

Action No.: 1103-14112
E-File Name: EVQ19TWINNW
Appeal No.: _____

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

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

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 ("1985 Sawridge Trust")

P R O C E E D I N G S

Edmonton, Alberta
December 20, 2019

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

December 20, 2019

Morning Session

The Honourable
Mr. Justice Henderson

Court of Queen's Bench of Alberta

D.C. Bonora
M.S. Sestito
C. Osualdini
E.H. Molstad, QC
E. Sopko
J.L. Hutchison
P.J. Faulds, QC
R. Lee

For the Trustee
For the Trustee
For Catherine Twinn
For Sawridge First Nations
For Sawridge First Nations
For the Office of Public Trustee and Guardian
For the Office of Public Trustee and Guardian
Court Clerk

THE COURT:

Good morning, please be seated.

MS. BONORA:

Thank you, Sir. I'll just introduce the parties if -

-

THE COURT:

Sure.

MS. BONORA:

So Doris Bonora is speaking and she is here with Michael Sestito for the Sawridge Trustees, Ed Molstad, and Ellery Sopko are here for Sawridge First Nation, Janet Hutchison and John Faulds are here for the Office of the Public Trustee and Guardian, Crista Osualdini is here for Catherine Twinn and I don't believe Shelby (phonetic) Twinn is here. The - the application today unfortunately has just become a scheduling application.

THE COURT:

M-hm.

Submissions by Ms. Bonora

MS. BONORA:

We had -- when we were before you on November 27, you had made a direction that your prior ruling was that there was no need for further document production.

THE COURT:

M-hm.

1 MS. BONORA: That is the ruling. That's what you said. If there
2 was something in particular that any of the parties think they need in order to properly
3 advocate their position you have prepared to at least on the surface to reconsider your
4 ruling.

5
6 THE COURT: M-hm.

7
8 MS. BONORA: If you want to tell me what and why you need --
9 it might impact the decision. This is from paragraph -- or page 6 and 7 of the November
10 27. And sorry just -- I -- we order all of the transcript I am wondering if you would like
11 you to send you the transcripts --

12
13 THE COURT: That would be helpful.

14
15 MS. BONORA: -- as we receive them.

16
17 THE COURT: Yes, that would be helpful.

18
19 MS. BONORA: So we will do that. You further went on to say --
20 so if any --

21
22 THE COURT: Just electronically.

23
24 MS. BONORA: Pardon me?

25
26 THE COURT: Just electronically.

27
28 MS. BONORA: Electronically?

29
30 THE COURT: Trying to avoid the paper.

31
32 MS. BONORA: Very good, Sir. So if any of the parties want to
33 deal with either of these issues and you dealt with production as well as procedure and if
34 there is any particular document that you want to see tell me in what in -- tell me what in
35 particular you want and tell me how those document will impact you in a material way --

36
37 THE COURT: Yes.

38
39 MS. BONORA: -- or materially out -- impact the outcome of the
40 decision. So just call my assistant and I have no free days between now and Christmas but
41 there's always 8:30, there's lunch hours and there's 4:30 if we need to.

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THE COURT: M-hm.

MS. BONORA: And, Sir, none -- obviously those applications did not happen.

THE COURT: M-hm.

MS. BONORA: From April 25th to November 27th there was seven appearances before you. And at least in three of those appearances the Office of the Public Trustee and Guardian addressed production.

THE COURT: M-hm.

MS. BONORA: And yet there is still no application for production before you.

THE COURT: M-hm.

MS. BONORA: And none that we have received.

THE COURT: M-hm.

MS. BONORA: Although, we received a letter, yesterday, from the Office of the Public Trustee and Guardian late in the day. That's -- that has a paragraph that I think is -- should be concerning to all of us, which says, (as read)

... without prejudice to the Office of the Public Trustees and Guardians fundamental objections to the current transfer issue proceeding the Office of the Public Trustee and Guardian has taken the position that further protection is required.

And then proceeded to say that the reason there was no application was because Catherine Twinn filed the supplemental affidavit of documents and they wanted to see what was in there. But then the Office of the Public Trustee and Guardian goes on to say that there are documents they need. These documents would not have been in Catherine Twinn's possession and they would have been at least in Sawridge First Nation's possession.

THE COURT: Yes.

MS. BONORA: And, so, it is not necessarily my practice to try

1 and address bad behaviour in litigation, but I say this because I feel now we are off of
2 January 16th, there is no way to achieve that. Mr. Molstad's going to address a new
3 schedule for us. And that we want the application to be peremptory on the Office of the
4 Public Trustee and Guardian because we don't think we're ever going to proceed unless it
5 is peremptory on them. I think your direction was very clear that the applications for
6 production should have happened between now and Christmas. And - and they were limited
7 because your direction was already that no production was required. And so then we
8 unfortunately I don't think can achieve it and we of course want the procedural fairness.
9 But the problem is now because we don't have an application and it hasn't been made and
10 now it's Christmas and all of those delays happened we won't be able to get to January 16.

11
12 THE COURT: Yes.

13
14 MS. BONORA: Catherine Twinn for -- filed a supplementary
15 affidavit that was produced. Ms. Os -- there's a lot of video, Ms. Osualdini has offered to
16 direct us to the parts of the video that are relevant. So I think Catherine Twinn has been an
17 active participant and has followed your direction. But we do think that we need some
18 direction from you now after seven appearances --

19
20 THE COURT: M-hm.

21
22 MS. BONORA: -- on this issue.

23
24 THE COURT: M-hm.

25
26 MS. BONORA: To get to a conclusion.

27
28 THE COURT: M-hm.

29
30 MS. BONORA: So, I - I am going to end my submissions there
31 and allow Mr. Molstad to put forward a schedule that I think is generally in agreement
32 among the parties.

33
34 THE COURT: Okay.

35
36 MR. MOLSTAD: I am not sure my friends have agreed to the
37 schedule but I advised them of it this morning --

38
39 THE COURT: Okay.

40
41 MR. MOLSTAD: -- myself and Ms. Bonora have agreed to it and I

1 believe that it's going to be satisfactory to them. But we're advised that we will be served
2 today with an application for production. We haven't seen it, so we don't know what the
3 scope is or what will be requested. So the time line is that we be served today with the
4 Public Trustee's application for production and as I understand it her submission is going
5 to be served today as well. Am I correct, in that understanding?

6
7 MR. FAULDS: No it won't be served today but it will be served
8 as soon as possible.
9

10 MR. MOLSTAD: Oh, okay. Well then we should set a day for the
11 service of the submission. Is it - is it completed or is it?
12

13 **Submissions by Mr. Faulds**
14

15 MR. FAULDS: No it's not. And, My Lord, may I perhaps just
16 before Mr. Molstad presents his proposed schedule if I might just provide a little bit of
17 additional background or insight into what's - what's occurred.
18

19 THE COURT: Sure. Mr. Molstad we will give you plenty of
20 opportunity to say whatever you'd like.
21

22 MR. MOLSTAD: Thank you, Sir.
23

24 MR. FAULDS: Thank you, I'd --
25

26 THE COURT: Mr. Faulds, it seem I should know what the issue
27 is rather than letting you give the schedule without me knowing what the issue is.
28

29 MR. MOLSTAD: Yeah. True.
30

31 MR. FAULDS: Just - just by way of time lines.
32

33 THE COURT: Yes.
34

35 MR. FAULDS: On November the 27th --
36

37 THE COURT: Yes.
38

39 MR. FAULDS: Your Lordship clarified -- made a further
40 clarification which included the comments which Ms. Bonora said --
41

1 THE COURT: M-hm.

2
3 MR. FAULDS: -- inviting any party to --

4
5 THE COURT: Yes.

