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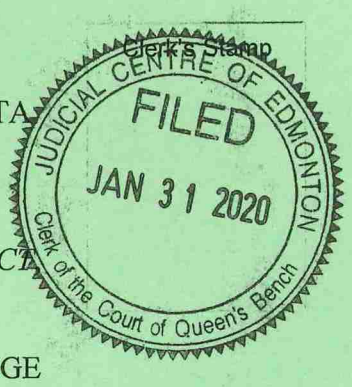
COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE *TRUSTEE ACT* RSA 2000, c T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**BRIEF OF SAWRIDGE FIRST NATION IN RESPONSE TO THE OPGT'S APPLICATION TO COMPEL THE SAWRIDGE FIRST NATION TO FILE AN AFFIDAVIT AND FOR PRODUCTION, FILED DECEMBER 20, 2019**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP Barristers and Solicitors 1700 Enbridge Centre 10175-101 Street Edmonton, AB T5J 0H3 Attention: Edward H. Molstad, Q.C. Telephone: 780-423-8506 Facsimile: 780-423-2870 File No.: 64203-7/EHM



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**Self-Represented Party,
Intervenor on Asset Transfer Issue**

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I. OVERVIEW

1. This brief is filed in response to the application of the Office of the Public Guardian and Trustee (the "OPGT") filed on December 20, 2019, seeking to compel affidavit evidence and wide-ranging production from either the Trustees of the Sawridge Band Inter Vivos Settlement (the "1985 Trustees") or the intervenor Sawridge First Nation ("Sawridge").

2. The OPGT brings the Application in the midst of two applications in which Sawridge has been granted intervenor status. The first is an application, pursuant to a Consent Order, inquiring into the jurisdiction of the Court to make certain orders related to amending the beneficiary definition in the 1985 Trust (the "Jurisdictional Application"). The Jurisdictional Application is concerned with whether this Honourable Court has the jurisdiction, on the basis of section 42 of the *Trustee Act*, RSA 2000, c T-8, public policy, its inherent jurisdiction, or any other common law power to amend the definition of beneficiary.

3. The second is an application by the Sawridge Trustees, filed September 13, 2019 for a determination of the effect of the August 24, 2016 consent order (the "2016 Consent Order") which approved the 1985 transfer of assets from the Sawridge Band Trust (the "1982 Trust") to the 1985 Trust (the "Asset Transfer Application"). The impact of this Order on the trust terms pursuant to to which the assets are held has not been determined.

4. The OPGT's Application for production is filed in relation to the Asset Transfer Application, which is scheduled to be heard on May 19, 2020. In support of its Application, the OPGT relies upon, *inter alia*, the supporting affidavit of Roman Bombak, sworn December 19, 2019 and filed December 20, 2019 (the "2019 Bombak Affidavit") and its written submissions filed on January 7, 2020.

5. Sawridge submits that the production sought by the OPGT is irrelevant to theAsset Transfer Application, and therefore the OPGT's Application should be dismissed in its entirety.

6. Sawridge opposes the Application on the grounds that the *Alberta Rules of Court* do not compel Sawridge to provide affidavit evidence,and because the production sought is irrelevant and immaterial to the Asset Transfer Application. Much of the production sought does not address the effect of the Asset Transfer Order but instead speaks to either the source of funds, internal Sawridge procedures, or seeks privileged documents. The existing record before This Honourable Court is sufficient to decide the Asset Transfer Application.

II. PROCEDURAL HISTORY

A. The OPGT Has Previously Brought Similar Applications without Success

7. The Application represents the latest in a series of overbroad attempts by the OPGT to obtain irrelevant or immaterial or privileged documents from Sawridge in this Action.

8. On June 12, 2015 the OPGT filed an application, returnable June 30, 2015 (the "2015 Application") seeking, *inter alia*, an Order pursuant to Rule 3.10 and 3.14 of the *Alberta Rules of*

Court requiring Sawridge, a non-party, to file an Affidavit of Records containing, but not limited to, the list and details of assets transferred into the 1985 Trust.

9. On June 30, 2015 Mr. Justice Thomas ordered, *inter alia*, the OPGT to file an amended 2015 Application (the "Amended 2015 Application") providing particulars of the documents sought. The Amended 2015 Application was returnable on September 2-3, 2015.

10. Mr. Justice Thomas' reasons for judgment on the Amended 2015 Application were released on December 17, 2015 (the "2015 Decision").[1] Mr. Justice Thomas denied the Amended 2015 Application.[2] He further held that as Sawridge is not a party to this Action Sawridge is not subject to disclosure procedures which apply to parties.[3] Mr. Justice Thomas held that, pursuant to Rule 5.13, the only Sawridge documents which are producible are those "that are 'relevant and material' to the issue before the court".[4] (add language saying "Denied" from Order)

11. Mr. Justice Thomas ordered that the OPGT file two Rule 5.13 applications against Sawridge. The two Rule 5.13 applications were to identify specific types of documents that the OPGT considers relevant and material to the issue of which assets were settled into the 1985 Trust.

12. The 2015 Decision also dealt with this Honourable Court's concern that the OPGT was engaging in an overbroad search for productions which exceeded the OPGT's mandate in this proceeding. Mr. Justice Henderson spoke of the need to "re-focus" the OPGT on the specific task at hand.[5]

13. Subsequent to the 2015 Decision the OPGT served two Rule 5.13 applications (the "Rule 5.13 Applications"), filed February 1, 2016, seeking production from Sawridge. One of the applications dealt with a dealt with Sawridge's membership process.

14. The other Rule 5.13 application (the "Settlement Application") was an overbroad and vague attempt to force Sawridge to produce records related to the settlement of assets in the 1985 Trust. The Settlement Application sought a number of irrelevant records, including attempts to quantify assets in the 1985 Trust and attempts to determine the disposition of assets prior to the Trust's inception.

