved by the Court in the ATO.

23. An Order granting a remedy such as that sought by the SFN could only be granted on application and following a full hearing. Issues relating to such a hearing would include:

    a. the standing of the SFN to bring such an application;

    b. limitation issues, given the events in question occurred almost 35 years ago. Even the ATO was granted more than two years ago;

    c. the application of the doctrines of laches or estoppel given the passage of 35 years;

    d. the availability of relief given the existence of the ATO, whether an application to set aside the ATO is a necessary pre-requisite to seeking such a remedy, and whether there are any valid grounds to do so;

    e. proper production of records by the SFN, including records concerning the origin of funds with which the transferred assets were acquired; records concerning the establishment of the trusts and transfer of the assets including records pertaining to the role of the SFN and its leaders in those transactions, records pertaining to the communications between the SFN or persons on its behalf with Canada respecting the trusts and trust assets;

[12] *Behn* v. *Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227 [Authorities Tab 1]; *Hoffman Estate (Re)*, 2019 ABQB 473 (Q.B.) [Authorities Tab 2]

f. questioning of the advisers who assisted the SFN in relation to the creation of the 1985 Trust and the asset transfer;

g. privilege issues, including whether privilege has been waived respecting the SFN's legal advice regarding the transfer in 1985 and today; and

h. accounting and other financial records to distinguish which assets held by the 1985 Trust came from the 1982 Trust and which did not.[13]

The OPGT anticipates many other issues would. arise.

24. Fortunately, such an application and hearing is unnecessary. The OPGT submits that the clear and expressed effect of the ATO is to confirm the transferred assets are held by and subject to the terms of the 1985 Trust for the benefit of its beneficiaries, precisely as the Trustees intended and the Court ordered with the knowledge and participation of the SFN and the consent of the OPGT.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2019.

HUTCHISON LAW

Per:

JANET L. HUTCHISON

Solicitors for the Office of the Public Guardian and Trustee of Alberta

FIELD LAW

Per:

FOR

P. JONATHAN FAULDS, Q.C.

Solicitors for the Office of the Public Guardian and Trustee of Alberta

[13] SFN's brief at para.106 provides its "understanding" on the debenture transferred directly to the 1985 Trust. The SFN's understanding is not evidence and no party has had an opportunity to test these positions or statements by the SFN. These submissions further highlight the inadequate evidentiary record before the Court on the issues the SFN seeks to raise.

LIST OF APPENDICIES

Tab	Appendices
A.	Written Submissions of the Sawridge First Nation, filed August 16, 2016
B.	Consent Order (Issue of Discrimination), filed January 22, 2018

LIST OF AUTHORITIES

Tab	Authorities
1.	*Behn* v. *Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227
2.	*Hoffman Estate (Re)*, 2019 ABQB 473 (Q.B.)

TAB A

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
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**WRITTEN SUBMISSIONS OF THE SAWRIDGE FIRST NATION**
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TABLE OF CONTENTS

I. INTRODUCTION

1. These submissions concern the Sawridge First Nation's ("**Sawridge**") response to submissions filed by the Office of the Public Guardian and Trustee of Alberta (the "**OPGT**") on August 5, 2016. The OPGT's submissions concern two applications that it filed, wherein it sought orders requiring Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court* (the "***Rules***"). One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "**Beneficiary Application**"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "**Settlement Application**").

2. With regards to the Beneficiary Application, Justice D.R.G. Thomas, in his written reasons for judgment dated December 17, 2015 ("***Sawridge #3***"), directed Sawridge to provide the OPGT with information that would allow it to identify the beneficiaries of the 1985 Sawridge Trust that it represents. He also ordered that the OPGT could file the Beneficiary Application by January 29, 2016, if it required further information or records in order to identify Sawridge's minors. Finally, he ordered that if the OPGT proceeded with an application, then Sawridge was required to provide written submissions in response by March 15, 2016. Further to those reasons for judgment, Sawridge provided the beneficiary-related information to the OPGT on January 18, 2016. The OPGT served the Beneficiary Application and the Settlement Application without written submissions on Sawridge on January 29, 2016. In response, Sawridge filed and served written submissions regarding both applications on March 15, 2016. A copy of the body of those written submissions has been included as **Tab 1** of these submissions.

3. Notwithstanding the fact that the OPGT failed to file written submissions by the January 29, 2016 deadline, Sawridge agreed to allow the OPGT to file and serve its submissions concerning both the Beneficiary Application and the Settlement Application by August 5, 2016, on the basis that Sawridge would be filing a reply to the OPGT's submissions by August 16, 2016. It also indicated that it would be making submissions to the Court regarding costs payable as a result of the OPGT's applications against Sawridge.

4. The OPGT has taken the position that certain terms in *Sawridge #3* related to the Beneficiary Application are ambiguous, and that clarification regarding the meaning of those

terms is required. In relation to the Settlement Application, the OPGT only recently indicated that it would not be proceeding with this application.

5. It is Sawridge's position that there is no merit to the OPGT's argument regarding the Beneficiary Application. The wording of *Sawridge #3* is clear, and Sawridge has provided all of the information that the OPGT needs to identify the minors that it represents. As such, the Beneficiary Application should be dismissed.

6. Sawridge also submits that the OPGT's conduct as against Sawridge is such that an order of costs should be made against the OPGT. The OPGT has taken a number of steps against Sawridge, a non-party to this Action, that resulted in Sawridge incurring significant expenses. The fact that the OPGT is no longer seeking any documents as part of its Rule 5.13 applications demonstrates that the steps taken against Sawridge were unnecessary and unreasonable. As such, Sawridge believes that there are sufficient grounds for the Court to exercise its discretion regarding costs, and to order that costs be paid by the OPGT, without indemnification from the 1985 Sawridge Trust.

II. FACTS

A. *BACKGROUND*

7. As noted above, Sawridge is not a party to this Action. On May 6, 2015, it received a letter from the OPGT indicating that Sawridge may wish to participate in an application that was scheduled for June 30, 2015.

8. On June 15, 2015, the OPGT served a box of written materials on Sawridge. That box of materials included several hundred pages of records, including an Affidavit of Roman Bombak, and a book containing excerpts from pleadings, transcripts, exhibits and answers to undertakings.

9. Included in the OPGT's materials was an Application that was filed by the OPGT on June 12, 2015. In that Application, the OPGT sought *inter alia* the following relief:

> An Order, pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of Court*, requiring the Sawridge Trustees and the Sawridge Band to file Affidavits

> 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 that are relevant and material to the issues in the within proceedings, including, but not limited to:
>
> The Sawridge Band membership application and decision process from 1985-present…[1]

10. Prior to Sawridge being served by the OPGT with the Application and the box of supporting materials, questionings were held by the parties to this Action. The OPGT questioned Paul Bujold, the Chief Executive Officer for the 1985 Sawridge Trust, on May 27 and 28, 2014. During that questioning, Mr. Bujold provided a significant amount of information regarding the 1985 Sawridge Trust's assets and regarding the identification of the trust's beneficiaries. Furthermore, he agreed to provide responses to most of the 50 undertakings that were requested by the OPGT during the questioning. Copies of both the transcript from Mr. Bujold's questioning and the answers to his undertakings are included in the OPGT's submissions, as Tabs 'A' and 'B' respectively.

11. The OPGT has not engaged in any further questionings on the answers to Mr. Bujold's undertakings. It is Sawridge's understanding that despite having had the responses to these undertakings for approximately a year and a half, no request has been made to question Mr. Bujold.

12. On June 17, 2015, Sawridge sent a letter to Justice Thomas regarding the application scheduled for June 30, 2015. In that letter, Sawridge indicated that it had requested an adjournment of all matters naming it as a respondent, because it had not received sufficient notice of the OPGT's application. Given the significance of the relief sought against Sawridge, it was seeking a reasonable adjournment to respond to the OPGT. The letter also states that all of the parties except the OPGT had consented to Sawridge's request for an adjournment.[2]

13. A case management conference was held with Justice Thomas on June 24, 2015. Justice Thomas granted Sawridge's request for an adjournment of those matters where it was

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[1] Application by the Office of the Public Trustee of Alberta, filed June 12, 2015, at para 1. [**Tab 2**]
[2] Letter to Justice D.R.G. Thomas, dated June 17, 2015. [**Tab 3**]

named as a respondent. Justice Thomas also ordered that the OPGT would have to provide full particulars of the relief that it was seeking against Sawridge.[3]

14. During the June 24th case management conference, Sawridge argued that the OPGT should be required to pay Sawridge costs for the adjournment application. Sawridge requested that those costs be payable by the OPGT directly, and not by the 1985 Sawridge Trust. Among other points, Sawridge argued that the OPGT's failure to consent to the adjournment of the matters concerning Sawridge was patently unreasonable, and went against the OPGT's duty as an officer of the Court. Justice Thomas ordered that Sawridge's application for costs of the adjournment application against the OPGT would be reserved to, "the final disposition of this matter."[4]

15. On July 17, 2015, Sawridge was served with an Amended Application by the OPGT, wherein the OPGT indicated that it was seeking an order requiring Sawridge to produce either an Affidavit of Records, or, in the alternative, all relevant and material records related to this Action, including but not limited to the following:

(a) Records related to Sawridge's membership criteria, membership application process and membership decision-making process from 1985-present, including:

(i) All inquiries received about Sawridge membership or the process to apply for Sawridge membership and the responses to said inquiries;

(ii) Any correspondence or documentation submitted by individuals in relation to applying for Sawridge membership, whether or not the inquiry was treated by Sawridge as an actual membership application;

(iii) Complete and incomplete Sawridge membership applications;

(iv) Sawridge 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;

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[3] Order, filed July 17, 2015. **[Tab 4]**
[4] *Ibid.* **[Tab 4]**

(v) 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 membership;

(vi) Any other records that would assist in assessing whether or not the Sawridge membership processes are discriminatory, biased, unreasonable, delayed without reason, or otherwise breach Charter principles or the requirements of natural justice (Paragraph 2(i));

(b) Records from Federal Court Actions T-66-86A or T-66-86B (Paragraph 2(ii));

(c) Records from Federal Court Action T-2655-89 (Paragraph 2(iii));

(d) Records that are relevant and material to certain issues set out in Exhibit J to Catherine Twinn's Affidavit dated December 8, 2014 and filed in Court of Queen's Bench Action 1403 04885, including Catherine Twinn's sworn but unfiled Affidavit (Paragraph 2(iv));

(e) Records that are relevant and material to the Sawridge Trustees' proposal to establish a tribunal for determining beneficiary status (Paragraph 2(v));

(f) Records that are relevant and material to conflict of interest issues arising from the multiple roles of the Sawridge Trustees (Paragraph 2(vi)); and

(g) Records that are relevant and material to the details and listing of any assets held in trust by individuals for Sawridge prior to 1982, transferred to the 1982 Trust, and transferred to the 1985 Trust (Paragraph 2(vii)).[5]

16. On August 14, 2015, Sawridge filed written submissions in response to the OPGT's Amended Application. In those submissions, Sawridge argued that since it was not a party to this Action, the OPGT could only obtain disclosure from it through Rule 5.13 of the *Rules*. According to Rule 5.13, a party seeking production from a non-party is required to specify exactly what records are being sought. Given the broad nature of the OPGT's requests for records, Sawridge argued that the OPGT was not entitled to the orders it was seeking.[6]

17. In addition, Sawridge submitted that a number of the OPGT's requests for information or records were irrelevant and not material to this Action, including the OPGT's requests for records related to Sawridge's membership process. Sawridge also wrote that it

[5] Amended Application of the Public Trustee, filed July 16, 2015, at pp 4 and 5. [**Tab 5**]
[6] Brief of the Sawridge First Nation, filed August 14, 2015, at paras 24-33. [**Tab 6**]

denied the suggestion by the OPGT that it was selectively producing records, and noted that the OPGT had failed to provide evidence of said conduct.[7]

18. Finally, Sawridge indicated in its submissions that it would be seeking costs from the OPGT directly (without indemnification from the 1985 Sawridge Trust) related to the Amended Application.[8]

19. The hearing regarding the Amended Application proceeded as scheduled on September 2 and 3, 2015. *Sawridge #3* contains Justice Thomas' reasons for judgment arising from the Amended Application. In *Sawridge #3*, Justice Thomas affirmed that the only way to compel Sawridge to provide records to the OPGT in this Action was through Rule 5.13.[9] He also wrote that the OPGT's Application for production was denied, but that it could (via a Rule 5.13 application) obtain materials/information from Sawridge related to specific matters:

> 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.[10]

20. Justice Thomas also stressed the importance of having the OPGT re-focus its role in this Action. He confirmed that the OPGT's role was not to engage in an assessment of Sawridge's membership process. Rather, the OPGT's role was limited to the following 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;