6
7 MR. FAULDS: -- seek further production if they considered it
8 essential, and to make any suggestions regarding process.

9
10 On December 3rd we received instructions to proceed with such an application. On
11 December 6th we received advice that Catherine Twinn was filing a supplementary
12 affidavit of records, the contents of which at that point we had no idea what it is about. As
13 a result of that, on December 6th Ms. Hutchison advised all of the parties that we wished
14 to review what Ms. Twinn was producing before we proceeded with an application. On
15 December the 16th, that is this Monday, we received the actual production of the
16 documents from - from Ms. Twinn and have had some opportunity to review it but certainly
17 not a full opportunity to review its contents.

18
19 On -- yesterday we issued a letter to all of the parties advising that having reviewed --
20 having conducted at least a preliminary review it appeared that there were additional
21 materials that we would be seeking.

22
23 THE COURT: M-hm.

24
25 MR. FAULDS: And we ser -- and we made two alternative
26 suggestions. We suggested that if the parties were willing to voluntarily produce those
27 materials that we might then take all of the steps necessary to conduct any questioning in
28 relation to those materials before the 10th of January and that that would permit the
29 application to proceed on January the 16th.

30
31 THE COURT: M-hm.

32
33 MR. FAULDS: If on the other hand the production was contested
34 then it was our view that - that the matter would have to be adjourned somewhat, we'd
35 anticipated perhaps we could use January 16th to argue about the production issues and
36 proceed from there. My friend's schedule doesn't - doesn't take advantage of - of that. But
37 that's - that - that's the - the factual background. I - I --

38
39 THE COURT: But what - what are we looking for? Like what -
40 - how -- what --

41

- 1 MR. FAULDS: We're - we're looking for things that directly
2 relate to assertions in the - in the Sawridge First Nation's submission.
3
- 4 THE COURT: M-hm.
5
- 6 MR. FAULDS: On which there has been no production, or for
7 which there - there is no current --
8
- 9 THE COURT: M-hm.
10
- 11 MR. FAULDS: -- evidentiary support.
12
- 13 THE COURT: M-hm.
14
- 15 MR. FAULDS: For example, we are looking for documents
16 relating to the status of the 1982 Trust. You may recall that Mr. Bujold the corporate
17 representative of the Sawridge Trustees gave evidence in response to a question from Mr.
18 Molstad in questioning in the run up to the August 2016 order that the 1982 Trust did not
19 exist.
20
- 21 THE COURT: M-hm.
22
- 23 MR. FAULDS: Mr. Molstad contests that in his submissions --
24
- 25 THE COURT: M-hm.
26
- 27 MR. FAULDS: But we have no records that - that would allow
28 that - that assertion to be assessed.
29
- 30 THE COURT: So who -- to that -- and I apologize if - if I don't
31 understand the complexities as well as I should at the moment. But to that I say so what.
32 The trust either exists or it doesn't right now. How does that effect the interpretation of
33 Justice Thomas' order which is really what we are looking for right now? How - how -
34 how does that?
35
- 36 MR. FAULDS: Well, I suppose that if the trust ceased to exist on
37 -- in 1985 are we understand --
38
- 39 THE COURT: Yes.
40
- 41 MR. FAULDS: -- to be the case. Any suggestion that the assets

1 are held for the 1982 Trust is moot. There is --

2
3 THE COURT: The beneficiaries didn't go anywhere. They were
4 still there. They are still there today. The '82 beneficiaries. So the assets can be transferred
5 to 1985, and held for the '85 beneficiaries or held for someone else. That - that is one of
6 the issues that has to be assessed in the context of what Justice Thomas meant when he
7 gave his order.

8
9 MR. FAULDS: Right. And --

10
11 THE COURT: So how -- whether the trust exists or not why -
12 why - why --

13
14 MR. FAULDS: Well perhaps again our -- we have appeared
15 before Your Lordship a number of times and - and - and - and I think our struggle with the
16 issue has been apparent. Our understanding is that Your Lordship intends to address what
17 the legal and factual situation was immediately prior to the granting of the asset transfer
18 ordered by Justice Thomas.

19
20 THE COURT: Right. I think I have to do that because we have
21 to know what the landscape was when Justice Thomas set about to grant the order. Was -
22 was he doing nothing more than saying everything was done properly in 1985 and therefore
23 I am just confirming that everything was done appropriately, so therefore I am confirming
24 the asset transfer, or was he saying, well no things were not quite done properly but I am
25 going to get an order to clean up some of the errors that were made. And if it is that scenario
26 was he intending to clean it up completely by saying the beneficial ownership was moved
27 to the 1985 beneficiary. So, I mean I -- it's -- I don't think I could try to interrupt Justice
28 Thomas' order without having a - a clear understanding of what in fact and in law the status
29 was immediately prior to him granting the order. That - that is what I intended to convey
30 and that is my plan for trying to deal with this, and I will be guided by your submission.

31
32 MR. FAULDS: And in -- and on that basis the - the Public
33 Trustee is of the view that the landscape relevant to that determination would include
34 whether or not the 1982 Trust continued to exist after the transfer occurred.

35
36 THE COURT: Okay. I am -- you - you could be right. I - I can't
37 see it right now. But you -- you know I haven't given it any thought until just this minute,
38 so you - you can --

39
40 MR. FAULDS: Sure. That -- sure that - that - that's --

41

1 THE COURT: -- persuade me of that.
2
3 MR. FAULDS: -- that's - that's one instance --
4
5 THE COURT: Okay.
6
7 MR. FAULDS: -- of the kind of thing.
8
9 THE COURT: Yes.
10
11 MR. FAULDS: Another instance there is reference in the -- in -
12 in our submissions that were filed initially relating to the fact that the 1985 Trust contained
13 assets which did not originate in the 1982 Trust.
14
15 THE COURT: Okay.
16
17 MR. FAULDS: And one of the examples of that was a
18 \$12,000,000 --
19
20 THE COURT: Debenture.
21
22 MR. FAULDS: -- debenture.
23
24 THE COURT: Yes. No, I see that.
25
26 MR. FAULDS: And in the - the Sawridge First Nation's
27 submissions there are submissions to the effect that they understand that debenture is of
28 limited value. If it - it seems to me that whether or not a 1985 Trust has \$12,000,000 in it
29 but originates from somewhere else or \$10 in it that originates from somewhere else could
30 be of significance.
31
32 THE COURT: I am not seeing how, but the --
33
34 MR. FAULDS: Well if the na --
35
36 THE COURT: Could be - could be right.
37
38 MR. FAULDS: If there are assets in the 1985 Trust.
39
40 THE COURT: Yes.
41

1 MR. FAULDS: Which did not originate in the '82 transfer --
2
3 THE COURT: Yes.
4
5 MR. FAULDS: And therefore were not affected by Justice
6 Thomas' order they're simply assets placed in that trust.
7
8 THE COURT: Sure.
9
10 MR. FAULDS: Then we have to still deal with a 1985 Trust.
11
12 THE COURT: All right. Well sure, whatever, yes --
13
14 MR. FAULDS: And - and - and that would --
15
16 THE COURT: Sure. Okay --
17
18 MR. FAULDS: -- involve the -- you know the --
19
20 THE COURT: -- so you want some - you want some other
21 materials, okay. So what are we going to do?
22
23 MR. FAULDS: So -- well that's the - that's the background, My
24 Lord.
25
26 THE COURT: Okay.
27
28 MR. FAULDS: And - and as I say, Mr. Molstad has the --
29
30 THE COURT: Yes. Yes.
31
32 MR. FAULDS: -- schedule which he was going to now speak to.
33
34 THE COURT: Yes.
35
36 MR. FAULDS: And I just wanted to -- I wanted - I wanted to
37 respond to the suggestions that the OPGT was acting in a dilatory fashion and was acting
38 improperly which --
39
40 THE COURT: Yes.
41

1 MR. FAULDS: -- obviously --

2
3 THE COURT: True.