15. Sawridge opposed both applications. Sawridge opposed the Settlement Application on the basis that the documents sought were irrelevant to the issue then before the court, namely, whether the 1985 asset transfer was valid (this is different from the issue currently before this Honourable Court, which is the effect of the 2016 Asset Transfer Order). Sawridge filed a brief

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[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799 [*Sawridge #3*] **[Tab 1]**

[2] Order of Mr. Justice Thomas, pronounced December 17, 2015 **[Tab 2]**

[3] *Sawridge #3* at paragraph 27 **[Tab 1]**

[4] *Sawridge # 3* at paragraph 31**[Tab 1]**

[5] *Sawridge # 3* at paragraph 32-39 **[Tab 1]**

in opposition to both Rule 5.13 Applications on March 15, 2016,[6] and also filed additional written submissions on August 16, 2016.[7]

16. No decision on the merits of the Settlement Application were ever rendered as the application was withdrawn as a component of the Asset Transfer Order. Sawridge is not a party to the Asset Transfer Order and, consequently, never provided consent to the Asset Transfer Order.

17. Mr. Justice Thomas issued his reasons on the Membership Application on April 28, 2017, (the "2017 Decision")[8]. Mr. Justice Thomas found that the various production provided by Sawridge to the OPGT prior to the hearing satisfied the OPGT's application, contrary to the OPGT's viewpoint. Mr. Justice Thomas also held that the OPGT had still not been "re-focused", per his 2015 Decision.[9]

III. PRODUCTION AND FAIRNESS

18. The OPGT Brief mischaracterizes the existing evidentiary record. At several points in its brief, the OPGT asserts that Sawridge's position on the Asset Transfer Application is not grounded in evidence. This is incorrect.

19. In both Sawridge's brief filed November 15, 2019 Sawridge relies upon the Affidavit of Paul Bujold sworn September 12, 2011, the Affidavit of Paul Bujold sworn February 15, 2017, the Affidavit of Darcy Twinn sworn September 24, 2019, the Affidavit of Roland Twinn sworn September 21, 2016, and testimony from the questioning on affidavit of Paul Bujold of May 27 and 28, 2014.[10] The OPGT had the opportunity to cross-examine Darcy Twinn on his affidavit and in fact did so on October 18, 2019.

20. Furthermore, the OPGT's assertion that many of the records it is seeking must exist ignores the fact that the Trustees thought it necessary to address the asset transfer issue in the underlying Action precisely because of the lack of documentation surrounding the transfer in April 1985.

21. The dearth of documentation surrounding the events of April 15, 1985 was established at the Questioning on Affidavit of Paul Bujold of May 27 & 28, 2014 and the answers to his undertakings from that questioning. Mr. Bujold's answers to his undertakings numbered 12 through 18 show that whatever documentation may have contemporaneously existed have since been lost. Mr. Bujold corresponded to Sawridge, former counsel, auditors, DIAND, and the CRA

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[6] The body of Sawridge's brief filed March 15, 2016 is reproduced at **Tab A**

[7] The body of Sawridge's submissions filed on August 16, 2016 are reproduced at **Tab B**

[8] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 [*Sawridge #4*] **[Tab 3]**

[9] *Sawridge # 4* at paragraph 26. **[Tab 3]**

[10] Brief of the Sawridge First Nation, filed November 15, 2019, pages 31-33 **[Tab C]**

with no success. It is clear from a review of his evidence that Sawridge was cooperative from the outset with the Trustees in turning over to Mr. Bujold any documentation in its possession relating to the transfer.[11]

22. Paragraph 20 of the OPGT Brief makes reference to "normal operation of a First Nation" and seems to suggests that this Honourable Court should make a negative inference if the documents sought do not exist. With respect, the OPGT is implicitly asking this Honourable Court to take judicial notice of certain facts related to the operation of a First Nation. This would not be a proper exercise of judicial notice. That Mr. Bujold was unable to identify and locate additional documentation, including from Sawridge, in his responses to his undertakings shows that, notwithstanding the OPGT's assumptions about the operation of a First Nation, such documents were not created or retained over the previous 30 years.

23. Furthermore, the OPGT's approach to the Application has caused prejudice to Sawridge's ability to effectively respond. On December 20, 2019 this Honourable Court ordered that questioning on affidavits in support of applications conclude by January 22, 2020. Notwithstanding that, the OPGT asserted that Mr. Bombak was unavailable to be questioned on any dates suggested by counsel for Sawridge. The OPGT then offered alternative dates on dates which the OPGT had previously been advised were unavailable to counsel for Sawridge and which fell after the January 22, 2020 deadline.

24. As a result, Mr. Bombak's questioning will be occurring on February 3, 2020, subsequent to the deadline for filing of this brief. Sawridge respectfully reserves the right to rely on Mr. Bombak's testimony from his Questioning on Affidavit in Sawridge's oral submissions of February 5, 2020.

IV. THE PRODUCTIONS SOUGHT ARE IRRELEVANT AND IMMATERIAL TO THE APPLICATIONS

A. There is no Legal Basis for the Application

25. 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.

[11] Questioning on Affidavit of Paul Bujold, July 27, 2016; page 16:15-17:2 **[Tab D]**

> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.[12]

26. 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.[13]

27. The party seeking the records from a third party has the burden of establishing that the Court should order the production of those records.[14]

28. 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 third party has those records.[15] Failing to adequately describe a record is fatal to an application under Rule 5.13.[16] In addition, if a description is worded in a manner that looks to compel discovery from a party, then that application will be denied.[17]

29. 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

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[12] *Rules of Court*, at 5.13. **[Tab 4]**

[13] *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB) [***"Ed Miller"***], at para 13 **[Tab 5]**; see also *Trimay Wear Plate v Way*, 2008 ABQB 601 [***"Trimay"***], at paras 13 and 18. **[Tab 6]**

[14] *Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA), at para 4. **[Tab 7]**

[15] *Ed Miller*, supra note 4, at paras 13-17. **[Tab 5]**

[16] *Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144, at paras 12 and 13. **[Tab 8]**

[17] *Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA), at para 16. **[Tab 9]**

> (d) documents of both 735458 and Alberta Industrial relating to the former senior manager, which they say go to Trimay's damage claim.[18]

30. 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.[19]

31. Case law is clear that the OPGT must demonstrate that the records 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 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]

32. 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.[20] 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 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.[21]

33. 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.[22] 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.[23]

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[18] *Trimay*, supra note 4, at para 12. **[Tab 5]**

[19] *Trimay*, at para 24. **[Tab 5]**

[20] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16. **[Tab 10]**

[21] *Weatherill (Estate of) v Weatherill*, 2003 ABQB 69, at paras 16-17. **[Tab 10]**

[22] *Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356 (Master Funduk), at paras 20-21. **[Tab 11]**

[23] *Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2, at paras 21 and 42 – 44. **[Tab 12]**

34. While this application for advice and direction has no pleadings in the usual sense, a review of the Asset Transfer Application, Jurisdiction Application, and the originating application can be relied upon to guide the direction of production.