(b) Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust;

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[7] *Ibid*, at para 47. [**Tab 6**]
[8] *Ibid*, at para 71. [**Tab 6**]
[9] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ["***Sawridge #3***"], at paras 27 and 28. [**Tab 7**]
[10] *Ibid*, at para 26. [**Tab 7**]

(c) Identifying potential but not yet identified minors who are children of [Sawridge] members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

(d) Supervising the distribution process itself.[11]

21. With regards to the second of the above-noted tasks, Justice Thomas affirmed that the OPGT could prepare and serve a Rule 5.13 application on Sawridge regarding the settlement of the assets in the 1985 Sawridge Trust:

> 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.[12]

22. Insofar as the third task, Justice Thomas held that the OPGT was representing (or potentially representing) minors who fell under the following categories:

(a) Minors who are children of members of Sawridge (category 2);

(b) Children of adults who have unresolved applications to join Sawridge (category 4); and

(c) Children of adults who have applied for membership in Sawridge but have had that application rejected and are challenging that rejection by appeal or judicial review (category 6).[13]

23. Justice Thomas ordered that Sawridge was required to provide the OPGT with the following information that would allow the OPGT to identify the minor beneficiaries listed in the above-noted categories:

(a) The names of individuals who have:

(i) made applications to join [Sawridge] which are pending; and

(ii) had applications to join [Sawridge] rejected and are subject to challenge; and

(b) The contact information for those individuals where available.[14]

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[11] *Ibid*, at para 37. [**Tab 7**]
[12] *Ibid*, at paras 46. [**Tab 7**]
[13] *Ibid*, at paras 56-57. [**Tab 7**]

24. The OPGT was advised that if it required additional documents to assist in identifying the minor beneficiaries, then it could file a Rule 5.13 application related to same:

> 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.[15] [***Emphasis Added***]

25. Finally, with regards to the issue of the costs payable by the OPGT, Justice Thomas wrote the following:

> 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.[16]

B. THE RULE 5.13 APPLICATIONS

26. As noted above and in Sawridge's written submissions of March 15, 2016, it provided the OPGT with a letter on January 18, 2016, wherein it enclosed all of the information that Justice Thomas ordered it to disclose. Sawridge provided a table containing a list of the adult individuals who had applied to join Sawridge, but whose applications were still pending (along with those individual's contact information). Sawridge also provided a list of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge. Sawridge's letter is attached as Tab D to the OPGT's submissions.

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[14] *Ibid*, at paras 57-58. **[Tab 7]**
[15] *Ibid*, at para 61. **[Tab 7]**
[16] *Ibid*, at para 71. **[Tab 7]**

27. At no time following the receipt of Sawridge's letter of January 18th did the OPGT indicate that it took issue with Sawridge's description of the information contained in that letter. Rather, the OPGT responded to Sawridge's letter by serving it with the Beneficiary Application and the Settlement Application, both of which were filed on January 29, 2016.

28. Rather than identifying any particular information or records that it needed to help it identify the minors that it was representing, the OPGT indicated that it was seeking the following as part of the Beneficiary Application:

> 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.

29. On March 14, 2016, the OPGT sent Sawridge a letter, wherein it noted that if Sawridge provided the OPGT with (i) an updated list of Sawridge's minor children, and (ii) "a written response to advise whether any of the individuals noted in Schedule 3 in your January 18, 2016 letter with pending membership applications have minor children", then same would satisfy the OPGT for the purpose of the Beneficiary Application.[17] In addition the OPGT confirmed that it wished to either postpone the Settlement Application so that Mr. Bujold could be questioned, or proceed with the Settlement Application as filed.

30. In light of the fact that the Schedule 3 to Sawridge's letter of January 18th contained a list of minors whose parents had applied for membership on their children's behalf, Sawridge wrote to the OPGT seeking clarification regarding its request on March 16, 2016. Sawridge did not receive a response to that request for clarification.

31. On April 5, 2016, the Sawridge Trustees provided the OPGT with an updated list of Sawridge's minors. The e-mail enclosing that information was included as Tab F to the OPGT's submissions.

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[17] Letter to Parlee McLaws LLP from Hutchison Law, dated March 14, 2015. [**Tab 8**]

32. On July 7, 2016, the OPGT provided Sawridge with copies of the records that it intended to rely upon as part of both the Beneficiary Application and the Settlement Application. Those documents included a number of excerpts from Affidavits sworn by Mr. Bujold, from his questioning, and from his answers to undertakings. In addition, the OPGT provided a copy of an Affidavit sworn by Catherine Twinn, dated September 30, 2015. The OPGT was clear in its letter enclosing its records that it intended to rely on Ms. Twinn's Affidavit as part of both applications.[18]

33. In light of the scope of the requests being made by the OPGT as part of the applications, and given the inflammatory comments made in Ms. Twinn's Affidavit, Sawridge proceeded with questioning based on the evidence being relied upon by the OPGT. Specifically, a further questioning of Mr. Bujold occurred on July 27, 2016.

34. Prior to Mr. Bujold's questioning commencing, the OPGT confirmed on the record that it no longer intended to proceed with the Settlement Application.[19] The OPGT also agreed to a Consent Order regarding the issues of the settlement of the 1985 Sawridge Trust, which states the following:

> UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust.[20] [***Emphasis Added***]

35. During his questioning, Mr. Bujold noted the following:

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[18] Letter from Hutchison Law, dated July 7, 2016, Exhibit 3 to the Questioning on Affidavit of Paul Bujold.[**Tab 9**]
[19] Transcript of Questioning on Affidavit of Paul Bujold, dated July 27, 2016 ["***2016 Transcript***"], at 5:16-25.
[20] Consent Order regarding settlement of assets, Unfiled. [**Tab 10**]

(a) The OPGT had not questioned him in relation to the undertakings that he provided.[21]

(b) Sawridge had fully cooperated with the Sawridge Trustees' requests for information made regarding the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust.[22]

(c) Sawridge was cooperative in providing information to the Sawridge Trustees regarding the settlement of the assets in the 1985 Sawridge Trust.[23]

(d) Sawridge provided the Sawridge Trustees with a number of records related to membership, including: a membership application form, a flow chart for the membership application process, Sawridge's membership rules, and letters of acceptance or rejection for membership. Those records were in turn sent to the OPGT.[24]

(e) The Affidavit of Catherine Twinn contained a number of statements that are inaccurate and also include inadmissible opinion evidence. [25]

III. ISSUES

36. As noted above, the OPGT has recently advised that it will no longer be proceeding with the Settlement Application. It also advised in its written submissions that it was only seeking clarification regarding certain terms used in *Sawridge #3* that concern the Beneficiary Application. As such, it is Sawridge's understandings that the issues in this application are as follows:

(a) Has Sawridge provided the OPGT with all of the beneficiary-related information that the OPGT requires to identify the minors it represents in this Action?

(b) Is Sawridge entitled to costs directly from the OPGT?

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[21] *2016 Transcript*, at 13:22-26.
[22] *Ibid*, at 16:9-24.
[23] *Ibid*, at 24:18-27.
[24] *Ibid*, at 34:24-35:12.
[25] *Ibid*, at 37:22-71:9.

IV. ANALYSIS

A. *THE BENEFICIARY APPLICATION*

37. Sawridge adopts its submissions of March 15, 2016 in response to the Beneficiary Application. It remains Sawridge's position that it has complied with Justice Thomas' directions in *Sawridge #3* regarding the production of information to the OPGT.[26] Sawridge also submits that the OPGT failed to articulate its requests for records in the Beneficiary Application with a level of precision that conforms with the requirements under Rule 5.13.[27]

38. In its submissions, the OPGT argues that the terms "unresolved", "rejected" and "unsuccessful", as referred to in *Sawridge #3*, are ambiguous, and that those terms require clarification so that the OPGT may finalize the list of minors that it represents. The OPGT has not indicated that it is seeking further production as part of the Beneficiary Application.

39. With regards to the term "unresolved", Justice Thomas employs this term in reference to the following category of beneficiaries that the OPGT is representing: "children of adults who have unresolved applications to join the SFN..."[28] A reading of Justice Thomas' reasons very clearly confirms that the term "unresolved" refers to completed applications for membership with Sawridge that have not been decided pursuant to Sawridge's own membership process. Earlier in his reasons for judgment, Justice Thomas states that the OPGT is only representing, "children of persons who have, at a minimum, completed a Sawridge Band membership application."[29] That statement confirms that in order to be considered an unresolved application, an applicant must have at least submitted a completed application for membership. Furthermore, Justice Thomas' use of the word "resolved" to describe completed membership determinations supports this interpretation.[30]

40. Sawridge has provided the OPGT with up to date information regarding individuals who have made applications for membership where a decision has not yet been reached (i.e., where a decision is pending). It is clear that based on that information, the OPGT

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[26] Written submissions of the Sawridge First Nation, dated March 15, 2016, at paras 14-15. **[Tab 1]**
[27] *Ibid*, at paras 16-18. **[Tab 1]**
[28] *Sawridge #3*, at para 56. **[Tab 7]**
[29] *Ibid*, at para 52. **[Tab 7]**
[30] *Ibid*, at para 49. **[Tab 7]**

can very easily ascertain the identity of all of the minor children of adults who have unresolved applications to join Sawridge. Accordingly, it is submitted that no further disclosure is required in relation to this category of minors.

41. In addition, Sawridge (in an effort to assist the OPGT) provided it with information regarding children whose parents had completed applications for membership on their behalf. That information has further facilitated the OPGT's objective of identifying the minors that it represents.

42. Insofar as the terms "rejected" and "unsuccessful", both terms are used by Justice Thomas to refer to individuals who have applied for membership in Sawridge, but whose applications have been denied. Specifically, Justice Thomas noted that the OPGT was only representing those minors who are children of applicants for membership who are challenging Sawridge's decision to deny their applications, or who can still advance such a challenge.[31]

43. Further to Justice Thomas' reasons, Sawridge advised the OPGT that the last application for membership that was denied by Sawridge was on December 9, 2013, and that no proceedings had been commenced related to that decision. As such, and given that there are no pending proceedings regarding membership disputes, there are no minors who fall into what Justice Thomas referred to as category 6.

44. The OPGT has suggested at Paragraph 27 of its submissions that its issues with the above-noted terms have in part arisen as a result of Sawridge's Membership Rules. Sawridge submits that the OPGT's comments regarding its Membership Rules are patently incorrect. Sawridge's membership process is straightforward. That process allows applicants to submit completed application for membership, and provides those applicants with the ability to appeal any decisions made concerning their membership. This process is far from being a confusing process, as is alleged by the OPGT. Furthermore, the OPGT has failed to point to anything that suggests that the Membership Rules have led to any confusion regarding the terms used by Justice Thomas. Consequently, no weight should be given to the OPGT's statements.

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[31] *Ibid*, at paras 56-58. [**Tab 7**]

45. The OPGT's decision to raise the issue of membership yet again is in direct contravention of *Sawridge #3*. The form of Order prepared by the parties arising from Sawridge #3 is clear that, "the Public Trustee shall not engage in collateral attacks on membership processes of the SFN..." Justice Thomas' reasons for judgment similarly confirm that the OPGT should not be conducting an "open-ended inquiry into membership of Sawridge Band..."[32] The fact that the OPGT has chosen to make reference to issues it believes exist with Sawridge's membership process is inappropriate, and should be taken into consideration as part of Sawridge's application for costs.

46. In its submissions, the OPGT refers to the Alberta Court of Appeal's decision in *RBC v Kaddoura*. That case is distinguishable from this application, as the passages cited by the OPGT concerned disclosure obligations by a party to an action. In contrast, the Beneficiary Application concerns disclosure by a non-party to this Action under Rule 5.13.

47. In closing, it is Sawridge's position that the OPGT now has all of the information that it requires in order to identify the minors that it represents. As such, and given that the OPGT has failed to identify any further records or information that it requires, it is submitted that the Beneficiary Application should be dismissed.

B. THE OPGT SHOULD PAY COSTS TO SAWRIDGE

i. The Costs Exemption and Advanced Costs Orders Do Not Apply

48. As the OPGT has noted in prior appearances, its argument that it should not be liable for costs rests on an Order that was made by Justice Thomas at the outset of the OPGT's involvement in this Action. That Order states that the OPGT would be exempt from the responsibility to pay costs to other parties to this Action:

> The Public Trustee will be exempted from any responsibility to pay the costs of the other parties in the within proceedings.[33] [***Emphasis Added***]

49. The Order also states the following regarding the OPGT's liability for costs:

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[32] *Ibid*, at para 36. [**Tab 7**]
[33] Order of Justice Thomas, filed September 20, 2012. [**Tab 11**]

> The Public Trustee shall receive full, and advance, indemnification for its costs for participation in the within proceedings, to be paid by the Sawridge Trust.[34] [***Emphasis Added***]

50. A reading of the plain language of the above-referenced Order indicates that the OPGT is only exempt from paying costs to other parties to this Action. The Order does not state that the exemption from costs would extend to costs payable to non-parties to this Action such as Sawridge. As such, it is submitted that the costs exemption that was made by Justice Thomas does not preclude Sawridge from claiming costs as against the OPGT without indemnification from the 1985 Sawridge Trust.