4
5 MR. FAULDS: We - we - we can't accept.

6
7 THE COURT: Yes, I am not - I am not pointing fingers at
8 anyone and I am sure Ms. Bonora was not trying to point fingers at anyone. But at - at the
9 end of the day, you know, it is time to - to make some real progress on this. And, you know,
10 when we start talking about document production in most lawsuits the concept of
11 diminishing returns comes into play. And you can - you can spend forever chasing down
12 every scrap of paper and the last few pieces of paper that you manage to get generally have
13 next to no impact on the outcome. And so at some point you have to say to yourself, you
14 know, when - when do we have enough of a factual background in place so that --
15 (UNREPORTABLE SOUND) excuse me. Excuse me. So that we can come to a proper
16 determination. And that is really what I am driving at. And that is why I opened the window
17 to permit any of the parties to - to come forward and if there is something that will be
18 helpful, I want it. Trust me, I want it. But I don't want to be in a situation for the next year
19 we are chasing down that last scrap of paper that may have totally marginal value and isn't
20 going to impact my decision in any event.

21
22 MR. FAULDS: And - and --

23
24 THE COURT: Because ultimately the - the facts -- the raw facts
25 are pretty well established in terms of when the trusts were created and the purpose of the
26 trusts were created and what the flow was. It is -- what - what - what arises from those
27 series of transactions that was presented to Justice Thomas when he made his decision.
28 That - that is --

29
30 MR. FAULDS: Yes. And --

31
32 THE COURT: -- that is what - that is what I am after but --

33
34 MR. FAULDS: I -- and - and My Lord, I -- I hope the OPGT is
35 not giving the impression that it is chasing the last scraps of paper. This is an issue that is
36 the legal effect of the asset of the transfer. This is ground which was not plowed before
37 Justice Thomas.

38
39 THE COURT: M-hm.

40
41 MR. FAULDS: This is ground which is OPGT was beginning to

1 explore before the asset transfer was - was approved.
2
3 THE COURT: M-hm.
4
5 MR. FAULDS: And which the OPGT then considered need not
6 be explored at that time --
7
8 THE COURT: M-hm.
9
10 MR. FAULDS: -- because the asset transfer order appeared to
11 resolve matters. So from a perspective --
12
13 THE COURT: Well it may well have -- it may well have Mr.
14 Faulds that is one of the options.
15
16 MR. FAULDS: Yeah.
17
18 THE COURT: That this may be totally over and if so we will -
19 we will - we will move on in that direction.
20
21 MR. FAULDS: So with -- so -- and - and we just -- then the
22 OPGT just wants to make it clear we're dealing with substantial interest of minors who the
23 OPGT was appointed by the Court to --
24
25 THE COURT: I am --
26
27 MR. FAULDS: -- to protect them --
28
29 THE COURT: I am totally painfully aware of the consequences
30 of any decision that I make. I am totally aware of that and it will have an impact on many,
31 many lives. But - but --
32
33 MR. FAULDS: So --
34
35 THE COURT: -- the reality is I want to come to the right
36 decision. Okay.
37
38 MR. FAULDS: Yes. And - and the - the OPGT of course wants
39 to assist in that process.
40
41 THE COURT: Good. Thank you.

1
2 MS. OSUALDINI: My Lord, if I might speak as well --

3
4 THE COURT: Sure.

5
6 MS. OSUALDINI: -- about an issue that has arisen this morning that
7 may require some scheduling.

8
9 THE COURT: Does this - does this fit into Mr. Molstad's
10 schedule or --

11
12 MS. OSUALDINI: It does. It's an issue raised by Mr. Molstad.

13
14 THE COURT: Oh okay.

15
16 MR. MOLSTAD: Perhaps I should speak to it first before you apply
17 to --

18
19 MS. OSUALDINI: Okay. Well I'd like to start because the process
20 was initiated by our office. I'd like to speak to it first, if that pleases the Court.

21
22 THE COURT: Sure.

23
24 **Submissions by Ms. Osualdini**

25
26 MS. OSUALDINI: So as mentioned by Mr. Faulds our client served
27 a supplemental affidavit of records earlier this month and following your directions about
28 the types of issues and the nature of the arguments that you are seeking at the asset transfer
29 application.

30
31 THE COURT: M-hm.

32
33 MS. OSUALDINI: So following that our client re-reviewed her
34 records, as the Court will know she's a former trustee, she was a trustee for 30 - 30 some
35 odd years in trust.

36
37 THE COURT: Yes.

38
39 MS. OSUALDINI: We reviewed her records and located some
40 records that came -- unadvised came into her possession as a trustee and were part of the
41 Trustee's records. Those records speak to the 1985 asset transfer, it speaks to the source --

1 in part speaks to the source of funding for the assets that - that were transferred to 1985
2 Trust. And it also speaks to beneficial distributions being made from the 1985 Trust. All
3 of which when we reviewed believed were relevant to the issues before the Court.
4

5 THE COURT: Okay.

6
7 MS. OSUALDINI: And directly respond to some of the issues.
8 Particularly issues being raised by the intervenor. When we first advised the parties that
9 were intending on circulating a supplemental affidavit of records the trustee's requested
10 that that they had the opportunity to review it first as they were concerned about other
11 privilege documents were in that doc -- were in our affidavit of records, which we did, and
12 subsequently it was resolved by saying, go ahead and distribute the records to the Office
13 of the Public Guardian and Trustee but we reserve our rights to say that they are privileged.
14

15 This morning Mr. Molstad brought to my attention the *Code of Conduct* for lawyers, this
16 is the first time this was brought to my attention. With a suggestion that Mr. Molstad's
17 client believes those are privileged records belonging to his client. So at this point now that
18 the code has been brought to our attention we are going to require Court direction on how
19 to resolve this. It's my understanding that these are not privileged records because they're
20 coming from the Trustee records. If Mr -- if the documents originate with Mr. Molstad's
21 clients it would appear to me that the privilege is waived when they were provided to
22 another party.
23

24 THE COURT: M-hm.

25
26 MS. OSUALDINI: But it appears - it appears that a dispute is
27 wanting to be asserted about these records and certainly our office does not want to be
28 violation of the code.
29

30 THE COURT: M-hm.

31
32 MS. OSUALDINI: So we're going to require direction on what we
33 are to do.
34

35 THE COURT: Okay.

36
37 MR. MOLSTAD: Do I get a chance now?
38

39 THE COURT: So, you are - you are on, Mr. Molstad.
40

41 **Submissions by Mr. Molstad**

1
2 MR. MOLSTAD: Thank you, Sir. First of all I just want to speak to
3 the schedule that -- and proposal, and the reason that I proposed today for the filing of the
4 Public Trustee's application and also for the submission to be filed is that yesterday the
5 Public Trustee's counsel sent us a letter with a proposed schedule that had as item 1 the
6 December 20, 2019 OPGT production application and submission file. So I assumed that
7 they were read to go today but if they're not tell us when.
8

9 MR. FAULDS: My Lord, I would suggest having regard to the
10 schedule that Mr. Molstad is proposing now I would suggest the 2nd of January, which is
11 technically free - free working days for him.
12

13 THE COURT: So - so you are planning that - that I would hear
14 the application?
15

16 MR. FAULDS: We're planning that you -- that Mr. Molstad -- I
17 don't think that's offensive to the schedule that Mr. Molstad is going to suggest --
18