35. Direction can be taken from the August 31, 2011 Order which defined the scope of the advice and direction being sought from the Court in relation to the transfer issue. 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." There is no reference to an accounting of the 1985 Trust. The concern is not the assets themselves, but the transfer.

36. The above show that the proper focus of the inquiry is a review of the mechanism of the transfer rather than details pertaining to specific assets. This is consistent with the inquiry intended by the Asset Transfer Application.

B. Each Class of Production Sought is Irrelevant or Beyond Sawridge's Control

> 1(a) Provide the tax filings and financial statements of the 1982 Trust from January 1, 1985 to present

37. With reference to paragraph 1(a) of the Application's claim for relief, any documents falling under this heading are irrelevant and immaterial. Tax filings and financial statements of the 1982 Trust have no relevance to the effect of the Asset Transfer Order. From the outset of this application for advice and direction, the issue regarding the settlement of assets into the 1985 Trust has not concerned the tax or financial statements of the 1982 Trust at any time, including after 1985.

> 1(b) The 1985 Trust financial statements from 2005 to present and any other financial records that establish the current value of the $12 million debenture

38. With reference to paragraph 1(b), Sawridge respectfully submits that these records, if they exist, are the property of the 1985 Trustees and are not in the possession or control of Sawridge.

> 1(c) Copies of Notices to SFN Band Members For the Members Meeting to Approve the Asset Transfer
>
> 1(d) Evidence regarding the consultation process with SFN Members prior to the April 15, 1985 vote

39. With reference to paragraphs 1(c) and (d), such documents, should they currently exist or previously have existed, are irrelevant and immaterial to the Applications. The process for amending, advancing, transferring assets from, or dissolving the 1982 Trust is outlined in the 1982 Trust deed itself, in section 42 of the *Trustee Act*[24], and is governed by the common law. Whatever internal Sawridge procedures occurred in 1985, if any, are not relevant to a determination of the effect of the August 24, 2016 Consent Order approving the transfer of

[24] RSA 2000, c T-8 **[Tab 13]**.

assets. In any event, it is clear from the preamble to the August 24, 2016 Consent Order and the evidence of Mr. Bujold that the search for such documentation was exhaustive and the limited relevant and material documentation that exists on point has already been produced.

> 1(e) Provide Minutes of the 1982 Trustee meetings, held prior to April 15, 1985, including Trustee's resolutions, referencing the proposal to transfer the 1982 assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer
>
> 1(f) Provide Minutes of the Sawridge Chief and Council meetings, held prior to April 15, 1985, including Band Council resolutions, referencing the proposal to transfer the 1982 assets to the 1985 Trust and to hold Band members' or beneficiary meetings regarding the transfer

40. Paragraphs 1 (e) and (f) again refer to internal Sawridge procedures. These records, if they exist, are irrelevant to the issue of the effect of the Asset Transfer Order. The OPGT has not shown how any internal Sawridge procedures could have an impact on the meaning of the Asset Transfer Order. In any event, it is clear from the preamble to the August 24, 2016 Consent Order and the evidence of Mr. Bujold that the search for such documentation was exhaustive and the limited relevant and material documentation that exists on point has already been produced.

> 1(g) Provide correspondence or financial reporting documents dated prior to April 15, 1985 that address the source of funds used to buy the assets now held in the 1985 Trust, including correspondence to or from Canada approving the original release of SFN capital and revenue funds for the purchase of those assets;

41. With regard to paragraph 1(g), the OPGT has failed to show the relevance and materiality of the source of funds used to purchase assets held by the 1985 Trust. The Asset Transfer Application and the Jurisdiction Application are not concerned with an accounting of the assets of the 1982 Trust or the1985 Trust. The concern on the Applications is the effect of the Asset Transfer Order and the jurisdiction of this Honourable Court to vary the 1985 Trust. None of this is concerned with the source of funds, but instead with the transfer of those funds on April 15, 1985.

> 1(h) The complete exchange of correspondence between Sawridge, or its advisors, and Canada beginning in December 1993 and continuing into at least 1994, regarding the existence of the 1985 Trust and Canada's concerns in relation to s64 and s66 of the *Indian Act*

42. With regard to paragraph 1(h), Sawridge submits that such correspondence is irrelevant and immaterial to the Asset Transfer Application, as the correspondence sought all post-dates 1985.

> 1(i) Provide documents prepared prior to May 1985 and directed to the SF, the 1982 Trustees and the 1985 Trustees from their respective financial or legal advisors, that address:
>
> i. Transfer of assets from the 1982 Trust to a new trust;

ii. Advice, comments or discussion regarding the consequences of an asset transfer for the interests of the 1982 Beneficiaries;
iii. Advice, comments or discussion regarding the need to consult with, inform, or hold a vote by the SFN Members or 1982 beneficiaries in relation to a transfer of assets

43. With regard to paragraph 1(i), any documents that may exist are irrelevant and immaterial, and, to the extent they were provided by Davies Ward and Beck or David Fennell (the "Legal Documents"), are privileged. Any legal/financial advice, comments, or discussion provided to Sawridge are simply the opinions of those who created the opinions. Their opinions have no bearing on this Court determination of the effect of the Asset Transfer Order.