51. Similarly, the plain language of the Order confirms that the OPGT is only entitled to indemnification for its costs for participation. The Order does not state that the OPGT would be able to seek indemnification from the 1985 Sawridge Trust for any costs that were awarded against it as part of this Action. Rather, it is submitted that the Order only extends to those legal costs that the OPGT has incurred in its representation of the minor beneficiaries.

52. This interpretation of the Order is supported by the fact that reading the Order more broadly would result in an unfair prejudice to any non-parties to this Action and to the 1985 Sawridge Trust. The OPGT has the ability by virtue of the *Rules* to advance applications against individuals and entities that are not parties to this Action. For example, it can (as it did with Sawridge) file an application to compel a non-party to provide disclosure. If the costs exemption were interpreted so as to include non-parties, then any innocent party who was brought into this Action by the OPGT would not have any recourse for costs, notwithstanding the fact that they may have been improperly brought into the litigation.

53. With regards to the 1985 Sawridge Trust, interpreting the above Order as compelling the trust to pay any award of costs made against the OPGT would result in the trust being liable for matters that are entirely out of its control. In other words, the 1985 Sawridge Trust could be held responsible for improper litigation-related decisions which were made by the OPGT, regardless of the position taken in relation to those decisions. This interpretation, it is

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[34] *Ibid.* [**Tab 11**]

submitted, would cause an unreasonable prejudice to the trust, and consequently to its beneficiaries, including those beneficiaries that are being represented by the OPGT.

54. Finally, it is submitted that the exceptional nature of the orders made by Justice Thomas suggests that they must be strictly interpreted by this Honourable Court.

ii. The Costs Exemption and Advanced Costs Orders Are Not Absolute

55. Even if the costs exemption and the related advance costs order compelling the Sawridge Trustees to pay the OPGT's costs did apply to Sawridge, the mere fact that those orders have been made does not bar this Court from revisiting the issue of costs. As Justice Binnie noted in *R. v Caron*, awards of advanced costs, "should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation..."[35]

56. Similarly, in *1985 Sawridge Trust v Alberta (Public Trustee)* ("***Sawridge #2***"), the Court of Appeal affirmed that the advance costs order in this Action would be subject to oversight and further directions by the Court.[36]

57. Interpreting orders granting exemptions from costs in an absolute fashion would have a deleterious effect on the litigation process. Costs are awarded for a number of reasons, including in order to discourage unnecessary steps being taken as part of litigation.[37] If a party was guaranteed to never be subject to an award of costs, then that party would be at liberty to take any position it wished, notwithstanding the lack of any merit to that position.

58. The above-noted issue was well summarized by the Court in *Children's Aid Society of St. Thomas (City) & Elgin (County) v S. (L.)*. That case concerned whether the Ontario Office of the Children's Lawyer ("**OCL**") should be held liable for costs resulting from an unnecessary multi-day trial. The OCL argued that it should not be held liable for costs arising from that trial for a number of reasons. The Court disagreed, and ordered costs against the OCL.

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[35] *R. v Caron*, 2011 SCC 5, at para 47. **[Tab 12]**
[36] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226 [***"Sawridge #2"***], at para 29. **[Tab 13]**
[37] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [***"Okanagan"***], at paras 22 and 26. **[Tab 14]**

In coming to its decision, the Court noted the following regarding the danger associated with taking an absolute view of a costs exemption:

> 53 A sense of immunity from costs may blind or desensitize a party or non-party litigant to the fact that other litigants are incurring costs and expenses to be involved in the court process. Immunity from costs could result in lack of accountability to the court process.
>
> 54 No participant in litigation should have *carte blanche* to pursue litigation that has no focus and no evidentiary basis, without running the risk of being held accountable for wasting time and money and an order to pay compensatory costs to indemnify the other litigants.[38] [***Emphasis Added***]

59. Furthermore, the *Rules* provide the Court with the means of varying orders such as the costs exemption order. The foundational provisions of the *Rules* confirm that the *Rules* (including those rules that concern costs) must be interpreted in a manner that encourages timely and cost-effective litigation.[39] The *Rules* go on to state that parties must, "refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules."[40] If a party violates those foundational rules, then the Court is given broad discretion to make orders to implement the intention of the *Rules*.[41]

60. Finally, it is important to note that interpreting an award for costs in an absolute fashion would run contrary to the discretionary aspect of costs. Case law is clear that the Court of Queen's Bench is vested with a discretionary power over costs.[42] Interpreting an order as removing the Court's ability to exercise its ability to award costs throughout proceedings is in direct conflict with this well-recognized discretionary authority.

61. Sawridge submits that if the costs exemption applies to Sawridge, then this Honourable Court has the ability to vary the terms of same to allow Sawridge to claim costs against the OPGT. Specifically, it is submitted that the Court should exercise its discretion to grant costs to Sawridge based on the OPGT's conduct during these proceedings. That conduct

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[38] *Children's Aid Society of St. Thomas (City) & Elgin (County) v S. (L.)*, 2004 CarswellOnt 390 (Ct J), at paras 53 and 54. [**Tab 15**]
[39] *Rules of Court*, Alta Reg 124/2010 ["***Rules of Court***"], at 1.2(1) and (2). [**Tab 16**]
[40] *Ibid*, at 1.2(3)(c). [**Tab 16**]
[41] *Ibid*, at 1.4. [**Tab 16**]
[42] *Okanagan*, at para 19. [**Tab 14**]

(as summarized below) has been unreasonable and unnecessary, and has resulted in significant time and money being wasted. It is accordingly appropriate for the Court to make an award.

62. As noted above, Sawridge has been involved in this Action since May 2015 as a result of the OPGT bringing an application to compel it to produce records. Since May 2015, the OPGT has taken a number of unreasonable or unnecessary steps which have resulted in direct prejudices against Sawridge. Those steps most notably include the following:

(a) In June 2015, the OPGT refused to consent to Sawridge's reasonable request for an adjournment of the portions of the OPGT's application that concerned Sawridge. The OPGT's position resulted in Sawridge being required to attend chambers to obtain an adjournment.

(b) The OPGT failed to exhaust all of its possible avenues for obtaining production from the parties to this Action before taking the exceptional step of seeking records from Sawridge (a non-party). The OPGT could have (as it had done in 2014) made requests for records to the Sawridge Trustees, or if necessary proceeded with further examinations on the answers to Mr. Bujold's undertakings. Rather than taking these steps, the OPGT opted to take the unnecessary step of pulling Sawridge into this Action. That step is especially unnecessary given that, as Mr. Bujold noted during his most recent questioning, Sawridge had been cooperating completely with any requests for records made by the Sawridge Trustees.[43]

(c) The OPGT proceeded with an Application for a broad array of records from Sawridge, despite it being clear in law that Sawridge was not a party to this Action, and that it was accordingly only required to provide records in accordance with Rule 5.13. Justice Thomas concurred with this position in *Sawridge #3*, and dismissed the OPGT's Amended Application for production. Given the number of types of records that were being requested by the OPGT and given the significance of the request that the OPGT was making, Sawridge was required to prepare lengthy written submissions, and to attend two days of applications.

[43] *2016 Transcript*, at 13:22-26, 16:9-24, 24:18-27, and 34:24-35:12.

(d) With regards to the Beneficiary Application, the OPGT failed to take reasonable steps to avoid the need for this Application. As noted above, the OPGT's sole concerns at this point regarding the Beneficiary Application are related to the interpretation of certain words in Sawridge's letter of January 18, 2016, and in *Sawridge #3*. Rather than approaching Sawridge regarding these interpretational issues, the OPGT waited until August 5th to advise Sawridge and the parties to this Action of its position. Had the OPGT raised this issue sooner, there may not have been a need to prepare submissions and to appear before this Honourable Court.

(e) Insofar as the Settlement Application, the OPGT's decision to withdraw its application shortly before the parties' submissions were due is another example of unreasonable conduct. In the Settlement Application, the OPGT requested ten different categories of records, many of which would have required significant work to find given that they dated back to the 1970s. Up until recently, the OPGT had continued to represent that it was going to proceed with the Settlement Application. Accordingly, Sawridge, in accordance with *Sawridge #3*, proceeded to prepare and file written submissions in response to the Settlement Application. It was only recently that the OPGT decided to abandon the Settlement Application. That decision, it is important to note, was made despite the fact that since filing and serving the Settlement Application in January 2016, the OPGT had not received any new information concerning the settlement of the assets in the 1985 Sawridge Trust.

(f) In addition to the above-noted conduct regarding the two Rule 5.13 applications, the OPGT's conduct regarding the evidence it intended to rely upon as part of these applications also resulted in unnecessary effort being expended by Sawridge. Rule 6.3 of the *Rules* is clear that an applicant is required to, "identify the material or evidence intended to be relied on [as part of an application]," and must serve on all parties, "any affidavit or other evidence in support of [an]

application."[44] The OPGT failed to particularize the evidence that it was relying upon in both the Settlement Application and the Beneficiary Application. It was not until July 7, 2016 that the OPGT finally advised Sawridge of what records it intended to rely upon.

63. The costs exemption was briefly addressed by the Court of Appeal in *Sawridge #2*. It wrote at the time that an exemption from costs was appropriate, because the Court, "has ample other means to control the conduct of the parties and the counsel."[45] As has been noted above, the Court has taken a number of steps to try and refocus the OPGT's conduct during this Action. To date, those steps have not resulted in any less unnecessary steps being undertaken as a result of the OPGT's conduct. While the Court of Appeal may have been of the opinion that other steps could be taken to control the OPGT, it is clear from its conduct that those steps have not been effective. As such, it is submitted that the issue of using costs to address the OPGT's conduct must be revisited.

64. In summary, Sawridge's involvement in this Action came as a result of the OPGT requesting that it produce a number of records. Since becoming involved in this Action, Sawridge has been required to attend a number of in person hearings, and has had to respond to at least three Applications filed against it by the OPGT. Sawridge has complied with all orders concerning it, and has to date only provided the OPGT with the information it was required to produce pursuant to *Sawridge #3*. Notwithstanding the OPGT's voluminous requests for records at the outset, it has now decided on its own that it no longer requires any records from Sawridge, and that it has sufficient information regarding both the 1985 Sawridge Trust's beneficiaries and regarding the settlement of its assets. The OPGT's decision to essentially abandon its request for records from Sawridge, especially when taking into account all of the steps that were taken to arrive at this point, is a perfect example of unnecessary litigation.

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[44] *Rules of Court*, at 6.3(2)(c) and 6.3(3)(b). [**Tab 16**]
[45] *Sawridge #2*, at para30. [**Tab 13**]

iii. The Costs Payable to Sawridge

65. The *Rules of Court* state that as a respondent to the OPGT's applications, Sawridge is entitled to claim costs.[46] Furthermore, case law is clear that the Court has the discretion to award costs against a party to a non-party.[47]

66. The starting point for any decision regarding the quantum of costs is the *Rules of Court*. They provide, *inter alia*, that the Court may consider a number of factors when assessing the appropriate scale of costs:

> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
>
> (b) a party's denial of or refusal to admit anything that should have been admitted;
>
> (c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;
>
> (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;
>
> (e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;
>
> (f) a contravention of or non-compliance with these rules or an order;
>
> (g) whether a party has engaged in misconduct. [48]

67. While costs are normally calculated in accordance with the applicable columns in Schedule C of the *Rules*, Courts have been willing to award enhanced costs in a number of circumstances. Those circumstances include cases where, for example, a party has proceeded with litigation despite clearly having a minimal chance of success.[49] In addition, Courts have been willing to order enhanced costs to a party as a result of the late adjournment of

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[46] *Rules of Court*, at 10.28. [**Tab 16**]
[47] *Manning v Epp*, 2006 CarswellOnt 6508 (Sup Ct J), at paras 18-20. [**Tab 17**]
[48] *Rules of Court*, at 10.33. [**Tab 16**]
[49] *Francescutto (Guardian ad litem of) v Strata Plan K227*, 1994 CarswellBC 741 (SC), at paras 5 and 6. [**Tab 18**]

applications,[50] or where the conduct of a party, "falls far short of what is expected from a responsible litigant."[51]

68. In *Hill v Hill*, the Court of Appeal noted that the following factors could be considered when determining if it were appropriate to order enhanced costs against a party:

(a) The winning party's legal fees;

(b) Whether the losing party brought any wasteful motions;

(c) Whether the losing party's zeal in bringing the action necessitated a strong response by the winning party;

(d) Whether the losing party's accusations were grounded; and

(e) The amount at issue.[52]

69. During the course of these proceedings against Sawridge, the OPGT engaged in a variety of conduct (as summarized above) which, based on the wording of the *Rules*, would militate in favour of a more substantial award of costs. The OPGT's conduct resulted in unnecessary steps being taken by all parties, and in unneeded delays in this Action. Additionally, the fact that the OPGT has effectively withdrawn all of its production-related applications against Sawridge is indicative of the unnecessary nature of those applications. Finally, the Applications prepared by the OPGT as part of the Settlement Application and the Beneficiary Application both contained irregularities regarding the relief sought and the evidence to be relied upon that weigh in favour of granting enhanced costs.