19 MR. MOLSTAD: My schedule is based upon the letter that they
20 sent me yesterday and that says December 20th Public Trustee files application and
21 submission. If they want a later date, I think that's what my friend is saying that they want
22 a later date. We're proposing January 17th to reply to the production and February 5th at
23 2:00 to hear the application before you, Sir, as we're advised that you're available on that
24 date at 2:00.
25

26 THE COURT: Just hold on a minute. Yes, I think I am
27 Edmonton that week. Yes.
28

29 MR. MOLSTAD: And - and May 19th we're advised you're
30 available that full day for the application in relation to the asset transfer.
31

32 THE COURT: Oh just a minute now. I've got a 2019 calendar
33 that is not helping me out. I should have brought my --
34

35 MR. MOLSTAD: We were advised I think was it yesterday by -- or
36 the day before? Very recently.
37

38 THE COURT: May 19th?
39

40 MR. MOLSTAD: May 19th for the full day for the asset transfer
41 issue.

1
2 THE COURT: Yes. I - yes, I think -- okay.
3
4 MR. MOLSTAD: And - and if - if this schedule --
5
6 THE COURT: So the trial coordinators have told you that I am
7 available on that day?
8
9 MR. MOLSTAD: They have. Yes, yeah.
10
11 THE COURT: Okay. Okay.
12
13 MR. MOLSTAD: And if these dates are set we would ask that they
14 be set based on your direction and that they be set peremptory in relation to the parties
15 including the Public Trustee.
16
17 And I just want to say in terms of our past experience the Sawridge First Nation has been
18 the respondent in an application for production by the Public Trustee previously that we
19 say was devoid of merit and which was dismissed in terms of its application.
20
21 THE COURT: Yes.
22
23 MR. MOLSTAD: And you don't have to take my word for it you
24 can read Mr. Justice Thomas' decisions in that regard. In that case we asked for cost against
25 the Public Trustee on the basis that they not be reimbursed.
26
27 THE COURT: M-hm.
28
29 MR. MOLSTAD: And the learned justice reserved but he
30 ultimately decided that they would be. We want them to be on notice that if -- we haven't
31 seen this application.
32
33 THE COURT: M-hm.
34
35 MR. MOLSTAD: But if this application is devoid of merit we will
36 on behalf the Nation seek instructions to seek costs as against the Public Trustee on the
37 basis that they not be reimbursed by the trust, and I want them to be aware of that.
38
39 THE COURT: Okay.
40
41 MR. MOLSTAD: Secondly, Sir, the documents received from Ms.

1 Osualdini's office on December 16, we've asked her to advise us how and in what capacity
2 her client came into possession and we heard today I think from her that they were part of
3 the trust documents. Keep in mind that her client has served in different capacities and at
4 times she has acted as legal counsel on behalf of the Sawridge First Nation as well as having
5 served as a trustee. And, we've also asked for particulars of the redacted documents
6 because documents had been redacted with no information as to the reason --
7

8 THE COURT: M-hm.
9

10 MR. MOLSTAD: -- that they have been redacted. I understand that
11 she'll be providing particulars of that to Ms. Bonora and providing her with copies of what
12 has been redacted and they can then decide whether we should see it. But based upon what
13 we seen so far the documents are clearly solicitor client privileged in any respect, some are
14 not, but most are.
15

16 THE COURT: M-hm.
17

18 MR. MOLSTAD: And we say, Sir, we don't have to make an
19 application in relation to these documents. They're in their possession and we can simply
20 make a demand pursuant to 7.2-13 of the *Code of Conduct*. That these privileged
21 documents are in their possession and that they be returned to our offices forthwith and
22 that's what we intend to do in relation to this matter.
23

24 So if you - if you agree with the schedule, Sir, and I'm not sure what day -- they told us
25 yesterday that they would be filing their submission today and I believe now they want to
26 change it to January 2nd, is that correct?
27

28 MR. FAULDS: That's my suggestion, My Lord. Where -- our --
29 just to be clear, our application and supporting affidavit are ready to be filed.
30

31 THE COURT: Okay.
32

33 MR. FAULDS: If - if the parties wish I can circulate them now
34 with my undertaking to file them and provide them with a copy --
35

36 THE COURT: Sure.
37

38 MR. FAULDS: -- that was filed with a stamp page.
39

40 THE COURT: Sure.
41

1 MR. MOLSTAD: Today is fine, I don't -- we don't need them now.
2 But you know --

3
4 THE COURT: Okay.

5
6 MR. MOLSTAD: -- we'd like to get the submission in --

7
8 THE COURT: Sure. Okay.

9
10 MR. MOLSTAD: In a timely way.

11
12 THE COURT: What we are going to do first is we are just going
13 to take a 2 minute break. I want to go get my calendar because I know that you may have
14 spoken with a trial coordinator but I don't want to start making firm dates.

15
16 MR. MOLSTAD: All right. Fine, Sir.

17
18 THE COURT: And then have --

19
20 MR. MOLSTAD: Yeah.

21
22 THE COURT: -- have to get back to you to try to get a
23 reasonable work -- so I will be back in just --

24
25 MR. MOLSTAD: Yeah.

26
27 (ADJOURNMENT)

28
29 **Discussion**

30
31 THE COURT: Please be seated. Sorry Mr. Molstad you were in
32 the middle of your submissions when I interrupted you.

33
34 MR. MOLSTAD: Oh no I - I - I completed my --

35
36 THE COURT: Okay.

37
38 MR. MOLSTAD: I - I am concerned about procedural fairness.

39
40 THE COURT: Sure.

41

1 MR. MOLSTAD: And that's why I proposed that, Sir.

2
3 MS. BONORA: Sir, just -- Mr. Molstad's schedule I think just
4 misses a few dates that I think we should also set so that we are sure to get to February, at
5 least to February 5th. And, so our proposal is that all questioning on -- in respect of the
6 production be done by January the 17th, and then briefs be filed by January 24th, and the
7 replies by January 31st. My friends had offered to file a brief with their application and
8 we're suggesting that's unnecessary that one brief by the OPGT would be sufficient
9 especially, you know, given the costs involved in a brief we would prefer they do one as
10 opposed to two.

11
12 THE COURT: M-hm.

13
14 MS. BONORA: Given that we have to pay those costs. And we
15 think that's more efficient in any event. And so, if we could just set those dates for
16 questioning and briefs, as well this morning, as directed by the Court, so that there is no
17 chance that we will also lose our February 5th date. I asked my friends if we could set those
18 dates, they had some difficulties, so I'll allow them to respond to those dates.

19
20 MR. FAULDS: My Lord, the - the -- in general terms, that sounds
21 reasonable, and I thank my friend for the suggestion that the OPGT just file a - a - a single
22 brief --

23
24 THE COURT: Yes.

25
26 MR. FAULDS: -- once whatever questioning and so forth has -
27 has conducted and with - with same right of replies everybody else has. They -- one of the
28 questions that now arises in the relation to the January 17th dates suggested by my friend
29 for the conclusion of questioning is there has been this preliminary privilege issue that has
30 been raised which may affect the ability to conduct the questioning. And so it - it would
31 seem that that issue requires resolution in order that we -- in - in order that the questioning
32 can occur. And that the OPGT is not directly concerned in that --

33
34 THE COURT: M-hm.

35
36 MR. FAULDS: -- appears to be an issue between the Saw --
37 primarily between the Sawridge First Nation and Ms. Twinn. But that -- we just flag that
38 but that's one issue --

39
40 THE COURT: So you - you say February 5th is potentially in
41 jeopardy?