44. Additionally, the Legal Documents, to the extent they consist of correspondence between Sawridge and its solicitors containing legal advice, are privileged. The OPGT has not shown why Sawridge should consent to waive privilege over any documents, should they exist. Sawridge rejects the OPGT's assertion at paragraph 31 of their brief that if the transfer of the assets from the 1982 to the 1985 Trust was not permitted in law, then there is a necessary implication that the 1982 Trustees knew their actions were not authorized.

45. In conclusion, Sawridge's position is that the OPGT's requests in the Application run contrary to the Honourable Mr. Justice Thomas' attempt to refocus the role of the OPGT in this action. This Honourable Court has been explicit – the OPGT must limit requests for records to records that are relevant and material.

V. RELIEF REQUESTED

46. For the above reasons, Sawridge requests that the OPGT's Application for Production be dismissed, with costs payable by the OPGT.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2020.

PARLEE McLAWS LLP

per

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

List of Authorities

Tab	Document
1.	*1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799
2.	Order of Mr. Justice Thomas, pronounced December 17, 2015
3.	*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299
4.	*Alberta Rules of Court*, Alta Reg 124/2010
5.	*Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, (1988) 63 Alta LR (2d) 189 (QB)
6.	*Trimay Wear Plate v Way*, 2008 ABQB 601
7.	*Metropolitan Trust Co. of Canada v. Peters*, 1996 CarswellAlta 274 (CA),
8.	*Esso Resources Canada Limited v Lloyd's Underwriters & Companies*, 1990 ABCA 144
9.	*Gainers Inc. v Pocklington Holdings Inc.*, 1995 CarswellAlta 200 (CA)
10.	*Weatherill (Estate of) v Weatherill*, 2003 ABQB 69
11.	*Re/Max Real Estate (Edmonton) Ltd v Border Credit Union Ltd*, (1988), 60 Alta LR (2d) 356
12.	*Dow Chemical Canada Inc v Nova Chemicals Corporation*, 2015 ABQB 2
13.	*Trustee Act,* RSA 2000, c T-8

List of Documents Relied Upon

Tab	Document
A.	Sawridge First Nation Brief, filed March 15, 2016
B.	Sawridge First Nation Submissions, filed August 16, 2016
C.	Brief of the Sawridge First Nation, filed November 15, 2019, pages 31-33
D.	Questioning on Affidavit of Paul Bujold, July 27, 2016;

Tab 1

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and

- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*.
("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] ***Sawridge #1*** at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

[11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 883 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information

unless the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and

that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee. A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and

4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

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

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

children of persons who have, at a minimum, completed a Sawridge Band membership application.

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

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

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

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

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

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

   a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

   b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

   c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
2. on a pro rata basis:

   a) be distributed to the members of Pool 1, and

   b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that

inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in ***Sawridge #2*** at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

Tab 2

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Dentons Canada LLP** 2900, 10180 101 Street Edmonton, AB T5J 3V5 Attention: Doris Bonora Telephone: (780) 423-7188 Facsimile: (780) 423-7276 File No.: 551880 -1

Clerk's Stamp

DATE ON WHICH ORDER WAS PRONOUNCED: December 17, 2015

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

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

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

IT IS HEREBY ORDERED THAT:

1. The Public Trustee's application for production of records/information from the Sawridge First Nation ("SFN") is denied.

2. Document production by SFN shall only be compelled pursuant to *Rule* 5.13(1) of the *Alberta Rules of Court*, Alta Reg 124/2010.

3. The Public Trustee shall not conduct an open-ended inquiry into the membership of the SFN and the historic disputes that relate to that subject.

4. The Public Trustee shall not conduct a general inquiry into potential conflicts of interest between SFN, its administration and the Sawridge Trustees.

5. The Public Trustee shall be limited to four tasks:

    (a) Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust; and

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

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

    (d) Supervising the distribution process itself.

6. The Public Trustee and the Sawridge Trustees are to immediately proceed to complete the first three tasks outlined in paragraph 5 above.

7. The Sawridge Trustees will submit a distribution arrangement by January 29, 2016.

8. The Public Trustee shall have until March 15, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

9. If no Rule 5.13(1) application is made in relation to the proposed distribution scheme, submissions on the distribution proposal shall be made by the Public Trustee and Sawridge Trustees at a case management meeting held before April 30, 2016.

10. The Public Trustee shall have until January 29, 2016 to prepare and serve an application, pursuant to *Rule* 5.13(1), on SFN identifying specific documents for production which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

11. If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any Rule 5.13(1) application by the Public Trustee.

12. SFN shall provide the following to the Public Trustee by January 29, 2016:

    (a) the names of individuals who have:

        (i) made applications to join the SFN which are pending; and

        (ii) had applications to join the SFN rejected and are subject to challenge;

    (b) the contact information for those individuals where available.

13. The Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, (Minors who are children of members of the SFN), the Public Trustee shall file a *Rule* 5.13(1) application by January 29th, 2016.

14. The SFN and the Sawridge Trustees shall have until March 15, 2016 to make written submissions in response to any application by the Public Trustee described in paragraph 13 above

15. The Public Trustee shall not engage in collateral attacks on membership processes of the SFN. The Sawridge Trustees shall not engage in collateral attacks on SFN's membership processes.