70. Based on the above, and taking into account the OPGT's conduct as summarized in these submissions, Sawridge submits that an enhanced scale of costs should be awarded against the OPGT. Sawridge proposes that those costs be payable as either a multiple of column 5 of Schedule C, or in a lump sum. Those costs should be payable in relation to the following steps:

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[50] *Edwards v Resort Villa Management Ltd*, 2015 ABQB 424, at para 96. [**Tab 19**]
[51] *Kent v Law Society of Alberta*, 2015 ABQB 432, at paras 18 and 19. [**Tab 20**]
[52] *Hill v Hill*, 2013 ABCA 313, at paras 11, 14, 17, and 39. [**Tab 21**]

(a) The adjournment application of June 24, 2015;

(b) The application before Justice Thomas on September 2 and 3, 2015, including the cost of preparing written submissions; and

(c) This application, including costs for the cross-examination on Affidavit of Mr. Bujold, the cost of preparing multiple written submissions, and of the withdrawal of the Settlement Application.

V. RELIEF REQUESTED

71. For the above reasons, the respondent Sawridge prays that this Honourable Court orders as follows:

(a) That the Beneficiary Application be dismissed; and

(b) That costs be paid to Sawridge by the OPGT on an enhanced basis and on the basis that the costs not be indemnified by the 1985 Sawridge Trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of August, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

LIST OF AUTHORITIES

Tab 1

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
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**BRIEF OF THE SAWRIDGE FIRST NATION**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP 1500 Manulife Place 10180 – 101 Street Edmonton, AB T5J 4K1 **Attention**: Edward H. Molstad, Q.C. Telephone: (780) 423-8500 Facsimile: (780) 423-2870 **File Number**: 64203-7/EHM

Clerk's Stamp

TABLE OF CONTENTS

I. INTRODUCTION

1. Further to Justice D.R.G. Thomas' reasons for judgment dated December 17, 2015,[1] the Sawridge First Nation ("Sawridge") was served with two applications by the Public Trustee of Alberta (the "Public Trustee") on January 29, 2016. In both of its applications, the Public Trustee is seeking orders to compel Sawridge to provide certain records pursuant to Rule 5.13 of the *Rules of Court*. One of the Public Trustee's applications concerns records related to the identification of the pool of potential beneficiaries for the 1985 Sawridge Trust (the "Beneficiary Application"). The other application concerns records related to the settlement of the assets in the 1985 Sawridge Trust (the "Settlement Application").

2. It is Sawridge's position that the Public Trustee should not be entitled to all of the records that it is seeking as part of its two applications. With regards to the Beneficiary Application, the Public Trustee has been provided with information that would allow it to identify the number and identity of the minors who it represents and who it may represent. Furthermore, the Public Trustee has failed to specify what records it is requesting from Sawridge as part of this application.

3. Insofar as the Settlement Application, a number of the Public Trustee's requests for records are irrelevant, as they do not concern the settlement of the assets into the 1985 Sawridge Trust; rather, a number of those requests are focused on quantifying the assets in the 1985 Sawridge Trust, and on attempting to determine how certain assets were disposed of well before the trust's inception. Those requests, it is submitted, are irrelevant to what Justice Thomas described as "potential irregularities" related to the settlement of the assets in the 1985 Sawridge Trust.

II. BENEFICIARY APPLICATION

A. *BACKGROUND*

4. In his reasons for judgment, Justice Thomas directed Sawridge to provide the Public Trustee with information that would allow the Public Trustee to identify the following:

---

[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 ["***Sawridge #2***"]. **[Tab B1]**

1. The names of individuals who have:

    a) made applications to join Sawridge which are pending; and

    b) had applications to join Sawridge rejected and are subject to challenge; and

2. The contact information for those individuals where available.[2]

5. Pursuant to that direction, Sawridge sent a letter to the Public Trustee on January 18, 2016, which included all of the above-listed information. As part of that letter, Sawridge provided a table containing a list of all of the adult individuals who had applied to join Sawridge, but whose applications were still pending with their contact information. Sawridge also provided a list of all of the adult parents, with contact information, who had made applications for membership for their minor children. Additionally, Sawridge confirmed that there were no membership appeal decisions outstanding, and that there were no membership decisions that were subject to challenge in accordance with the relevant limitations period under the Sawridge Constitution and its laws. A copy of that letter has been included as **Tab C1** of these submissions. The attached copy of the letter does not contain the tables referred to above, as those tables contain private and confidential information.

6. On January 29, 2016, the Public Trustee served Sawridge with the Beneficiary Application. According to the Public Trustee's application, it is seeking the following records from Sawridge:

> 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.

7. The undertaking response referred to in the above paragraph was included in the Public Trustee's document titled, "excerpts from pleadings, transcripts, exhibits and answers to undertakings," which was filed on June 12, 2015, at pp. 153-155. That undertaking response is a

[2] *Ibid*, at para 57.

two-page table that outlines all of the minors who are currently members of Sawridge, and indicates whether those minors are currently beneficiaries of the 1985 Sawridge Trust.

B. *SUBMISSIONS*

8. As noted above, the production of records by a non-party to an action is governed by Rule 5.13 of the *Rules of Court*. That rule creates a narrow exception to the general rule that parties are typically only allowed disclosure from other parties to an action. It states as follows:

> 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.[3]

9. Case law is clear that Rule 5.13 is not intended to give a party to an action the right to obtain document discovery from a third party. Rule 5.13 exists to allow parties access to clearly specified records held by a third party; it cannot be relied upon by parties to engage in a fishing expedition, or to compel a third party to disclose records that they may have.[4]

10. The party seeking the records from a third party has the burden of establishing that the Court should order the production of those records.[5]

11. In light of the specific nature of the request under Rule 5.13, the applicant party must clearly identify the records being sought from the third party, and must establish that the third party has said records in its possession. The moving party must accordingly describe the records being sought with a level of precision, and must provide evidence establishing that the

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[3] *Rules of Court*, at 5.13. **[Tab A1]**
[4] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) ["***Ed Miller***"], at para 13 **[Tab B2]**; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 ["***Trimay***"], at paras 13 and 18. **[Tab B3]**
[5] *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA), at para 4. **[Tab B4]**

third party has those records.[6] Failing to adequately describe a record is fatal to an application under Rule 5.13.[7] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[8]

12. In *Trimay Wear Plate v Way*, for example, Justice Graesser held that the defendants were not entitled to certain records sought from a third party under the previous version of Rule 5.13 (Rule 209), because of a lack of specificity in their request. The defendants' requests in that action were drafted in the following manner:

> (a) documents surrounding 735458's [the Third Party] ownership of Trimay [the Plaintiff], which they say are relevant to whether any proprietary processes or technology exist;
>
> (b) documents concerning 735458's and Alberta Industrial's business dealings with Trimay, which they say are relevant to Trimay's costs and are thus relevant to Trimay's damage claim;
>
> (c) documents concerning Alberta Industrial's business dealings with Trimay which they say relate to the former the Defendants' allegations about mismanagement of Trimay and are thus relevant to damages; and
>
> (d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.[9]

13. Justice Graesser held that the defendants' requests were not worded with sufficient specificity to determine if the third party had any relevant or material records. As such, the application was (with the exception of two requests specific documents) dismissed.[10]

14. In his reasons for judgment, Justice Thomas identified three categories of minors who were potential recipients of a distribution of the 1985 Sawridge Trust:

(a) Minors who are children of members of Sawridge;

(b) Children of adults who have unresolved applications to join Sawridge; and

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[6] *Ed Miller*, supra note 4, at paras 13-17. **[Tab B2]**
[7] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144, at paras 12 and 13. **[Tab B5]**
[8] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. **[Tab B6]**
[9] *Trimay*, supra note 4, at para 12. **[Tab B3]**
[10] *Ibid*, at para 24. **[Tab B3]**

(c) Children of adults who have applied for membership in Sawridge, but have had their application rejected and are challenging that rejection by appeal or judicial review.[11]

15. Sawridge, in its letter of January 18, 2016, provided the Public Trustee with all of the information that would allow it to identify the minors in the last two of the categories listed above. Insofar as the second category, Sawridge provided a list of the adults who had pending applications to Sawridge, as well as a list of adults who had made applications for membership on behalf of their minor children. With regards to the third category, Sawridge confirmed that no appeals had been commenced or could be commenced in relation to any membership applications. As such, and given that information concerning the minors who are currently members of Sawridge was already provided to the Public Trustee as part of Mr. Bujold's undertaking responses, it is Sawridge's position that the Public Trustee does not require any further documents related to same.

16. Furthermore, even if additional records were necessary to identify the minor beneficiaries that the Public Trustee is representing, the Public Trustee's request under Rule 5.13 fails to articulate what documents it is seeking with any level of precision. As noted in the above-cited cases, an applicant is required to provide a precise description of what records it is seeking from a third party under Rule 5.13. Rather than specifying what documents it is seeking, the Public Trustee has simply requested all documents that "may" assist in identifying the minor beneficiaries. That request, it is submitted, is far too broadly worded to be permitted under Rule 5.13.

17. Another issue raised by the manner in which the Public Trustee has framed its request for records is that Sawridge is unable to determine if any of the records that are being sought are producible, or if Sawridge would oppose their production. Some of the records being requested by the Public Trustee may contain confidential information regarding applicants for membership or regarding Sawridge itself. Given that the Public Trustee has not specified which documents it is seeking, Sawridge is unable to say if any records containing confidential

[11] *Sawridge #2*, supra note 1, at para 56. **[Tab B1]**

information are being sought, and is accordingly unable to know whether it needs to raise an objection related to same.

18. The issue of identifying what is being sought by the Public Trustee is rendered even more difficult by the fact that the Public Trustee has indicated in its application that it is relying on, "all relevant materials filed to date" in this action. As a non-party, Sawridge has not necessarily been privy to all of the filings in this action. Importantly, the Public Trustee has failed to provide any indication of what evidence it will rely on, and is instead suggesting that Sawridge should comb through the tomes of records that have been filed in order to guess what the Public Trustee deems is a "relevant document" for the purpose of this application. This failure to specify what evidence is being relied upon runs contrary to the principle of precisely framing a request under Rule 5.13.

III. SETTLEMENT APPLICATION

A. *BACKGROUND*

19. The first Order pronounced in this action is dated August 31, 2011. That Order was pronounced by Justice Thomas, and outlines the scope of the application being made by the 1985 Sawridge Trust's trustees for advice and direction.[12] That Order notes at paragraph 1(b) that one of the purposes of this action is to seek direction, "with respect to the transfer of assets to the 1985 Sawridge Trust."

20. In the Affidavit of Mr. Bujold filed by the trustees of the 1985 Sawridge Trust in support of their application for advice and direction, Mr. Bujold noted the following regarding the advice and direction being sought:

> 25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.[13]

21. In his reasons for judgment, Justice Thomas indicated that certain questions had been raised regarding the settlement of the assets in the 1985 Sawridge Trust. Accordingly, he

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[12] Order of Justice D.R.G. Thomas, dated August 31, 2011. [**Tab C2**]
[13] Affidavit of Paul Bujold, sworn September 12, 2011, at para 25. [**Tab C3**]

ordered that the Public Trustee could serve Sawridge with an application under Rule 5.13 concerning the assets settled in the 1985 Sawridge Trust. [14]

22. On January 29, 2016, the Public Trustee served Sawridge with the Settlement Application. In that application, the Public Trustee indicated that it was seeking ten different categories of records from Sawridge. Those various categories are outlined at paragraph 1 of the Settlement Application.