1
2 MR. FAULDS: Well I am - I am just -- I am just identifying that
3 as - as an issue that's been raised --
4

5 THE COURT: Yes.
6

7 MR. FAULDS: -- because of that - of that controversy, yeah.
8

9 MR. MOLSTAD: The February 5th date was a date that we simply
10 proposed that Sawridge would file a reply. The dates --
11

12 MS. BONORA: No, no.
13

14 THE COURT: No.
15

16 MS. BONORA: That would be the date for the hearing.
17

18 MR. FAULDS: No, that was the hearing.
19

20 MR. MOLSTAD: Oh sorry.
21

22 MS. BONORA: Yes.
23

24 MR. MOLSTAD: Pardon me, the hearing of the -- oh, sure, yeah,
25 you're right, sorry.
26

27 MS. BONORA: Sir, I don't think that that's a very extensive
28 application. You had offered to do a production application either at 8:30 or noon or at 4:30
29 and perhaps sometime before January 7 -- before let's see perhaps January 12th we would
30 allow those parties to bring an application before you to deal with the privileged
31 documents, if that's in fact necessary. So if we could deal with that before January 12th.
32 The original schedule by the OPGT certainly had a number of things happening before
33 January 16th and so I think that could occur, if you would indulge them in an early morning
34 application on that to preserve the February 5th date.
35

36 MS. OSUALDINI: And, My Lord, just in terms of the privilege
37 issue, it appears that part of the privilege issue is - is disseminating from where these
38 records came from. Did they come from the Trustee records or did they come from the
39 SFN's records. So we're also going to need disclosure and affidavits from the parties that
40 speak to those issues because my client's going to say that they come from the Trustee
41 records, and I understand the Trustees are saying that they don't all from from the records,

1 so that's going to be a very relevant determination for you to have to make. It's -- the
2 privilege application is not -- I think as - as simple and able to be heard on a weeks' notice
3 over Christmas as - as is being suggested.
4

5 THE COURT: Well, there is no application on privilege at the
6 moment. Mr. Molstad's position is either you will get a letter this afternoon demanding the
7 return of the documents and you will either comply with his demand or you won't, and if
8 you don't presumably you better do something about it. So it looks to me like the onus is
9 on you to do something and unless I have misunderstood the landscape.
10

11 MR. MOLSTAD: Yes, that's - that's the position he takes, Sir.
12

13 THE COURT: So --
14

15 MS. OSUALDINI: Well it appears to me - it appears to me that the
16 rule -- I'm sorry My Lord, this was only brought to my attention this morning so I haven't
17 had time to properly prepare, but it doesn't - it doesn't appear that there is a -- the rule is
18 clear about whose obligation it is to - to bring the application. Because we - we very clearly
19 advised the parties that our understanding is these aren't privileged records, and I would
20 say if Mr. Molstad believes otherwise there is an onus upon him to bring an application to
21 assert his privilege.
22

23 THE COURT: Well, I guess we better have an application to
24 determine who has the onus to bring the application. You know, I -- at - at some point - at
25 some point all the money in this trust is going to be gone paying lawyers, to be totally
26 honest, and there is going to be nothing left for the beneficiaries no matter who they are if
27 - if keep going around in circles like this. So, what are we going to do about the schedule
28 then?
29

30 MS. BONORA: Sir, could we just say by February -- sorry
31 January the 12th their applications will be made with respect to privilege and the parties
32 can determine who has to bring it. We won't decide today whose onus it is. The parties
33 will decide obviously whose obligation that is. And that I think we also want to say that all
34 applications on production by any party have to be brought. The 12th is a Sunday, Sir, so
35 the 13th would be the date that I am proposing. And --
36

37 THE COURT: So -- and then we would have to try to find some
38 time to hear that application.
39

40 MS. BONORA: Yes, I am suggesting that it has to be brought
41 before that date.

1
2 THE COURT: It has to be brought before -- the application has
3 to be brought before the 13th?
4

5 MS. BONORA: Yes.
6

7 THE COURT: Okay. Is that -- and -- yes, you could try to find
8 some time to do that if you like but why --
9

10 MR. FAULDS: My Lord, I wonder if we might at minimum snag
11 the dates that are available which appear to be available February the 15th and March the
12 19th. So --
13

14 MR. MOLSTAD: February the 5th.
15

16 THE COURT: February the 5th.
17

18 MR. FAULDS: February the 5th, I am sorry. Yes February the
19 5th and - and May the 19th.
20

21 THE COURT: Yes. Well I can - I can tell you that when the trial
22 coordinator tells you that those days are available that means that I am in Edmonton on
23 those days and it doesn't mean to say I am doing nothing else that day, and you know, if
24 you want an opportunity on a case like this to have a meaningful motion, you know, I
25 would like an opportunity to read the materials before I steer -- start hearing you. And so
26 when I look at both February 5th and May 19th, when I look at what is going in the days
27 and weeks leading up to that, you know it -- it is -- now that is not your problem that is -
28 that is my problem. So, whatever we will - we will books those days and I will do whatever
29 so --
30

31 MR. FAULDS: Yes I -- it just --
32

33 THE COURT: But it - but it -- but what I am saying is that if
34 you know this - this is not something that I am going to be able to sit and at the end of
35 hearing you say, yeah, yeah sure you win, go ahead, go ahead and do whatever you want.
36 But it - it takes a little energy to - to properly review this stuff. And -- whatever.
37

38 MR. FAULDS: And - and we're - we're aware that this was
39 complex and the - and the parties -- the parties experience some of what Your Lordship is
40 --
41

1 THE COURT: M-hm. Right.
2
3 MR. FAULDS: -- referring to as well. Given the nature of these
4 issues and the --
5
6 THE COURT: Yes.
7
8 MR. FAULDS: -- that have arisen.
9
10 THE COURT: This is -- what I am saying this isn't something
11 you can do off the corner of your desk.
12
13 MR. FAULDS: Yes, yes I -- we --
14
15 THE COURT: Which - which is what most case managements
16 are. Getting together and saying, yes you can bring your notion on 2 days from today or
17 whatever it is -- these -- this is different?
18
19 MR. FAULDS: Yes. Yes. That has -- that has not been the history
20 of this proceeding since the outset, I think that is fair to say.
21
22 THE COURT: Yes. Okay.
23
24 MR. FAULDS: But if we had -- it seems we are looking for three
25 - three determinations one is a determination of this privilege issue; two, is a determination
26 of the production issues that will follow that; and then three, is the actual asset transfer
27 order and those - those events aren't -- now - now it's clear those aren't going to have to
28 be determined and --
29
30 THE COURT: M-hm.
31
32 MR. FAULDS: And so whatever dates that the Court is able to
33 provide that are suitable.
34
35 MS. OSUALDINI: And, My Lord, I just might stand up at this point.
36
37 THE COURT: Yes.
38
39 MS. OSUALDINI: I have advised my friends that the May 19th date
40 isn't available in my calendar, it requires some cancellations, and I was hoping there might
41 be another day to -- for the actual asset transfer application.