16. The decision on costs in relation to the Public Trustee's production application is reserved until the Court evaluates any Rule 5.13(1) applications brought by the Public Trustee

Honourable Justice D.R.G. Thomas

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:_____

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:_____

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:_____

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

Parlee McLaws LLP

Per:_____

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:_____

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

McLennan Ross LLP

Per:_____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

APPROVED AS TO FORM:

Reynolds, Mirth, Richards & Farmer LLP

Per:_____

Marco Poretti, Counsel for the Sawridge Trustees

Dentons Canada LLP

Per:_____

Doris Bonora, Counsel for the Sawridge Trustees

Hutchison Law

Per:_____

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

Parlee McLaws LLP

Per:_____

Edward H. Molstad QC, Counsel for Sawridge First Nation

Bryan & Co. LLP

Per:_____

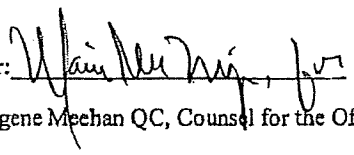
Nancy E Cumming QC and Joseph Kueber QC , Counsel for Roland Twinn, Bertha L'Hirondelle, Margaret Ward and E. Justin Twin

McLennan Ross LLP

Per:_____

Karen Platten QC and Crista Osualdini, Counsel for Catherine Twinn

Supreme Advocacy LLP

Per: 

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

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Tab 3

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299

Date: 20170428
Docket: 1103 14112
Registry: Edmonton

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

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Original Applicants

- and -

Public Trustee of Alberta

Applicant/Respondent

- and -

Sawridge First Nation

Respondent/Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

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

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

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

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

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

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

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

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

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

II. "Current and Possible" Minor Beneficiaries

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

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

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

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

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

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

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

1. persons who have made Band applications prior to this date, had that application rejected, but are challenging that outcome, and

2. persons who have filed completed and unresolved Band applications ("pending" Band applications), who are in the future rejected during the application process, and then challenge that outcome.

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

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

III. Costs

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

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

[18] Second, in the ***Sawridge #3*** decision I directed the Public Trustee to proceed with the *Rule* 5.13 applications, and reserved the question of costs to follow completion of those applications. The Band argues that it was forced to prepare written materials in response. However, the Public Trustee then abandoned a *Rule* 5.13 application. The Band also observes *Rule* 5.13(2) creates a mandatory obligation on the Public Trustee to pay for records produced via that procedure:

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

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

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

[21] The Band argues as the successful party the Band presumptively should receive a costs award (*Rule* 10.29(1)) and that the Court should apply the foundational *Rules* 1.1-1.2 to encourage efficient litigation through costs. An award against the Public Trustee is warranted given the 2015 adjournment was inevitable, premature as the Public Trustee had alternative

sources for the information it sought, and the Public Trustee took meritless steps including the abandoned *Rule* 5.13 application. In this case the Band says that enhanced costs are warranted.

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

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

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

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

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

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

consequences from cooperating with the Court and litigants in the production of relevant evidence.

[28] Normally, I would consider instructing payment of "an amount" under *Rule* 5.13 except for the fact that I have been informed that the Trust is indemnifying the Band for its activities in relation to this proceeding. This means one way or another the Trust will end up 'on the hook' for these litigation activities. Accordingly, I find there is no point in me ordering payment of "an amount" because of the Public Trustee's *Rule* 5.13 activities.

IV. Conclusion

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

[30] I pause to add one further observation. I have taken a 'costs neutral' approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers), on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

Heard on the 24th day of August, 2016.
Dated at the City of Edmonton, Alberta this 28th day of April, 2017.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for Public Trustee of Alberta

E. H. Molstad, Q.C. and
G. Joshee-Arnal
Parlee McLaws LLP
for Sawridge First Nation

Attendances:

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
for Catherine Twinn

L. A. Maj
Justice Canada
for the Minister of Aboriginal Affairs and Northern Development

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for Patrick Twinn et al.

S. A. Wanke
DLA Piper (Canada) LLP
for Maurice Stoney et al.

Tab 4

(Consolidated up to 156/2019)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

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larger or smaller amount the Court may determine, on a party who, without sufficient cause,

(a) does not serve an affidavit of records in accordance with rule 5.5 or within any modified period agreed on by the parties or set by the Court,

(b) does not comply with rule 5.10, or

(c) does not comply with an order under rule 5.11.

(2) If there is more than one party adverse in interest to the party ordered to pay the penalty, the penalty must be paid to the parties in the proportions determined by the Court.

(3) A penalty imposed under this rule applies irrespective of the final outcome of the action.

Obtaining records from others

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.

Inspection and copying of records

5.14(1) Every party is entitled, with respect to a record that is relevant and material and that is under the control of another party, to all of the following:

(a) to inspect the record on one or more occasions on making a written request to do so;

(b) to receive a copy of the record on making a written request for the copy and paying reasonable copying expenses;

(c) to make copies of the record when it is produced.

Tab 5

Alberta Court of Queen's Bench
Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.
Date: 1988-11-02

J.B. Laskin, for plaintiff.

M.H. Dale, Q.C., for defendants.

D.N. Jardine, for Bank of Nova Scotia.

(Edmonton No. 8003-12393)

November 2, 1988.

[1] WACHOWICH J.:- This is a motion by the Caterpillar defendants for an order directing the Bank of Nova Scotia ("the bank"), which is not a party to the action, to produce a series of documents described in Sched. D to the defendants' notice of motion and which relate to the bank's dealings with the plaintiff.

[2] The defendants rely on the provisions of R. 209(1) of the Rules of Court (Alberta), which provides as follows:

> 209. (1) When a document is in possession of a third person not a party to the action and it is alleged that any party has reason to believe that the document relates to the matters in issue, and the person in whose possession it is might be compelled to produce it at the trial, the court may on the application of any party direct the production of the document at such time and place as the court directs and give directions respecting the preparation of a certified copy thereof which may be used for all purposes in lieu of the original, saving all just exceptions.

[3] In Sched. D the defendants set out 13 categories of documents which they are seeking from the bank; however, they notified the court that they are no longer pursuing the request in para. 13. The bank objects to producing any of the requested documents, with the exception of documents given to it by the plaintiff. This is the type of documentation sought in paras. 1 and 10, and the bank indicated to the court that this will be supplied.

[4] Counsel for the bank divides the types of documents requested in Sched. D into four broad categories:

1. Material supplied by the plaintiff to the bank, such as financial statements, executive summaries and budgets.

2. Minutes of meetings and records of verbal discussions in which bank officials participated together with officers of the plaintiff.