B. *SUBMISSIONS*

23. Case law is clear that the Public Trustee must demonstrate that the records that it is seeking from Sawridge are relevant and material to the issues in dispute in this action. The *Rules of Court* affirm that a party is only required to disclose records that are relevant and material. Relevance and materiality are generally defined by the parties' pleadings:

> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. [*Emphasis Added*][15]

24. In addition to reviewing the parties' pleadings, a Court must, when determining whether a record is producible, review a moving party's reason for seeking a record from another party. In *Weatherill (Estate of) v Weatherill*, one of the leading cases concerning applications for document production, Justice Slatter affirmed that a document's relevance is determined based on the issues in a given action, and that said issues are defined (per the *Rules of Court*) based on the parties' pleadings.[16] With regards to materiality, Justice Slatter noted that a document will be material to an action if that document would help determine one of the issues that arises in the

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[14] *Sawridge #2*, supra note 1, at paras 45-47. **[Tab B1]**
[15] *Rules of Court*, at R.5.2. **[Tab A2]**
[16] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. **[Tab B7]**

parties' pleadings. He also affirms that a Court must review a party's line of argument in order to determine whether a document is needed to prove a fact related to one of the issues.[17]

25. A party looking to obtain a record from another party, as with most applications, has the burden of proving that said record is relevant and material.[18] If a moving party fails to meet its burden of proving that a record should be produced, then a Court must dismiss that party's application for disclosure.[19]

26. From the outset of this action, the issue regarding the settlement of the assets in the 1985 Sawridge Trust has not concerned the quantification of those assets. At no time has an application been brought for an accounting of those assets; nor has any tracing-type application been brought in relation to the assets.

27. Rather, and as indicated in the first Order pronounced by Justice Thomas and in Mr. Bujold's Affidavit, the issue regarding the settlement of the assets concerns the actual transfer of those assets to the 1985 Sawridge Trust. That transfer, as was noted in Mr. Bujold's Affidavit, occurred in April of 1985. Accordingly, it is Sawridge's position that the only documents related to the assets in the 1985 Sawridge Trust that are relevant and material to this action are those that concern the actual transfer of the assets into that trust.

28. Based on its position regarding the Public Trustee's requests for records, Sawridge provided the Public Trustee with a response to its request in paragraph 1(c). That response was provided via letter on March 11, 2016. A copy of that letter has been included at **Tab C4** of these submissions. Sawridge indicated that it did not have any other records concerning the subject matter of that request.

29. A number of the Public Trustee's requests for records concern matters that predate the transfer of the assets to the 1985 Sawridge Trust. Specifically, certain requests concern records related to assets held by certain individuals in the 1970s (paragraph 1(a)), to the settlement of certain assets in the 1982 Sawridge Trust (paragraphs 1(b) and 1(j)), and to other

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[17] *Ibid*, at paras 16-17. [**Tab B7**]
[18] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. [**Tab B8**]
[19] *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2, at paras 21 and 42 – 44. [**Tab B9**]

matters that predate April of 1985 (paragraphs 1(e), 1(f), and 1(h)). These records are neither relevant nor material to the issue that is the subject of this action, being the actual transfer of the assets to the 1985 Sawridge Trust.

30. Similarly, a number of the other requests concern the identification of the assets located in the 1985 Sawridge Trust. The requests for records concerning transfers that occurred into the trust following its settlement in April of 1985 (paragraph 1(d)) and concerning certain matters in the 1985 Sawridge Trust's financial statements (paragraph 1(g)) are again irrelevant and not material to the issue of the transfer of the assets into the 1985 Sawridge Trust. As eluded to above, the Trustees of the 1985 Sawridge Trust are not seeking an accounting of the trust's assets, or any similar remedy.

31. With regards to paragraph 1(i) of the Public Trustee's application, Sawridge again takes the position that the records being sought regarding the transfers of funds that purportedly occurred in 1984 and 1985 are irrelevant to this action. Additionally, no evidence has been provided to support this request by the Public Trustee. An applicant under Rule 5.13 has the burden of proving that a third party possesses a record. As no evidence has been referred to by the Public Trustee in relation to this request, it is Sawridge's position that the Public Trustee's request under paragraph 1(i) should be dismissed.

32. Sawridge also takes the position that the Public Trustee's request under paragraph 1(j) is irrelevant to the issue of the transfer into the 1985 Sawridge Trust. The Public Trustee has requested records that concern the assets that certain individuals intended to be included in the 1982 Sawridge Trust. The question of intent in these circumstances is irrelevant to the actual transfer that took place.

33. In conclusion, Sawridge's position is that the Public Trustee's requests in the Settlement Application run contrary to Justice Thomas' attempt to refocus the role of the Public Trustee in this action. Justice Thomas was clear in his reasons for judgment that an application under Rule 5.13 was, "not intended to facilitate a 'fishing trip'."[20] The Public Trustee has ignored Justice Thomas' finding in this regard, and has attempted to request a number of records that are not clearly identified and that are irrelevant and immaterial to this action.

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[20] *Sawridge #2*, supra note 1, at para 16. **[Tab B1]**

IV. RELIEF REQUESTED

34. For the above reasons, the respondent Sawridge prays that the contested portions of the Public Trustee's applications for disclosure be dismissed, with costs payable by the Public Trustee on the basis that these costs shall not be paid by the Sawridge Trust.

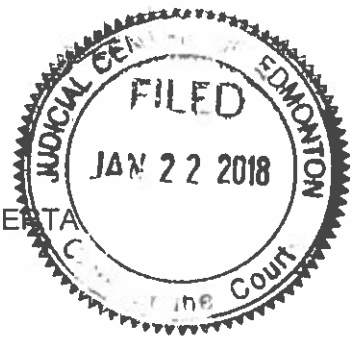
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2016.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Solicitors for the Sawridge First Nation

TAB B

Clerk's stamp:



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

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

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

APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (ISSUE OF DISCRIMINATION)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5

JUSTICE: D.R.C. THOMAS
DATE: JAN 19, 2018
LOCATION: EDMONTON

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

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

for Clerk of the Court

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("1985 Trust"), for which an Application for Advice and Direction was filed January 9th, 2018;

AND WHEREAS the first question in the Application by the Sawridge Trustees on which direction is sought is whether the definition of "Beneficiary" in the 1985 Trust is discriminatory, which definition reads:

> "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed

all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

AND UPON being advised that the parties have agreed to resolve this specific question on the terms herein, and no other issue or question is raised before the Court at this time, including any question of the validity of the 1985 Trust;

AND UPON being advised the Parties remain committed to finding a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries;

AND UPON there being a number of other issues in the Application that remain to be resolved, including the appropriate relief, and upon being advised that the parties wish to reserve and adjourn the determination of the nature of the relief with respect to the discrimination;

AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

AND UPON noting the consent of the Sawridge Trustees, consent of The Office of the Public Trustee and Guardian of Alberta ("OPGT") and the consent of Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust.

2. The remaining issues in the Application, including the determination of any remedy in respect of this discriminatory definition, are to be the subject of a separate hearing. The timeline for this hearing will be as set out in Schedule "A" hereto and may be further determined at a future Case Management Meeting.

3. The Justice who hears and determines the remaining issues in this Application may consider all forms of discrimination in determining the appropriate relief.

4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as ~~the sole determinative factor that~~ a ground upon which the 1985 Trust ~~should~~ could be dissolved.

5. ~~The provisions in paragraph 4, above, will not prevent reliance on this Consent Order for any purpose in the within proceedings.~~

The Honourable D. R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

Karen Platten, Q.C.
Counsel for Catherine Twinn as Trustee for the 1985 Trust

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**Litigation Plan January 19, 2018**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

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

NO.	ACTION	DEADLINE
1.	Case Management Meeting to address Trustee's application for an Order on the Discrimination Issue.	January 19, 2018
2.	Settlement meeting of all counsel for the Parties to continue to discuss remedies;	February 14, 15 or 16, 2018
3.	Interim payment on accounts made to OPGT from the Trustees	January 31, 2018 and February 28, 2018
4.	Agreed Statement of Facts to be circulated to all Parties, by the Trustees on the issue of the determination of the definition of beneficiary and grandfathering (if any).	By February 28, 2018
5.	Further Settlement meeting of all counsel for the Parties to continue to discuss remedies and draft Agreed Statement of Facts.	By March 30, 2018
6.	Responses from the Trustees to the OPGT regarding all outstanding issues on accounts to the end of 2017	March 30, 2018
7.	All Parties to provide preliminary comments on the Trustee's first draft of an Agreed Statement of Facts.	By May30, 2018
8.	Concurrently with the preparation of the agreed statement of facts, all Parties to advise on whether they have any documents on which they respectively intend to rely on the issue of the remedies. If they have documents, they will file an Affidavit of Records	By ~~February 28~~, 2018 April 30
9.	Concurrently with the preparation of the agreed statement of facts, all non-parties may provide records on which they intend to rely to all Parties who will determine if they are duplicates and if not, non party may file an Affidavit of Records	By February 28, 2018
10.	Third 2018 Settlement Meeting of all counsel to continue to discuss remedies and draft Agreed Statement of Facts.	By April 30, 2018
11.	Questioning on new documents only in Affidavits of Records filed, if required.	By ~~May 30~~, 2018 June 15
12.	Non-party potential beneficiaries provide all Parties with any facts they wish to insert in the Agreed Statement of Facts.	By April 30, 2018

13.	Final Response by OPGT and any other recognized party on Agreed Statement of Facts.	By June 30, 2018
14.	Agreed Statement of Facts filed, if agreement reached.	By July 15, 2018
15.	Parties to submit Consent Order proposing revised Litigation Plan including a procedure for the remainder of the application including remedy for striking language or amending the trust under section 42 of the Trustee Act or amending the trust according to the trust deed. Alternatively, Trustees to file application re: same.	By July 15, 2018
16.	All other steps to be determined in a case management hearing	As and when necessary

TAB 1

Behn v. Moulton Contracting Ltd., [2013] 2 S.C.R. 227

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: December 11, 2012;

Judgment: May 9, 2013.

File No.: 34404.

[2013] 2 S.C.R. 227 | [2013] 2 R.C.S. 227 | [2013] S.C.J. No. 26 | [2013] A.C.S. no 26 | 2013 SCC 26

Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn and George Behn, Appellants; v. Moulton Contracting Ltd. and Her Majesty The Queen in Right of the Province of British Columbia, Respondents, and Attorney General of Canada, Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation, Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority, Chief Sally Sam Maiyoo Keyoh Society, Council of Forest Industries, Alberta Forest Products Association and Moose Cree First Nation, Interveners.

(43 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Civil procedure — Standing — Aboriginal law — Treaty rights — Duty to consult — Individual members of Aboriginal community asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether individual members have standing to assert collective rights in defence.

Civil procedure — Abuse of process — Motion to strike pleadings — Members of Aboriginal community blocking access to logging site and subsequently asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether raising defences constituted abuse of process.

Summary:

After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation in British Columbia, a number of individuals from that First Nation erected a camp that, in effect, blocked the company's access to the logging sites. The company brought a tort action against the members of the Aboriginal community, who argued in their defences that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated their treaty rights. The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community did not have standing to assert collective rights in their defence; only the community could invoke such rights. They also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the members of the community had failed to challenge the validity of the licences when they were issued.

Held: The appeal should be dismissed.

The duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them. While an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its Aboriginal or treaty rights, here, it does not appear from the pleadings that the First Nation authorized the community members to represent it for the purpose of contesting the legality of the licences. Given the absence of an allegation of authorization, the members cannot assert a breach of the duty to consult on their own.

Certain Aboriginal and treaty rights may have both collective and individual aspects, and it may well be that in appropriate circumstances, individual members can assert them. Here, it might be argued that because of a connection between the rights at issue and a specific geographic location within the First Nation's territory, the community members have a greater interest in the [page229] protection of the rights on their traditional family territory than do other members of the First Nation, and that this connection gives them a certain standing to raise the violation of their particular rights as a defence to the tort claim. However, a definitive pronouncement in this regard cannot be made in the circumstances of this case.

Raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process in the circumstances of this case. Neither the First Nation nor the community members had made any attempt to legally challenge the licences when the Crown granted them. Had they done so, the logging company would not have been led to believe that it was free to plan and start its operations. Furthermore, by blocking access to the logging sites, the community members put the logging company in the position of having either to go to court or to forego harvesting timber after having incurred substantial costs. To allow the members to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations.

Cases Cited

Referred to: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Beckman v. Little*

Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4) 236; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Toronto (City) v. [page230] C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Forest Act, R.S.B.C. 1996, c. 157.

Indian Act, R.S.C. 1985, c. I-5.

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 9-5(1).

Supreme Court Rules, B.C. Reg. 221/90 [rep.], r. 19(24).