1
2 MS. BONORA: Sir, it is difficult to find full days if we don't
3 chose May 19th we may be off to the end of the year. Certainly into the fall. We think the
4 parties have to make some adjustments in order to have this proceed and so we're asking
5 you to set May 19th as a peremptory application date. We also -- in terms of the actual
6 scheduling you had also made reference to the ability of parties to bring an application for
7 procedural fairness.
8

9 THE COURT: M-hm.
10

11 MS. BONORA: And, so I wonder if we could just have an all-
12 encompassing January 2nd, 2020, every application that is going to be brought will in fact
13 be brought by that day. And at least filed and served because we - we can't have the position
14 where you know we deal with production --
15

16 THE COURT: M-hm.
17

18 MS. BONORA: And then suddenly we are back to square one on
19 the - on the issue of fairness. And so, I wonder if we could have that as an all-encompassing
20 day. And so then on the days we have our -- with my proposal, subject to my friends'
21 submissions January 2nd, January 12th for privileged -- 13th I'm sorry. And then January
22 17 for questioning, first briefs, primary briefs on the 24th, reply briefs on the 31st and then
23 the production application on February 5th and the asset transfer issue on May 9th, with
24 those dates being peremptory. Sorry May 19th -- ha --
25

26 THE COURT: So the only issue we have is that one of the
27 counsel isn't available the 19th and is that a hard --
28

29 MS. OSUALDINI: Well I can make some calculations but I was
30 hopeful that there might be a different day.
31

32 THE COURT: Well, I am sure there is a different day but I mean
33 try - trying to - trying - trying to find a day when this array of people and myself are
34 available is going to be tough. That is presumably the reason we are off to May 19th. Is
35 there anything before that Mr. Molstad? Like what's the --
36

37 MR. MOLSTAD: We weren't advised of any dates before that, Sir.
38

39 MS. BONORA: I think that was --
40

41 MR. SESTITO: Yeah, no, those --

1
2 MS. BONORA: Those were dates the Trustees were --

3
4 MR. SESTITO: -- those were the only -- May 19th we're advised
5 was the only full day on your calendar that has been set so far.

6
7 MS. HUTCHISON: And, My Lord, we just spoke to Ms. Hinz
8 yesterday so that's pretty current information I think about your calendar.

9
10 THE COURT: Okay. Well I - I -- you know, I don't know what
11 to say. I -- I mean I - I gather it is the end of the fall. The fall, my time in the fall at the
12 moment is free. Because the fall schedule hasn't come out, but the fall is a long way away.
13 You know for something that has been kicking around for 9 or 10 months already going to
14 the fall would be problematic for me. So, like it -- are -- is this a major imposition to you
15 or --

16
17 MS. OSUALDINI: I mean I'll make my schedule work I was just
18 hoping that I would -- there might be some other date available.

19
20 THE COURT: Well, it - it doesn't -- it doesn't look like that is
21 likely to me. So I apologize if it is problematic for your personal schedule, and I hate to do
22 that to you but I am not thinking there is much alternative here unless we put it off into the
23 time horizon that is totally unsatisfactory.

24
25 MS. OSUALDINI: Okay.

26
27 THE COURT: Okay.

28
29 MR. FAULDS: My Lord, Ms. Bonora proposed a schedule
30 which -- well it's a very tight time line and which - which doesn't necessarily resolve the
31 concern that we identified, but the privilege issue may not actually be resolved before the
32 deadline for conducting questioning on the documents. And so if -- I - I don't know if - if
33 this is feasible but I mean if February the 5th which we know is available were the date to
34 resolve the - resolve the privilege issue, the question then would be is there some dates say
35 within the - the next month, say you know by early March when we could address the
36 production issue before Your Lordship and then that -- and then we have March the 19th
37 for the actual --

38
39 THE COURT: May - May the 19th.

40
41 MR. FAULDS: Yeah -- or May, I am sorry, I keep on saying

1 March, yeah, May 19th for the actual hearing if -- that would seem to --

2
3 THE COURT: Well we have the whole day booked on the 16th
4 of January. That - that time is now all --

5
6 MR. FAULDS: Of course, yes. Then perhaps we could do the
7 privilege subject to - to my friends if we could deal with the privilege issue on the 16th,
8 deal with the production issues on the 5th. Right, and then - and then we would be looking
9 at - at -- in terms of the -- what's - what's - what's produced is clarified then you know I
10 am sure the parties can work out a schedule for any final examinations and solutions in --
11 to work towards the May 19th date. I wouldn't imagine that's a problem.

12
13 MS. BONORA: Sir, we - we - in fact do find that problematic. We
14 - we though there was a clear direction that the app -- the production application should be
15 filed.

16
17 THE COURT: M-hm. Yes.

18
19 MS. BONORA: At least filed by today.

20
21 THE COURT: Sure.

22
23 MS. BONORA: And it hasn't been.

24
25 MR. FAULDS: But it will be.

26
27 MS. BONORA: And so, we I think need dates directed by the
28 Court.

29
30 THE COURT: M-hm.

31
32 MS. BONORA: So that we don't have another delay and another
33 postponement that puts us into the fall.

34
35 THE COURT: M-hm.

36
37 MS. BONORA: And so, my new proposal is then, Sir, is that
38 privilege will be deal with by -- on the January 16th date, and then that just puts us into
39 some tighter timelines, questioning by the 22nd, primary briefs by the 28th, replies by the
40 31st. And the Trustees then are taking the smallest amount of time in getting their reply
41 ready for -- in the 4 day period. So that then we can for sure get to the February 5th by

1 giving you still only 5 days to read our reply briefs.

2
3 MS. HUTCHISON: My Lord, just one comment. At the moment the
4 schedule we're discussing doesn't allow for questioning after the production application is
5 decided, which sort of presupposes there will be no further production and that's a bit
6 problematic if there is -- if there is further production it's quite likely that there will be
7 questioning on it because we will never have seen those documents before. And there will
8 only be production of them if they're relevant and material to the asset transfer issue. And
9 it also raises the question, My Lord, about the appropriateness of some of these dates being
10 peremptory. I think you are hearing that there are a lot of pieces -- moving parts at the
11 moment. I ought -- I am hearing all counsel --

12
13 THE COURT: Yes I am - I am - I am hearing a lot of that. But I
14 have yet to hear anything that tells me that there is anything material that is going to have
15 any impact on the decision that I am going to make on this -- on this asset transfer issue,
16 like --

17
18 MR. HUTCHISON: With res - with respect, My Lord, that is not
19 something this Court can determine until the application is before it.

20
21 MS. BONORA: Sir, two points, I agree with my friend we have
22 not addressed questioning after production but we have from February 5th to May 19th to
23 deal with that. And if there's a problem we can come back to you. The other thing as
24 presupposes is that there actually be a production application. It was our view that we
25 would try and be cooperative in the list of ques -- documents that are being requested. We
26 think there is probably zero documents that will be produced. Perhaps -- sorry, no, there is
27 a - a couple -- perhaps a couple in respect to the debenture issue because that has never
28 been an issue. The rest -- we will -- I am sure the answer will be they have all be produced.

29
30 We started the transfer issue -- I just wanted to say this, we started the transfer issue on the
31 basis that there were no documents to show that the transfer was done properly. And that's
32 why we needed the Court to confirm it. So that's the whole basis for the transfer issue is
33 that there are no documents. But we will look at our clients -- our - our friend's application.
34 It is our intention to be cooperative. We wrote a letter earlier this month saying please give
35 us a preview we can start to work on it and we had no response to that. And that is - that is
36 fine. But, we also didn't get an application. So that is why we're saying, I think at this point
37 we need the Court's direction on dates so that we can get to at least February -- well January
38 16th and February 5th.

39
40 THE COURT: Okay. Does anyone have any concerns with the
41 dates that have been proposed? The deadlines that have been proposed?