3. Communications from the bank to the plaintiff, both (i) written, and (ii) oral.

4. Documents representing the bank's internal communications and analyses, including interoffice memoranda and internal reports.

[5] In support of its motion, the defendants submitted an affidavit of Sona Holt, assistant secretary of Caterpillar Incorporated (formerly Caterpillar Tractor Co.). Among other things, this affidavit attests to the special and unique relationship which existed between the plaintiff and the bank in this extremely lengthy and complex litigation which commenced in May 1980. From the time that the plaintiff first began dealing with the bank in January 1980 until the date of receivership in November 1986, the bank was intimately involved in the day-to-day operations of the plaintiff company. For example, during most of this period the plaintiff was required to report to the bank before making any acquisitions, and an officer from the bank visited the plaintiff company on a twice weekly basis.

[6] Another special circumstance of this case, the defendants argue, is that the bank was responsible for putting the plaintiff company into receivership, and is now the sole unsatisfied secured creditor, as such, it would be the sole one to benefit if this action is successful. The defendants also state that it has proven to be very difficult and sometimes impossible to get necessary information from the plaintiffs, and that they have good reason to believe that much of this information is in the possession of the bank.

[7] The British Columbia Court of Appeal in *Rhoades v. Occidental Life Ins. Co. of California,* [1973] 3 W.W.R. 625, set out the standard of "probable relevance" as the basis test for determining whether to order production of documents in the hands of a person not a party to the action. In considering the scope of O. 31, R. 20A of the rules of the Supreme Court (the equivalent of Alberta R. 209(1)), McFarlane J.A. stated at p. 629:

> In the present case it is clear that the mental and physical condition of the insured during the period preceding her death is relevant to the issues in the action. It is shown that the University has in its possession, through Dr. Miles, records which are probably relevant to that condition. Therefore, "This is no fishing expedition", to use the words of Keith J. in *Coderque v. Mutual of Omaha Insur. Co.,* [1970] 1 O.R. 473 at 477, [1969] I.L.R. 1-297.

[8] The court attached four caveats to the "probable relevance" test:

1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.

2. The documents need not *necessarily* be admissible in evidence at trial.

3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.

4. The third party's objections to production must be considered, but are not determinative.

[9] I accept this approach, with the additional condition that the rule cannot be used as a method of obtaining discovery of a person not a party to the action. As Mr. Justice Thompson of the Ontario High Court said in *Markowitz v. Toronto Transit Comm.,* [1965] 2 O.R. 215 at 217, when considering the Ontario equivalent of R. 209(1):

> Rule 349 was never intended to be used merely as a means of obtaining discovery from a stranger to the action; nor for exploratory purposes alone...

[10] In this case, I feel that the special circumstances, especially the bank's intimate involvement in the day-to-day operations of the plaintiff company, justify the use of R. 209(1) to allow discovery of many of the documents in the possession of the bank relating to this matter. However, I appreciate the bank's argument that an unlimited order for production of documents would work a hardship on them in this situation, since the total documentation would amount to thousands of pages. I also accept their submission that that internal bank memoranda expressing the private opinions of bank officials are of no relevance in this action. Further, some of the defendants' requests, as set out in Sched. D., are so broadly worded that they have all appearances of exploratory "fishing expeditions" or attempts to obtain examination for discovery of a third party.

[11] With these principles in mind, I order that the bank produce all the documents which fall into the first three of the four categories described by counsel for the bank. All documents which properly fall into category 4, including all internal bank communications and memoranda relating to the plaintiff's business, ought not to be produced. This will exclude the documents sought in paras. 3, 5 and 9 of Sched. D, and will limit the documents producible under paras. 4, 7, 8,11 and 12.

[12] If the matter of costs has not been agreed upon counsel may speak to me in regards to the same.

Application granted in part.

Tab 6

Court of Queen's Bench of Alberta

Citation: Trimay Wear Plate Ltd. v. Way, 2008 ABQB 601

Date:20080930
Docket: 9703 22138
Registry: Edmonton

Between:

Trimay Wear Plate Ltd.

Plaintiff

- and -

Keith Way and Premetalco Inc., carrying on business under the firm name and style Wilkinson Steel and Metals

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] The Defendants apply for an order under Rule 209 directing two non-party corporations to produce records they claim are relevant to the action.

[2] Trimay seeks damages or an accounting of profits from the Defendants, claiming that Way breached fiduciary duties owed to Trimay and misappropriated proprietary information of Trimay, for the benefit of his new employer Premetalco Inc. Way left Trimay's employ in 1996 and immediately went to work for Premetalco. Trimay alleges that Way and Premetalco used Trimay's confidential and proprietary information to compete with it in the wear plate business. Trimay also alleges that Way improperly solicited clients and prospective clients of Trimay. The Defendants deny the allegations. The action, commenced in 1997, is now being case managed by me.

[3] This application arose in the course of case management.

Facts

[4] The non-party corporations are 735458 Alberta Inc. and Alberta Industrial Metals Ltd. The evidence before me is that 735458 is the sole shareholder of Trimay. Alberta Industrial is the sole shareholder of 735458. Maurice Shugarman and Garry Stein are officers of Trimay. They are directors of Alberta Industrial, and they or their holding companies are shareholders in that company. Stein is a director of 735458.

[5] The evidence discloses that Trimay purchases materials from Alberta Industrial. Both Trimay and 735458 operate out of the same facility. 735458 and Alberta Industrial lease equipment to Trimay, which Trimay uses in the production of wear plate. Alberta Industrial has invested in Trimay. Alberta Industrial was involved in an investigation into the activities of a former senior manager of Trimay, which the Defendants allege are relevant to the qualification of Trimay's damage claim.

[6] The records sought to be produced from 735458 and Alberta Industrial are described as:

(a) documents relating to the alleged "proprietary" nature of Trimay's technology and processes; and
(b) documents relating to the damages claimed by Trimay.

[7] Production of these records was sought by the Defendants when examining officers of Trimay for discovery, and the Plaintiff has since refused to produce records of 735458 and Alberta Industrial.