Treaties and Agreements

Treaty No. 8 (1899).

Authors Cited

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich, 2009.

Perell, Paul M. "A Survey of Abuse of Process", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2007*. Toronto: Thomson Carswell, 2007, 243.

Woodward, Jack. *Native Law*, vol. 1. Toronto: Carswell, 1994 (loose-leaf updated 2012, release 5).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJ.A.), 2011 BCCA 311, 20 B.C.L.R. (5) 35, 309 B.C.A.C. 15, 523 W.A.C. 15, [2011] 3 C.N.L.R. 271, 335 D.L.R. (4) 330, [2011] B.C.J. No. 1271 (QL), 2011 CarswellBC 1693, affirming a decision of Hinkson J., 2010 BCSC 506, [2010] 4 C.N.L.R. 132, [2010] B.C.J. No. 665 (QL), 2010 CarswellBC 889. Appeal dismissed.

Counsel

Robert J. M. Janes and *Karey M. Brooks*, for the appellants.

Charles F. Willms and *Bridget Gilbride*, for the respondent Moulton Contracting Ltd.

[page231]

Keith J. Phillips and *Joel Oliphant*, for the respondent Her Majesty the Queen in Right of the Province of British Columbia.

Brian McLaughlin, for the intervener the Attorney General of Canada.

Allisun Rana and *Julie Tannahill*, for the interveners Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation.

John Hurley and *François Dandonneau*, for the interveners the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

Christopher G. Devlin and *John W. Gailus*, for the interveners Chief Sally Sam and the Maiyoo Keyoh Society.

John J. L. Hunter, *Q.C.*, *Mark S. Oulton* and *Stephanie McHugh*, for the interveners the Council of Forest Industries and the Alberta Forest Products Association.

Jean Teillet and *Nuri G. Frame*, for the intervener the Moose Cree First Nation.

The judgment of the Court was delivered by

LeBEL J.

I. Introduction - Overview

1 This appeal raises issues of standing and abuse of process in the context of relations between members of an Aboriginal community, a logging company, and a provincial government. After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation ("FNFN") in British Columbia, a number of individuals from that First Nation erected a camp

that, in effect, blocked the company's access to the logging sites. The company brought a tort action against these members of the Aboriginal community, who argued in their defence that the licences were void because they had been [page232] issued in breach of the constitutional duty to consult and because they violated the community members' treaty rights.

2 The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community (the "Behns") did not have standing to assert collective rights in their defence; only the community could raise such rights. The courts below also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the Behns had failed to challenge the validity of the licences when they were issued.

3 The Court is asked to consider in this appeal whether an individual member or group of members of an Aboriginal community can raise a breach of Aboriginal and treaty rights as a defence to a tort action and, if so, in what circumstances. But, as this question of standing is not determinative for the purposes of this appeal, the Court must also decide whether the doctrine of abuse of process applies in this case.

4 For the reasons that follow, I would dismiss the appeal.

II. Facts

5 As this is an appeal from a decision on a motion to strike pleadings, the following facts are taken from the pleadings. The Behns are, with one exception, members of the FNFN, a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. The FNFN is a party to Treaty No. 8 of 1899, which covers an area comprising parts of Alberta, British Columbia, Saskatchewan and the Northwest Territories. The Behns allege that they have traditionally hunted and trapped on a part of the FNFN's territory that has historically been allocated to their family.

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6 Moulton Contracting Ltd. ("Moulton") is a company incorporated pursuant to the laws of British Columbia. On June 27, 2006, the British Columbia Ministry of Forests ("MOF") granted Moulton two timber sale licences and a road permit (the "Authorizations") pursuant to the *Forest Act*, R.S.B.C. 1996, c. 157. These Authorizations entitled Moulton to harvest timber on two parcels of land within the FNFN's territory, both of which are within the Behn family trapline. The Behns stated in their Amended Statement of Defence that the FNFN manages its territory by allocating parts of it (called traplines) to specific families:

> While the rights provided for in the Treaty # 8 extended throughout the tract described in the treaty, most of the aboriginal people comprising the Fort Nelson First Nation traditionally ordered themselves so that the rights to hunt and trap set out in Treaty 8 were exercised in tracts of land associated with different extended families. These extended families were headed by a headman. [A.R., at p. 89]

7 Before granting the Authorizations, the MOF had contacted representatives of the FNFN and individual trappers, including George Behn, the headman of the Behn family, in developing and amending its forest

development plan ("FDP"). The MOF contacted the FNFN in August 2004 and individual trappers, including Mr. Behn, in September 2004 to notify them that additional harvesting blocks were being proposed. The trappers it contacted were invited to advise it of any concerns they had or provide it with comments by October 20, 2004. MOF officials met a representative of the FNFN in November 2004 to discuss consultation on the proposed amendment to the FDP. The issue of funding to enable the FNFN to provide information to the MOF was discussed at that meeting. Funding was ultimately refused. On January 31, 2005, the MOF wrote to the FNFN to advise it that archaeological impact assessments would be conducted for certain areas proposed for harvesting in the amendment to the FDP. Two archaeological impact assessments were completed in August 2005, and copies of them were delivered to the FNFN. The MOF and the FNFN met again [page234] on September 21, 2005 to discuss the proposed amendment further.

8 The MOF approved the amendment to the FDP. On June 2, 2006, it put the two timber sale licences relevant to this appeal up for sale. After granting the Authorizations to Moulton, the MOF wrote to George Behn on June 28, 2006, to advise him that Moulton had been awarded licences to harvest timber within his trapping area. In that letter, George Behn was advised to contact Moulton directly to confirm the date its harvesting operations were to commence. The MOF again wrote to Mr. Behn on July 17, 2006, to advise him that the operations would begin on August 1, 2006. On August 31, 2006, George Behn wrote to the MOF, requesting that the Authorizations granted to Moulton be cancelled and seeking consultation. No copy of this letter was sent to Moulton.

9 Between September 19 and September 22, 2006, Moulton started moving its equipment to one of the two sites to which the Authorizations applied. On September 25, 2006, the MOF notified Moulton that there was a potential problem with George Behn. The MOF requested that Moulton move its operations to the second site. Moulton replied that it could not do so because it had commitments to a mill to deliver timber from the first site.

10 In early October 2006, the Behns erected a camp on the access road leading to the parcels of land to which the Authorizations applied. The camp blocked access to the land where Moulton was authorized to harvest timber.

11 On November 23, 2006, Moulton filed a statement of claim in the British Columbia Supreme Court against the Behns, Chief Logan on behalf of herself and the FNFN, and the Crown. Moulton claimed damages from the Behns for interference with contractual relations. In their statement of [page235] defence, the Behns denied that their conduct was unlawful. They alleged that the Authorizations were illegal for two reasons. First, the Crown had failed to fulfil its duty to consult in issuing the Authorizations. Second, the Authorizations infringed their hunting and trapping rights under Treaty No. 8.

12 Moulton applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 [repealed] (now Rule 9-5(1), *Supreme Court Civil Rules*, B.C. Reg. 168/2009), to have a number of paragraphs struck out of the Behns' statement of defence on the ground (1) that it was plain and obvious that they did not disclose a reasonable defence, or (2) that the relief being sought in them constituted an abuse of process. In substance, the paragraphs Moulton sought to have struck related to the Behns' allegations that the Authorizations were invalid because they had been issued in breach of the Crown's duty to consult and because they violated the Behns' treaty rights, and to their allegations that their acts were neither illegal

nor tortious. The Crown supported Moulton's application and further submitted that the Behns lacked standing to raise a breach of the duty to consult or of treaty rights, as only the FNFN had such standing.

III. Judicial History

A. *British Columbia Supreme Court, 2010 BCSC 506, [2010] 4 C.N.L.R. 132*

13 Hinkson J. held that the Behns lacked standing to raise the defences pertaining to the duty to consult and treaty rights. He stated that although Aboriginal and treaty rights are exercised by individuals, they are collective in nature. As a result, they are not possessed by nor do they reside with individuals. He mentioned that collective rights can be asserted by individuals only if the individuals are authorized to do so by the collective. Hinkson J. found that the FNFN had not authorized the Behns to assert these rights.

[page236]

14 Hinkson J. also held that the impugned paragraphs in which the Behns submitted that the Authorizations were invalid had to be struck out as an abuse of process under Rule 19(24) of the *Supreme Court Rules*. He reasoned that the Behns could not be permitted to introduce the subject matter of the invalidity of the Authorizations now in their statement of defence, as they should instead have applied for judicial review.

15 It should be noted that the trial then proceeded from September to November 2011 in the British Columbia Supreme Court on the basis of the paragraphs that had survived the motion to strike. The trial judge has reserved his judgment until this Court disposes of this appeal.

B. *British Columbia Court of Appeal, 2011 BCCA 311, 20 B.C.L.R. (5th) 35*

16 Saunders J.A., writing for the Court of Appeal, agreed with Hinkson J. that the Behns lacked standing to assert that the duty to consult owed to the FNFN had not been met and that collective rights had been infringed by the issuance of the Authorizations. She said, at para. 39, that "an attack on a non-Aboriginal party's rights, on the basis of treaty or constitutional propositions, requires authorization by the collective in whom the treaty and constitutional rights inhere". In this case, the Behns had received no such authorization by the FNFN. Saunders J.A. was careful to point out that she was not suggesting that collective rights could never provide a defence to individual members of an Aboriginal community.

17 Saunders J.A. also concluded that the defences raised by the Behns constituted an impermissible collateral attack upon the Authorizations granted to Moulton. She added that this conclusion was not incompatible with the proper administration of justice, since the FNFN, as a collective, had the capacity to challenge the Authorizations through [page237] a number of legal avenues. She therefore upheld Hinkson J.'s conclusion that the impugned defences constituted an abuse of process.

IV. Analysis

A. *Issues*

18 Three issues must be addressed in this appeal. First, can the Behns, as individual members of an Aboriginal community, assert a breach of the duty to consult? This issue raises the question to whom the Crown owes a duty to consult. Second, can treaty rights be invoked by individual members of an Aboriginal community? These two issues relate to standing.

19 The third issue relates to abuse of process. Does it amount to an abuse of process for the Behns to challenge the validity of the Authorizations now that they are being sued by Moulton after having failed to take legal action when the Authorizations were first issued even though they objected to their validity at the time?

B. *Positions of the Parties*

(1) Behns

20 The Behns submit that the Court of Appeal erred in holding that they lacked standing to assert defences based on treaty rights and that challenging the validity of the Authorizations constituted an impermissible collateral attack. The Behns contend that the principles related to standing apply to the assertion of a claim, not of a defence. As a result, they do not apply in this case, since the Behns are simply defending against an action. In the alternative, the Behns assert that they have standing because, as members of the FNFN, they have a substantial and direct interest in their rights under Treaty No. 8.

21 On the collateral attack issue, the Behns argue, relying on *Garland v. Consumers' Gas Co.*, [page238] 2004 SCC 25, [2004] 1 S.C.R. 629, that the defences they assert do not constitute a collateral attack, since they are not parties to the Authorizations. Alternatively, they submit that, if the impugned paragraphs do constitute a collateral attack, the attack is permissible, because the legislature did not intend that any attempt to question the lawfulness of the Authorizations could be made only by applying for judicial review.

22 Finally, the Behns submit that the principle of the rule of law will be violated if they cannot assert their defences. They contend that whether their conduct was lawful cannot be determined without also addressing the lawfulness of the Authorizations.

(2) Moulton

23 Moulton responds that the Behns have no standing to raise a defence based on Aboriginal or treaty rights, because only the FNFN, as the collective, can assert a claim that these rights have been infringed. Moulton also contends that the Crown's duty to consult is owed to the collective, not to individual members of the collective. Responding to the Behns' submission that they have standing because they are only seeking the dismissal of the action, Moulton submits that they are relying on an affirmative defence that requires an order declaring the Authorizations to be invalid. Moulton adds that the activity for which the Behns are now being sued - erecting and participating in a blockade - is not a right protected under Treaty No. 8. Finally, since the Behns could have challenged the legality of the Authorizations by applying for judicial review when they were issued, Moulton submits that it amounts to a collateral attack

for the Behns to challenge their validity now as a defence to a tort claim.

(3) Crown

24 According to the Crown, the collective nature of Aboriginal and treaty rights means that claims in relation to such rights must be brought by, or on behalf of, the Aboriginal community. Although the Crown recognizes the Behns' interest in their [page239] treaty rights, it submits that their position on this issue disregards two factors: (1) the issue arising in the litigation concerns a defence to a claim related to a blockade, not to the exercise of hunting or trapping rights; and (2) the FNFN is named as a party to the proceedings and therefore represents the community in them. The Crown further submits that having a substantial and direct interest in a treaty right does not entitle an individual to bring a treaty rights claim or defence.