1
2 MR. FAULDS: Could - could Ms. Bonora just please repeat, I --
3 sorry, I wasn't -- didn't make a note of that.
4

5 MS. BONORA: Sir, I would say all applications of any sort
6 addressed in November - November 27th hearing have to be filed - filed and served by
7 January 2nd. That any applications with respect to privilege have to be brought - brought
8 by January 12th and will be heard on January 16th.
9

10 THE COURT: Filed by January 13th?
11

12 MS. BONORA: 13th.
13

14 THE COURT: I keep remembering the 12th is a Sunday.
15

16 THE COURT: I will - I will -- I am so sorry. So any applications
17 with respect to privilege will be brought by January 13th and heard on January 16th. The
18 questioning with respect to the applications that are filed on January 2nd will happen by
19 January 22, the primary briefs on production will have --
20

21 THE COURT: The question - the questioning on those
22 applications will take place by January 22nd?
23

24 MS. BONORA: Correct.
25

26 THE COURT: Yes, I thought you said the applications but --
27 yes.
28

29 MS. BONORA: Sorry the questioning on all the applications that
30 are filed will happen by January 22nd. The primary briefs with respect to the February 5th
31 application will happen on January 28th, the replies to those primary briefs will be filed by
32 January 31st, and the February 5th application -- with respect to the applications filed
33 January 2nd will be peremptory, so that's on February 5th, and the asset transfer issue will
34 happen on May 19th.
35

36 MS. OSUALDINI: My Lord, just so I am understanding so no dates
37 are being set at this point and by court order for the OPGT's questioning of Catherine
38 Twinn or Paul Bujold on the produced documents, is that correct? You are talking about
39 questioning on affidavits filed in support of the applications only, I am just not clear on
40 that.
41

1 MR. SESTITO: I - think our intention is that all questioning that
2 will be required in advance of the February 5th application occur on or before the 22nd of
3 January.
4

5 MS. OSUALDINI: And the February 5th date would be for
6 production -- including the production application is that --
7

8 THE COURT: That is the principle reason for February 5th.
9

10 MS. OSUALDINI: Yes. Okay. And so then after February 5th we're
11 all in agreement that there may be -- if there is a production, even if -- and if the privilege
12 issue allows production of the documents in dispute there will be -- there well -- maybe
13 questioning before May 19th. And we're just not setting dates or deadlines for that?
14

15 MR. SESTITO: That -- we will - we will need to get the results
16 of the February 5th application and it may involve another appearance.
17

18 MS. OSUALDINI: Yes, thank you, Mike. Thanks.
19

20 MS. BONORA: Sorry, Mr. Mol said - said I was confusing and I
21 probably was. The applications are being filed by January the 2nd, all applications. And
22 then the briefs are being filed -- the primary briefs are being filed by anyone who is seeking
23 production on January 28th.
24

25 MR. FAULDS: No, no their brief has to be filed January 2nd.
26

27 MR. MOLSTAD: And the brief -- their application for production
28 is filed today. Their brief in relation to that application is filed January 2nd.
29

30 THE COURT: You -- actually that was the old position we have
31 moved from there.
32

33 MS. BONORA: Yes. I know there is so many dates planned.
34

35 MR. FAULDS: Ms. - Ms. Bonora proposed that we not do - do
36 repetitive briefs --
37

38 THE COURT: To minimize the number of briefs.
39

40 MR. FAULDS: Yeah.
41

1 MR. MOLSTAD: Well, you know, you are going to give me two
2 days to reply? No that is not enough. If you want to file your brief on -- if I am filing a
3 reply to your production application, in which I will likely be perhaps seeking costs against
4 the Public Trustee without indemnification, I - I don't want to be in the position where you
5 have -- we have to -- you're filing on the 28th and we have to file on the - the 31st.
6

7 THE COURT: Yes. That is pretty tight Mr. Mol - or Mr. Faulds.
8

9 MS. BONORA: So we -- we will concede that there needs to be
10 two briefs then, Sir.
11

12 MR. MOLSTAD: Yeah we want their brief now. It was to have
13 been filed and served today.
14

15 THE COURT: When - when can you realistically get that Mr.
16 Faulds?
17

18 MR. FAULDS: Well My Lord --
19

20 THE COURT: Cause Mr. Molstad needs a couple of weeks at
21 least to respond, I think is what he is saying.
22

23 MR. FAULDS: Sure. So -- well then let's - let's -- if I can look
24 at the calendar again. But working backwards from Mr. Molstad would file --
25

26 MR. MOLSTAD: We want it January 2nd that's when we want it.
27

28 THE COURT: Can you do January 2nd?
29

30 MR. FAULDS: As somebody said you can't always get what you
31 want.
32

33 MR. MOLSTAD: Well you told us you would give it to us. It was
34 your date.
35

36 MR. FAULDS: Sure, I am -- sorry I -- My Lord, I had lost my
37 calendar.
38

39 THE COURT: Well January 2nd is a - a Tuesday.
40

41 MR. FAULDS: It's - it's a --

1
2 MR. MOLSTAD: It's a Thursday.
3
4 THE COURT: Or a Thursday, sorry.
5
6 MR. FAULDS: It's a Thursday. It's - it's the day after - after --
7
8 THE COURT: Right. So --
9
10 MR. FAULDS: -- New - New Years and I - I mean I will - I will
11 - I will say, I was attempting to be as cooperative as possible in terms of getting things
12 moving, but given - given the way things have unfolded, I am going to suggest January the
13 7th.
14
15 THE COURT: Mr. Molstad, will that give you enough time to -
16 -
17
18 MR. MOLSTAD: Yes.
19
20 THE COURT: -- respond.
21
22 MR. MOLSTAD: Thank you, Sir.
23
24 THE COURT: January 7th for the Public Trustee to file a brief.
25
26 MS. HUTCHISON: I apologize, My Lord, I -- if counsel could -- when would briefs on the
27 privilege application be made -- filed? I am not clear on our schedule for that.
28
29 MS. OSUALDINI: Yeah, I was just about to say that. Because, My
30 Lord, yeah it appears even in terms of a privilege application that we need to give some
31 structure around evidence because it sounds like evidence is going to be important on
32 sourcing the documents. And my other suggestion too is perhaps today given that we're
33 running under very tight time lines to do things is that we decide today who is bringing the
34 application because we don't really have a lot of time to waste on determining that. And
35 my suggestion given the tight time line is Mr. Molstad apparently knows what - what he
36 believes is privileged in that. So let's have his client bring that application. Put forward
37 what they think is privileged and why and then I can respond to it.
38
39 MR. MOLSTAD: We haven't seen the documents yet, Sir. It's send
40 over a bunch of documents that are redacted in - in many ways so we have to see them all
41 before we can -- they've seen them.

1
2 MS. OSUALDINI: Sir, this can become a much larger issue than
3 what Mr. Molstad's saying because my client has other trustee records so what - what am
4 I to do that I have seen.
5

6 THE COURT: Well if they are privileged you turn them back to
7 where they have come from. If they are not privileged you keep them and use them. Well
8 that is pretty straightforward to me.
9

10 MS. OSUALDINI: But from my perspective these documents
11 weren't privileged because they're trustee records. I don't know how a third party --
12

13 THE COURT: Well then - then - then we would have an issue.
14

15 MS. OSUALDINI: So that is what I am saying --
16

17 THE COURT: Mr. Molstad says there are.
18

19 MS. OSUALDINI: This isn't an easy issue because the records from
20 my understanding is in the Trustee's possession. And now a third party is trying to assert
21 privilege over them which in my perspective would have been waived if - if they were
22 released to a third party. So this - this is not an easy issue. And we would like to have it
23 dealt with properly so there -- this -- there isn't any confusion going forward.
24

25 THE COURT: M-hm.
26

27 MS. OSUALDINI: And it would appear to be an issue from the
28 Trustee's perspective as well because from my understanding they're also in possession of
29 them. So are we to be returning these documents to the SFN. It's also an issue that affects
30 the OPGT because these records are now in their possession as well. So what are we to do
31 in the interim?
32

33 THE COURT: Well, I think what Mr. Molstad has done is to say
34 that quite apart from this litigation you have a professional obligation, a duty to the Law
35 Society to ensure that you are not using privileged documents that may have come into
36 your possession inadvertently or into your client's possession inadvertently and he wants
37 them back. So -- but he hasn't seen them yet so he can't tell you fully what his position is
38 on that. So --
39