Argument

[8] The Defendants rely on Rule 209, which provides:

> 209(1) On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when
>
> (a) the record is in the possession, custody or power of a person who is not a party to the action,
>
> (b) a party to the action has reason to believe that the record is relevant and material, and
>
> (c) the person in possession, custody or power of the record might be compelled to produce it at the trial.

(1.1) The Court may also give directions respecting the preparation of a certified copy of the record, which may be used for all appropriate purposes in place of the original.

(2) A person producing a record is entitled to receive such conduct money as the person would receive if examined for discovery.

(3) The costs of the application shall in the first instance be borne by the party making the application but if it thereafter appears to the Court that by reason of the production there has been a saving of expense the Court may award the whole or part of the costs to the party making the application.

[9] The Defendants allege that one of the fundamental issues in the action is whether or not Trimay had any proprietary or confidential information in the first place. The Defendants deny they are liable to Trimay for damages or an accounting, and dispute the amount of damages being claimed by Trimay. Damages are very much in issue

[10] Trimay has not yet elected whether it will seek damages (its own losses) arising out of the alleged misconduct of the Defendants, or whether it will seek an accounting of the Defendants' profits (disgorgement). The Defendants dispute Trimay's losses and claim, amongst other things, that Trimay's losses for some of the relevant time resulted from or were contributed to by mismanagement of the former senior manager.

[11] The Defendants rely on ***Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.***, (1990) 74 Alta. L.R. (2d) 262 (C.A.) and ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, (1988), 63 Alta. L.R. (2d) 189.

[12] With reference to the records sought, the Defendants are particularly interested in the purchase agreement whereby 735458 acquired the shares in Trimay, although they seek:

(a) documents surrounding 735458's ownership of Trimay, 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.

[13] The Defendants reference the tests for production from third parties as set out in ***Ed Miller Sales***:

- the documents should be "probably relevant";
- the application is not a fishing expedition;
- the documents need not necessarily be admissible;
- the documents must be adequately described;
- the third party's objections must be considered; and
- the application is not a means of obtaining discovery from a stranger to the action.

[14] Since ***Ed Miller Sales*** and ***Esso Resources*** were decided, Rule 209 has been amended to apply to records that are "relevant and material". At the time of those decisions, documents could be sought from third parties which "any party has reason to believe...relates to the matters in issue". As is obvious, the current rule provides a narrower scope of production than was the case when ***Ed Miller Sales*** and ***Esso Resources*** were decided.

Response

[15] 735458 and Alberta Industrial resist the application, and cite ***Koenen v. Koenen***, 2001 ABCA 46, ***Berube v. Wingrowich***, 2005 ABQB 367, ***Ed Miller Sales*** *(supra)*, ***Esso Resources Canada Ltd. v. Stearns Catalytic Ltd***, (1989), 98 A.R. 374 (Q.B.) Aff'd (1990), 108 A.R. 161 (C.A.), ***Wasylyshen v. Canadian Broadcasting Corp.***[2006] A.J. No. 1169 (Q.B.), and ***Metropolitan Trust Co. of Canada v. 337807 Alberta Ltd.***, [1996] A.J. No. 291 (C.A.). They also refer to the commentary on Rule 209 in Stevenson and Côté, *Alberta Civil Procedure Handbook*, vol. I (Edmonton: Juriliber, 2005) at 215-216.

[16] In essence, the third parties argue that the application should fail for lack of specificity of the Defendants' requests. Instead of seeking production of specific documents, the Defendants seek discovery in general areas of questioning. The third parties point to a lack of evidence that the purchase documents dealt with proprietary processes or technology. They also point out that many of the records relating to business transactions between Trimay and the third parties can be obtained through Trimay.

Analysis

[17] As noted by Veit J. In ***Berube***, the mere fact that entities are associated with a party is not a sufficient basis to require production. A close affiliation between the target entity and a litigant does not remove the requirements of Rule 209 that the records sought be relevant and material (at para. 4).

[18] ***Wasylyshyn***, referring to the *Alberta Civil Procedure Handbook*, notes that Rule 209 is to be interpreted narrowly and is to be used only to gain access to specific records.

[19] Lack of specificity was key to the Court of Appeal denying the application for production in ***Metropolitan Trust.***

[20] Here, the Defendants have identified only 2 specific documents: the purchase agreement between 735458 and the former owner of Trimay's shares, and a lease agreement between Trimay and 735458 of a welding machine.

[21] There is no evidence before me that any of the records sought relating to business transactions between Trimay and 735458 and Alberta Industrial are unavailable through Trimay. The Defendants are apparently seeking to corroborate the accuracy of information that has been provided to them by Trimay, although there is no evidence to suggest that the information provided by Trimay is unreliable.

[22] The Defendants have already had extensive discovery of Trimay's officer and Messrs. Stein and Shugarman concerning management issues surrounding Trimay and the investigation of the former senior manager. Production of records from the third parties is apparently sought to corroborate the information already provided by Trimay's officers. Again, there is no evidence to suggest that the information already provided is inaccurate.

[23] In argument, there was considerable discussion about the lease of the welding machine, which apparently could not be located by Trimay. There was also considerable discussion about what may or may not be in the share purchase agreement.

Decision

[24] On the evidence and submissions before me, I am not satisfied that the Defendants have provided the degree of specificity required to establish that the third parties have any relevant and material records, other than with respect to the purchase agreement and the lease of the welding machine.

[25] The lease has not been produced by Trimay, and should be produced by 735458. It is relevant to an item of expense, which is relevant to Trimay's costs of production of the products in issue in the lawsuit.

[26] The purchase agreement is relevant to the extent that it may disclose whether proprietary processes or technology were considered in the purchase of the shares. This is clearly relevant to the existence of trade secrets. 735458 should produce this agreement, but in producing it, is entitled to expurgate irrelevant and confidential information such as the purchase price and financial details.

[27] Otherwise, I am of the view that the records sought are of tertiary relevance to the issues in the lawsuit, at best. Records relating to corroboration of information already provided, or only testing credibility, may be relevant, but are not generally material. I am not convinced of the materiality of any of the records sought, other than the lease and purchase agreement discussed above.