25 On whether the impugned paragraphs constitute an impermissible collateral attack, the Crown submits that the question is whether the claimant is content to let the government's decision stand. In the instant case, the impugned defences raise an unequivocal challenge to the validity and legal force of the Authorizations. Furthermore, the Crown submits that the Behns could have challenged the validity of the Authorizations by applying for judicial review instead of blockading a road.

C. *Standing*

(1) Duty to Consult

26 In defence to Moulton's claim, as I mentioned above, the Behns argue, *inter alia*, that their conduct was not illegal, because the Crown had issued the Authorizations in breach of the duty to consult and the Authorizations were therefore invalid. The question that arises with respect to this particular defence is whether the Behns can assert the duty to consult on their own in the first place.

27 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, this Court confirmed that the Crown has a duty to consult Aboriginal peoples and explained the scope of application of that duty in respect of Aboriginal rights, stating that "consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed [page240] is an essential corollary to the honourable process of reconciliation that s. 35 [of the *Constitution Act, 1982*] demands": para. 38. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Court held that the duty to consult applies in the context of treaty rights: paras. 32-34. The Crown cannot in a treaty contract out of its duty to consult Aboriginal peoples, as this duty "applies independently of the expressed or implied intention of the parties": *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 61.

28 The duty to consult is both a legal and a constitutional duty: *Haida Nation*, at para. 10; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; see also J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-38. This duty is grounded in the honour of the Crown: *Haida Nation*, *Beckman*, at para. 38; *Kapp*, at para. 6. As Binnie J. said in *Beckman*, at para. 44, "[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose." The duty to consult is part of the process for achieving "the reconciliation of the pre-

existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31; *Haida Nation*, at para. 17; see also D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009).

29 The duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35. The content of the duty varies depending on the context, as it lies on a spectrum of different actions to be taken by the Crown: *Haida Nation*, at para. 43. An important [page241] component of the duty to consult is a requirement that good faith be shown by both the Crown and the Aboriginal people in question: *Haida Nation*, at para. 42. Both parties must take a reasonable and fair approach in their dealings. The duty does not require that an agreement be reached, nor does it give Aboriginal peoples a veto: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at paras. 2 and 22; *Haida Nation*, at para. 48.

30 The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.

31 In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it for the purpose of contesting the legality of the Authorizations. I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal.

[page242]

(2) Aboriginal or Treaty Rights

32 The Behns also challenge the legality of the Authorizations on the basis that they breach their rights to hunt and trap under Treaty No. 8. This is an important issue, but a definitive pronouncement in this regard cannot be made in the circumstances of this case. I would caution against doing so at this stage of the proceedings and of the development of the law.

33 The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R.*

v. Sappier, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

34 Some interesting suggestions have been made in respect of the classification of Aboriginal and treaty rights. For example, the interveners Grand Council of the Crees and Cree Regional Authority propose in their factum, at para. 14, that a distinction be made between three types of Aboriginal and treaty rights: (a) rights that are exclusively collective; (b) rights that are mixed; and (c) rights that are predominantly individual. These interveners also attempt to classify a variety of rights on the basis of these three categories.

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35 These suggestions bear witness to the diversity of Aboriginal and treaty rights. But I would not, on the occasion of this appeal and at this stage of the development of the law, try to develop broad categories for these rights and to slot each right in the appropriate one. It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.

36 In this appeal, the Behns assert in their defence that the Authorizations are illegal because they breach their treaty rights to hunt and trap. They recognize that these rights have traditionally been held by the FNFN, which is a party to Treaty No. 8. But they also allege that specific tracts of land have traditionally been assigned to and associated with particular family groups. They assert in their pleadings that the Authorizations granted to Moulton are for logging in specific areas within the territory traditionally assigned to the Behns, where they have exercised their rights to hunt and trap. On the basis of an allegation of a connection between their rights to hunt and trap and a specific geographic location within the FNFN territory, the Behns assert that they have a greater interest in the protection of hunting and trapping rights on their traditional family territory than do other members of the FNFN. It might be argued that this connection gives them a certain standing to raise the violation of their particular rights as a defence to Moulton's tort claim. But a final decision on this issue of standing is not necessary in this appeal, because another issue will be determinative, that of abuse of process.

[page244]

D. *Abuse of Process*

37 The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they had standing, themselves or through the

FNFN, they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move.

38 Had the Behns acted when the Authorizations were granted, clause 9.00 of the timber sale agreements provided that the Timber Sales Manager had the power to suspend the Authorizations until the legal issues were resolved: trial judgment, at para. 16. Moulton would not then have been led to believe that it was free to plan and start its logging operations. Moreover, legal issues like standing could have been addressed at the proper time and in the appropriate context.

39 In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, [page245] at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

40 The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358 ... .
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added.]

41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used [page246] to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human*

Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

42 In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[page247]

V. Conclusion

43 For these reasons, I would dismiss the appeal with costs to the respondent Moulton.

Appeal dismissed with costs.

Solicitors:

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Solicitors for the respondent Moulton Contracting Ltd.: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitors for the interveners Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation: Rana Law, Calgary.

Solicitors for the interveners the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority: Gowling Lafleur Henderson, Montréal.

Solicitors for the interveners Chief Sally Sam and the Maiyoo Keyoh Society: Devlin Gailus, Victoria.

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Solicitors for the intervener the Moose Cree First Nation: Pape Salter Teillet, Toronto.

End of Document

TAB 2

Court of Queen's Bench of Alberta

Citation: Hoffman Estate (Re), 2019 ABQB 473

Date: 20190625
Docket: ES03 130974
Registry: Edmonton

Court File Number	ES03 130974
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial Centre	Edmonton
Estate Name	Hubert Hoffman
Applicant	Debora Hoffman
Personal Representative	Gordon Hodge

Reasons for Decision
of the
Honourable Mr. Justice Peter Michalyshyn

I. Introduction

[1] By this court's order filed September 19, 2018, the following issues were directed to a hearing:

> Can, as sought by beneficiary Debora Hoffman, the June 15, 2012 Order of Madam Justice Ross (filed July 12, 2012 authorizing the distributions referenced therein out of the Estate (the "2012 Distribution Order") be the subject of challenge and re-opened?
>
> Whether the transfer of shares of U.S. Holdings Inc. (USH), a corporation which held the shares of Fresno Supreme Inc., which in turn held the subject U.S.

> properties, was, as challenged by Debora Hoffman, in contravention of paragraph 1 of the 2012 Distribution Order which authorized the Personal Representative to sell the properties by means and on such terms and conditions as he deems appropriate?

[2] By the time of the hearing, the issues had resolved – as stated in the brief of the respondent Personal Representative – essentially to:

> Should the court change the value attributed to a beneficiary's share in an interim distribution by the Personal Representative in 2012 and 2013, after the personal representative applied for and obtained advice and direction from the court?

[3] The answer turns in large part on whether any of the following circumstances constitute grounds to revisit or question the effect of the 2012 Distribution Order:

a. that the personal representative transferred certain shares to Blake Hoffman;

b. that Debora Hoffman now argues for a lower tax discount on Blake Hoffman's assets;

c. that the personal representative has acknowledged that certain adjustments to distributions will need to occur on the final accounting, including consideration of the income earned from 2011 to 2012 from both the US assets and the Canadian assets.

[4] For reasons which follow, I find that the 2012 Distribution Order and its effect on the distributions amongst the beneficiaries, including the manner in which it has been interpreted in the personal representative's discretion – should be undisturbed.

II. Background

[5] The application rising rise to the stated issue is backed up by a record that is as extensive as has been the litigation between the parties. For the purposes of this application the evidence of particular relevance includes the following:

i. The starting point is Hubert Hoffman's will dated February 17, 2000, and Hubert's death on November 3, 2009;

ii. Hubert's will gifts the residue of his estate to his four children in somewhat unequal shares; there is no apparent complaint arising from the unequal distribution;

iii. The four children are Susan Hoffman, Blake Hoffman, Dean Hoffman, and Debora Hoffman ("the beneficiaries");

iv. On this application the positions of Susan, Blake and Dean are aligned with the personal representative; Debora takes issue with the personal representative's position;

v. Blake is a US citizen; certain estate assets are in the United States; early on, it was understood that the transfer of Hubert's US assets should be done in the most tax-efficient manner;

vi. Though Hubert's will allowed *in specie* distributions, the beneficiaries were unable to agree on certain matters and, accordingly, the personal representative applied to the court for advice and direction;

vii. On other matters however the beneficiaries were agreed:

a. Before the court was Blake's uncontradicted affidavit evidence of May 30, 2012 that the beneficiaries had agreed that the distribution of Hubert's US assets to Blake would:

> "facilitate [the beneficiaries'] the desire to retain the real property assets, but separate their ownership and operation amongst beneficiaries, and for other sound economic and practical reasons, including financing requirements and tax considerations [emphasis added] the beneficiaries have agreed that my share of the estate would be satisfied by transfer of US assets held by Fresno Supreme. With my share of the estate being worth approximately $45,000,000…"
>
> "I believe that this arrangement would be a benefit to my siblings as it would take away the complexities of them owing and operating US assets. It would consolidate their assets in Edmonton and the cash I pay to the estate would be available for distribution to the Canadian beneficiaries. In this way, the US assets would be held by me, a US resident and citizen, while the Canadian assets would be held by my siblings, who are Canadian residents and citizens."

b. Also before the court was the affidavit of the personal representative filed June 7, 2012:

> Assuming that Blake Hoffman receives his entitlement by way of transfer of assets in the United States, the Edmonton land, buildings, cash and other investments would be available for distribution to Dean Hoffman, Sudan Hoffman and Debora Hoffman, all of whom reside in Edmonton…

c. Also before the court were affidavits of Dean and Susan Hoffman, both filed June 12, 2012, both of which confirm they support Blake's receipt of the US assets.

d. And finally also before the court was Debora's own affidavit filed June 15, 2012, averring that:

> I have no objection to the Blake Hoffman trust being determined, particularly to facilitate his

> receipt of or purchase of the assets in the United States, which would then facilitate the Edmonton land, buildings, cash and other investments being available for distribution to Hubert Dean Hoffman, Susan Evelyn Edith Hoffman, and myself.

viii. On June 15, 2012 Ross J authorized the personal representative to sell certain US properties to a company controlled by Blake "at a value as appraised and by means and on such terms and conditions as he deems appropriate"; in fact, the properties were not sold – rather, the shares of the US company holding the properties were transferred to a corporation controlled by Blake;

ix. As part of the share transfer, some $3 million in retained earnings from the operation of the deceased's properties were transferred to Blake;

x. Also as part of the share transfer, the personal representative deducted $16,118,863 as a "tax discount" – the effect of which was to enrich Blake by that amount *were it not come to pass* that Blake sold the properties, or if the US taxing authorities took issue with the share transfer itself; equally, the $16,118,863 was a potential liability to Blake – and to Blake only – were it *come to pass* that he sold the properties or the US taxing authorities took issue with the share transfer;

xi. Before the June 15, 2012 order, in correspondence leading to the application for advice and direction, Deborah was aware personally and/or through her advisors, of the following: that the approximately $45 million Cdn value of the US assets Blake proposed to take over was net of a tax discount then valued at $15,710,222;

xii. These figures were included in the materials provided to Ross J leading to the June 15, 2012 Distribution Order;

xiii. Days before the June 15, 2012 order, Debora's counsel confirmed that "I am instructed that we're not contesting any of the appraisal values".

xiv. The June 15, 2012 order specifically authorizes the personal representative to:

> …sell those properties owned by Fresno Supreme Inc. to a company controlled by Blake Hoffman at values as appraised and on such terms and on conditions as he deems appropriate. (emphasis added)

xv. Weeks after the June 15, 2012 order, the personal representative prepared detailed calculations which identified, amongst other things, the US assets including the cash (then $3,346,141) and "Extra Tax" (then $16,118,863);

xvi. On July 31, 2012, Debora appealed the June 15, 2012 Distribution Order; the Notice of Appeal was silent regarding US matters including the tax discount, and in any event was discontinued on September 14, 2012;

xvii. The beneficiaries continued to order their affairs without objection until early 2015, but particularly on December 2, 2016 when Debora's Statement of Claim issued, contesting amongst other things, the personal representative's valuation of the US assets, including the tax discount.

III. Positions of the parties

a. Debora Hoffman

[6] At the application before me Debora was clear that she took no issue – or no longer takes issue – with the personal representative's decision to allow Blake Hoffman to purchase shares as distinct from taking proceeds of the sale of the US properties. She denies she seeks to 'undo' the personal representative's structuring of Blake's distribution, whether or not she agrees it was 'by the letter' of the order given.