40 MS. OSUALDINI: Sure.
41

1 MS. SOPKO: The redacted ones are going to the Trustees?
2
3 MS. OSUALDINI: Yeah.
4
5 MS. SOPKO: Is my understanding.
6
7 MS. OSUALDINI: So they - they have seen the underacted
8 documents.
9
10 MS. SOPKO: The - the redacted ones.
11
12 THE COURT: Right. The unredacted.
13
14 THE COURT: The redacted but not the underacted?
15
16 MS. SOPKO: The redacted.
17
18 MR. MOLSTAD: Yeah, we haven't seen the unredacted
19 documents. We've only been provided with documents that are redacted that have portions
20 of them that have been deleted.
21
22 MS. OSUALDINI: Oh I see - I see what you are saying. You have
23 seen the pages that don't have --
24
25 MR. MOLSTAD: Yes.
26
27 MS. OSUALDINI: I see what you're saying.
28
29 THE COURT: So when can you get those to him?
30
31 MS. OSUALDINI: Today. I can let my paralegal know to send those
32 today.
33
34 THE COURT: Okay. So, Mr. Molstad you will get those
35 documents today and can we at least narrow down the documents that you think are subject
36 to privilege?
37
38 MR. MOLSTAD: I feel that -- I can tell you what we seen so far,
39 the communications between the Sawridge First Nation in house counsel and legal counsel
40 that was acting for the Sawridge First Nation.
41

1 THE COURT: Oh okay.
2
3 MR. MOLSTAD: So it's not really a complicated issue, Sir.
4
5 THE COURT: Okay. Okay. So, the question is how did - how
6 did those documents get into possession of other people. That is --
7
8 MS. OSUALDINI: And - and Sir --
9
10 MR. MOLSTAD: I - I don't - I don't know that Sir. One of the
11 problems we have too, Sir, with the First Nation is that they closed down their offices for
12 approximately 2 weeks over the Christmas period, so it makes it difficult to communicate
13 with them.
14
15 MS. SOPKO: They close after today till the 6th.
16
17 MR. MOLSTAD: I think the 6th of January.
18
19 MS. SOPKO: After today until the 6th, yeah.
20
21 MR. MOLSTAD: Yeha.
22
23 MS. OSUALDINI: And - and the other issue, Sir, is that these
24 documents are about the trusts. So, they're not about First Nation business, they're about
25 the trusts.
26
27 THE COURT: Well sure. But if - if it is communications
28 between counsel presumably a First Nation can seek advice with respect to a trust. So just
29 because the subject matter is the trust doesn't mean to say it is not privileged.
30
31 MS. OSUALDINI: M-hm.
32
33 THE COURT: So it may well be a privilege.
34
35 MS. OSUALDINI: And - and another issue that may have to be dealt
36 with is whether there is a privilege vis-à-vis the beneficiaries. And the Trustee's and the
37 First Nation in regards to this information. So this --
38
39 THE COURT: M-hm.
40
41 MS. OSUALDINI: This actually is a quite complicated --

1
2 THE COURT: M-hm.

3
4 MS. OSUALDINI: -- issue.

5
6 THE COURT: Well I sure hope there is something of substance
7 that is going to impact the outcome when we start going down this path, because it looks
8 to me like this is totally going off the rails. That is the way it looks to me.
9

10 MS. OSUALDINI: So My Lord, I think we just need direction on
11 who is to file the application by January 2nd.
12

13 THE COURT: Well I am not going to give a direction on that.
14 One of you is going to decide that it is an issue that you want me to make a ruling on. And
15 when a motion comes to me I will make a decision. Do you think you want to bring an
16 application go right ahead. If Mr. Molstad does he can go right ahead but I don't know
17 enough about it to determine who should be making the motion.
18

19 MS. OSUALDINI: Okay.
20

21 THE COURT: But if there is a motion I will hear it.
22

23 MS. BONORA: So Sir, can we have a direction that that schedule
24 then is ordered?
25

26 **Ruling**
27

28 THE COURT: All right. We will make that a direction that --
29 with the amendments that Mr. Faulds has suggested. So January 2nd the applications,
30 January 7th the Public Trustee will file its brief, January 13th the privilege materials,
31 January 16 the privilege application to the extent that there might be one, January 28th for
32 a questioning -- I am sorry, January 22nd questioning.
33

34 MR. MOLSTAD: On or before, I believe.
35

36 MR. SESTITO: On or before, yeah.
37

38 MR. MOLSTAD: On or before January 22nd, Sir.
39

40 THE COURT: 22nd?
41

1 MR. MOLSTAD: Yeah.

2

3 THE COURT: And the 28th of January for the brief -- primary
4 brief; January 31st for the rebuttal brief; April 5th for the production application.

5

6 MR. SESTITO: February, Sir.

7

8 THE COURT: February 5th.

9

10 MR. SESTITO: February 5th

11

12 THE COURT: February 5th, whatever.

13

14 MS. BONORA: And - and May 19th for the asset transfer --

15

16 THE COURT: And May 19th for the actual application.

17

18 MS. BONORA: Are - are those peremptory, Sir?

19

20 THE COURT: I am telling you that I want them to happen.
21 Peremptory is a funny word and never - never means never. So, I mean, the message I want
22 to convey is if there is something that is going to be important that will help me make the
23 right decision I want to have access to it.

24

25 MS. BONORA: Of course.

26

27 THE COURT: But at the same time I want this to get dealt with.
28 So I implore you to get it ready for May 19th. So if I said peremptory and something came
29 up on the 5th of May I would -- I am not going to force it on if there is something about to
30 be available that would help me. So --

31

32 MS. BONORA: Thank you for those comments.

33

34 THE COURT: -- I don't -- I would be tempted to say peremptory
35 but I would be fooling myself if I said that.

36

37 MS. BONORA: Thank you, Sir.

38

39 MS. HUTCHISON: Thank you, My Lord I - I just want to be sure we're clear January 7th is
40 the OPGT's brief of production application.

41

1 THE COURT: The pro --

2

3 MS. HUTCHISON: January 28th are the responding briefs to the production applications, is
4 that correct?

5

6 THE COURT: Well I think there were going to be two briefs.
7 One is the Public Trustee would file its brief on January 7th.

8

9 MS. HUTCHISON: Yes.

10

11 THE COURT: Once you got some additional material from
12 questioning you would file a supplemental brief if that is what you wanted to do. And then
13 the responding briefs would be filed by the 31st.

14

15 MS. HUTHCINSON: So --

16

17 THE COURT: That -- so I think --

18

19 MS. HUTCHISON: Thank you, My Lord. So if --

20

21 THE COURT: -- Ms. Bonora was trying to avoid having you do
22 two briefs.

23

24 MS. HUTCHISON: So if we are able to question on a privileged materials between January -
25 January 16th priv - privilege motion being argued and January 28th we would -- got it.
26 Thank you. Thank you, My Lord.

27

28 THE COURT: Okay are we - are we there?

29

30 MR. MOLSTAD: I hope. I think - I think I know what the schedule
31 is but I am not sure.

32

33 MS. BONORA: I think - I think we got it.

34

35 MR. SESTITO: We'll - we'll bring Mr. Molstad up to speed.

36

37 THE COURT: I know it is - it is a tight time frame in January
38 for sure there is a lot going on. But it sounds to me is if we don't get that schedule in place
39 everything else is going to fall apart on us. It seems to me. So let's try to get that done, if
40 we can.

41

1 MS. BONORA: Thank you for your indulgence today, Sir.

2
3 THE COURT: Thank you very much.

4
5 MS. OSUALDINI: Thank you very much, My Lord. Merry
6 Christmas.

7
8
9

10 PROCEEDINGS CONCLUDED

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