[7] It is the consequence of the transfer vs sale approach that Debora says should be addressed in a final passing of accounts, notwithstanding the June 15, 2012 Distribution Order, and events leading up to it.

[8] Debora maintains there is nothing in the June 15, 2012 order that insulates particularly the tax discount from a 'fairness' assessment on a final passing of accounts. She argues it is open to the court on a final passing of accounts to examine whether – as she alleges has occurred here – there was an overpayment to Blake particularly on account of the tax discount. She argues that the alleged overpayment defeats the intention in the will by conferring a greater benefit to Blake than is permitted under the will.

[9] Through a proposed expert – though no one has been qualified as such for the purposes of this hearing – Deborah objects to the deduction of the full $16,118,863 potential liability in Blake's favour – suggesting as an example that a 50% discount for that liability would be more appropriate outcome. Debora suggests the tax discount deprives her of at least $2.4 million of her share of the estate.

[10] Deborah appears to acknowledge having notice of the tax discount prior to the June 15, 2012 order, though she maintains it was notice only of an 'approximate' value, and if only for that reason, it should be 'on the table' at a final passing of accounts. (It does not appear to be disputed however that before June 15, 2012 Debora had been provided with appraised values that assessed the tax liability at $15,710,222, and that by July 18, 2012 Debora had been provided with the updated $16,118,863 tax discount figure, which again was unobjected to until early 2015 at the earliest, and categorically by December, 2016.)

b. The Personal Representative

[11] The personal representative says he has acted properly and without partiality in the exercise of his discretionary in administering the estate. He denies there is evidence that he exercised his discretion in arriving at the valuations in question in bad faith, or that he is guilty of obvious misconduct, or that he was not authorized to act in the manner he did, or that he took into account irrelevant considerations. His position is summarized at para 5 of his brief filed January 4, 2019:

> The Personal Representative provided all relevant information, including proposed valuations, back up calculations, and supporting materials to all

> beneficiaries and their professional advisors with adequate time for review and feedback. The Personal Representative then sought the Court's advice, after which the Court gave directions on the distribution. A beneficiary should not now, several years later, ask the court to review substantially the same information and reach a different decision.

[12] Specifically regarding the impugned tax discount, the personal representative says that what Blake has received are assets still imbedded with potential tax liability if or when Blake sells them.

[13] The personal representative has signalled that in the ongoing administration of the estate, he agrees some adjustments to be made. He disputes that by saying so, he is undermining his position that the June 15, 2012 order – and particularly as it deals with the tax discount – should now be revisited in the context of a passing of accounts.

c. Blake Hoffman

[14] Blake argues the June 15, 2012 order was the result of a series of events known to the parties and which gave rise to what he calls a "distribution scheme". The June 15, 2012 order consummated the scheme, allowing it to go forward. It was a distribution scheme, he says, that was not only in his interests but also in the interests of the remaining beneficiaries, all of whom were fully on notice of it.

[15] In law, Blake argues the interim distributions should be viewed on a continuum. Toward one end of the continuum are distributions 'on their merits' – they should be immune from review on a final passing of accounts, absent, *inter alia,* alleged personal representative misconduct. Toward the other end of the continuum are distributions made in the moment – made subject to a final passing of accounts, but in the meantime 'without prejudice' to moving on with the administration of the estate.

[16] Blake argues that on the suggested continuum, the 'tax discount' was a distribution of a risk but on the merits. It was a risk of which all concerned were advised. Blake argues further that as an agreed or at least unopposed risk, the alleged reward of the risk is not something that should be permitted to be reviewed on a passing of accounts application, if it has already been accounted for by the parties and confirmed in an order of the court.

d. Dean and Susan Hoffman

[17] Briefly put, these beneficiaries support the positions advanced by Blake and the personal representative.

[18] Both state that leading up to and shortly following the June 15, 2012 order, all parties were fully informed particularly of the tax discount, and of its role as a necessary part of the overall distribution scheme. They note that had the US properties been sold to Blake – as distinct from the shares of those properties being transferred to him – an immediate tax liability of some $16 million would be triggered. As a result of the share transfer Blake has been able to defer that tax liability, but for Blake it remains at least a contingent liability. At the end of the day, these beneficiaries agree the personal representative acted reasonably, and without timely objection by any of the beneficiaries or their professional advisors, in allowing Blake the benefit – and the risk – of the tax discount/deferral.

IV. Analysis

[19] No one disagrees with the statements of law regarding the powers and duties of a trustee, here a personal representative in a will charged with the administration of Hubert's estate. The powers include a very wide discretion. The duties include an obligation to maintain an even hand – "to hold the balance evenly between the beneficiaries" – and to act in the best interests of the beneficiaries, when distributing and dividing the assets of an estate: ***Boe v Alexander***, 1987 CarswellBC 182, 15 BCLR (2d) 106, at paras 20-21; ***Birkenbach Estate (Re)***, 2018 ABQB 538, at paras 95-100; ***Cormack Estate***, 2016 ABQB 544, 25 ETR (4th) 142, at para 34.

[20] Nor is it controversial that the courts should be reluctant to interfere with a personal representative's exercise of discretion, and should do so only if there is evidence the personal representative acted in bad faith, is guilty of obvious misconduct, was not authorized to act in the manner he did under the will, or took into account irrelevant considerations: ***McNeil v. McNeil***, 2006 ABQB 636, 408 AR 144, at para 84.

[21] Romaine J in ***McNeil*** relies on Donovan W.M. Waters, Law of Trusts in Canada, (Carswell, 3d ed. – the 4th ed., cited by personal representative, is to the same effect) – that the court must first ascertain as a matter of construction of the will the task to which the discretion of the Trustees is attached. In my view this threshold consideration applies equally to discretion conferred on a personal representative by a court order such as the Distribution Order of June 15, 2012.

[22] Again turning to Waters, once that discretion has been determined:

> …the court will not intervene simply because the beneficiaries or any other complainants do not agree with the decision of the trustees in the exercise of their discretion. Nor will it intervene merely because it would not have come to the same decision itself. The court will intervene, however, if (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken in to account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion. (at p 990)

[23] The decision of Kent J in ***Lecky Estate v. Lecky***, 2011 ABQB 802 is further authority for the above proposition:

> As discussed in *McNeil v. McNeil*, 2006 ABQB 636 (CanLII), 408 AR 144 [McNeil] at paragraphs 85 and 87, once the nature and scope of those duties and powers have been determined by the Court, it is solely the task of trustees to decide how best to employ the powers bestowed upon them in fulfilling their duties under the Will. The policy reason for this is patent: a testator's intention that his executors and not the court exercise their judgment in administering his estate is to be respected. So long as they act within the scope of their discretion, the Trustees are to be afforded considerable deference.

[24] The personal representative's powers extend to taking into account the impact of taxes in distributing property: ***Podulsky Estate v Podulsky Estate***, 2015 ABQB 509, 2015 CarswellAlta 1471, at para 99.

[25] Debora relies on ***Podulsky Estate*** for the proposition that absent the consent of the beneficiaries, the personal representative may take into account the tax implications of a distribution only in a manner that is consistent with the terms of the will (at paras 102, 113). In my view ***Podulsky Estate*** is distinguishable from the case before me – in ***Podulsky Estate*** there was no order given on an application for advice and direction, none of the extensive and unobjected-to disclosure leading up to and shortly post-dating the order, and none of the transparent arrangements between the beneficiaries and their advisors that allowed one beneficiary to take all US assets, leaving the remaining beneficiaries to take all Canadian assets.

[26] Debora relies also on ***Re Schippmann Estate***, 2001 BCCA 195, 2001 CarswellBC 846. I find however that it too is distinguishable on its facts. Unlike the case before me, in ***Schippmann Estate*** there was no agreement or even consideration of the impugned event or transaction by or between the parties.

[27] Deborah cites no authority squarely for the proposition that a distribution such as followed the June 15, 2012 order can be revisited on a final passing of accounts. In the absence of authority to the contrary, in my view – having regard for the circumstances leading up to and following the June 15, 2012 order – the order, while interim, was very much on its merits – 'with prejudice' – to a final passing of accounts.

[28] The case of ***Holmes v National Trust Company***, 2004 ABQB 960, at paras 9-10, is some authority in support of this conclusion. ***Holmes*** was a case in which decisions made at an initial passing of accounts were *res judicata*, leaving for a final passing of accounts only issues that may have arisen from the date of the initial application and decision.

[29] I agree with the position of the personal representative at para 67 of his counsel's Brief, that determining the valuation of the estate was within his broad discretion. In fact, it was necessary to exercise quite little discretion, given the June 15, 2012 Distribution Order, properly understood in the context of what led to the order being given. Any discretion that was exercised pursuant to the June 15, 2012 order was informed by the fact all beneficiaries were fully aware of, and expressed no objection to, the tax discount which is at the heart of Debora Hoffman's application.

[30] Debora's "expert" report changes nothing. What is most relevant is not an after-the-fact expert opinion, but rather the agreement of the beneficiaries, also based on multiple opinions, leading to the June 15, 2012 order, and which informed the personal representative's exercise of discretion then and thereafter.

[31] Nor does it weaken the personal representative's position that he has decided to revisit certain other matters on a final passing of accounts. The other matters are of a different nature as compared to the tax discount, and his dealing with them as distinct matters is also within the personal representative's broad discretion.

[32] I do not agree that the personal representative's position on these other matters is an admission that the June 15, 2012 order, and the personal representative's actions pursuant to it, failed to order the parties' affairs on the 'big picture' of how the estate was to be distributed amongst the siblings.

[33] Debora objects to the personal representative's submission that Blake's share of the estate including the tax discount was reasonable and "court-approved" and should not therefore be reviewable on a final passing of accounts. She argues that it is "a dangerous proposition" that

merely placing documents before the court, without more, can be interpreted as the court having considered and adjudicated the evidence in those documents.

[34] In view, what is a more 'dangerous proposition' is that a party fully informed of the background to the June 15, 2012 application and not objecting to the sworn evidence before the court that she agreed to the distribution to Blake Hoffman – can now years later challenge what was part of the very foundation for the order.

[35] The materials before me – summarized in part earlier in these reasons, and as argued unanimously by those opposed to Debora's position – satisfy me that the parties had reached an overall arrangement by June 15, 2012, an integral part of which was the distribution of the US assets to Blake, including the tax discount.

[36] The transcript of the proceedings of June 15, 2012 confirms that Ross J was aware that no one other than Blake had expressed an interest in the US properties, and that whatever disagreements remained amongst the beneficiaries had nothing to do with the proposed distribution of the US properties.

[37] Granted, the June 15, 2012 order does not specifically mention Blake's approximate $45 million share of the estate, net of the tax discount. But the principled basis for Blake's share was squarely in evidence. More importantly, his share – again net of the tax discount – was not disputed. The same could not be said for the Edmonton properties. It is doubtless for this reason that the Edmonton properties and the values attributed to them are specifically set out in the June 15, 2012 order, whereas the US properties and their value are not.

[38] The 'principled basis' for the events leading up to and coming after the June 15, 2012 order include that no beneficiary other than Blake could take the US assets without incurring immediate or potentially deferred tax liability.

[39] On the whole of the record before me, it is clear that again, leading up to and coming after the June 15, 2012 order, the beneficiaries were well aware that Blake's taking of the US properties *including* the tax discount was an integral part of the interim distribution of the estate and should not now be revisited.

V. Conclusion

[40] At its core this application is about whether the court should change the value attributed to Blake Hoffman's share in the 2012/2013 interim distribution authorized by the June 15, 2012 Distribution Order, and implemented by the personal representative in the exercise of his discretion.

[41] Though Debora insists she takes issue only with the 'effect' of the June 15, 2012 order, I find her application to be, in essence, a stale-dated, collateral attack on the order, and on the limited degree to which the personal representative needed to exercise his discretion leading to the June 15, 2012 order, and thereafter.

[42] I disagree that it is open to Debora on a final passing of accounts to revisit the tax discount authorized by the June 15, 2012 order and applied by the personal representative.

[43] Likewise, I disagree that the tax discount issue should be revisited on a final passing of accounts simply because the personal representative, in his discretion, acknowledges the need to revisit certain *other* adjustments to interim distributions.

[44] Debora has been wholly unsuccessful and, on the face of it, is liable to the respondents for their costs. If the parties are unable to agree on the nature or quantum of those costs, I will of course hear submissions.

Heard on the 22nd day of January, 2019.
Dated at the City of Edmonton, Alberta this 25th day of June, 2019.

Peter Michalyshyn
J.C.Q.B.A.

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