[28] Other than with respect to the two specific documents, the Defendants' application is dismissed.

[29] There has been mixed success on the application. I will leave costs in the cause on this application. In the event that the Plaintiff succeeds in this action, the third parties should also have their costs of the application. If the Defendants succeed, their costs of this application are recoverable from the Plaintiff, but not the third parties.

Heard on the 20th day of May, 2008.
Dated at the City of Edmonton, Alberta this 30th day of September, 2008.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Donald J. Wilson
Davis LLP
for the Plaintiff

Robert P. James
Parlee Mclaws
for the Defendants

Louis Belzil
Bennett Jones
for the Third Parties

Tab 7

In the Court of Appeal of Alberta

Citation: Metropolitan Trust Company of Canada v Peters, 1996 ABCA 101

Date: 19960308
Docket: 15519, 15594, and 15767
Registry: Calgary

Appeal No. 15519:

Metropolitan Trust Company of Canada

Respondent
(Plaintiff)

- and -

Robert George Peters

Appellant
(Defendant)

- and -

337807 Alberta Ltd., Rocky Mountain Land Company Inc. and R. Kent Remington, also known as Dr. Kent Remington

Not Parties to Appeal
(Defendants)

- and -

Paul Caron

Respondent
(Not a Party)

Appeal No. 15594:

Metropolitan Trust Company of Canada

Respondent
(Plaintiff)

- and -

Robert George Peters

Appellant
(Defendant)

- and -

**337807 Alberta Ltd., Rocky Mountain Land Company Inc.
and R. Kent Remington, also known as Dr. Kent Remington**

Not Parties to Appeal
(Defendants)

- and -

Michael J. Tims and Gordon Roper

Appellants
(Not Parties)

Appeal No. 15767:

Metropolitan Trust Company of Canada

Respondent
(Plaintiff)

- and -

Robert George Peters

Appellant
(Defendant)

- and -

**337807 Alberta Ltd., Rocky Mountain Land Company Inc.
and R. Kent Remington, also known as Dr. Kent Remington**

Not Parties to Appeal
(Defendants)

The Court:

**The Honourable Madam Justice Hetherington
The Honourable Madam Justice Russell
The Honourable Madam Justice Hunt**

**Memorandum of Judgment
Delivered from the Bench**

COUNSEL:

C. Nicholson, for the Respondent (Plaintiff)

D. Weyant, for the Appellant (Defendant)

R. D. Maxwell, for the Respondent (Not a Party)

C. Nicholson, for the Respondent (Plaintiff)

D. Weyant, for the Appellant (Defendant)

L. Burt, for the Appellants (Not Parties)

C. Nicholson, for the Respondent (Plaintiff)

D. Weyant, for the Appellant (Defendant)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

HETHERINGTON, J.A.:

[1] Madam Justice Hunt wilt deliver the unanimous decision of the Panel in all of these cases.

HUNT, J.A. (for the Court):

[2] The first appeal arises from a decision of a Chambers Judge who refused to order a solicitor to submit to examination for discovery as an "officer" under Rule 200. The solicitor in question, Mr. Caron, had been a solicitor for the plaintiff, Metropolitan Trust. It was conceded before us that the evidence to date would suggest that he has acted only in the capacity of a solicitor. The pleadings in this case raise an issue as to whether solicitor/client privilege has been waived by Metropolitan Trust. That legal issue has not yet been determined. In these circumstances, it seems to us that the application to examine Mr. Caron was premature. Therefore, given the present state of the evidence, we dismiss the appeal without commenting upon whether, in circumstances such as this case, and in the face of evidence that may become available in the future, Mr. Caron could be characterized as an "officer" for the purposes of Rule 200.

[3] The second appeal concerns the production of documents in the hands of third parties, copies of which documents are listed by number only on the affidavit of documents of Mr. Peters, one of the defendants. Mr. Peters has claimed privilege in regard to the copies of these documents, which were assembled by his solicitor from the files of the third parties. The third parties are Mr. Roper, an accountant with Ernst Young, and Mr. Tims, a partner of Mr. Peters and an employee of Peters & Company. Both of these individuals were close personal advisors to Mr. Peters and assisted him with the project that has given rise to this litigation.

[4] The documents at issue have been described entirely by reference to the affidavit of documents of Mr. Peters. In that affidavit, the documents are described only by numbers and by the titles preceding the numbers, those titles being, "Peters & Company

Limited/Michael J. Tims" and "Ernst & Young/Gordon Roper". Given the lack of specificity in this description of the documents, we are unable to tell whether these documents are "relevant" or "probably relevant" to quote the words of the decision in ***Esso Resources Canada Ltd, v. Steams Catalytic Ltd.,*** (1989) 98 A.R. 374, aff'd. (1990) 74 Alta. L.R. (2d) 262 (C.A.) where it is stated at paragraph 25, "Rule 209 should not be used to permit discovery of a person not a party if it amounts to a fishing expedition" and, at paragraph 29, "relevance or probable relevance must be established by the applicant". Therefore, we allow this appeal, set aside the order below, and order that the appellants Tims and Roper have their costs both here and below.

[5] The third appeal raises the issue of whether Mr. Roper (who was, as I have said, an accountant who worked for the accounting firm Ernst & Young) was an agent of Mr. Peters in the matters giving rise to this litigation, or whether he was an independent contractor. If he was an agent, Mr. Peters would be required to comply with the disputed undertakings which arose on his examination for discovery. The evidence before the Chambers Judge on the question of agency or independent contractor was slender, such evidence arising from the examination for discovery of Mr. Peters. Nevertheless, the Chambers Judge made a finding based on that evidence. We are not convinced that the ruling he made was in error and, accordingly, this appeal is dismissed.

(Discussion as to costs)

HETHERINGTON, J.A. (for the Court):

[6] Costs will follow the event.

Counsel: In respect to Mr. Caron, since he is not a party to the litigation, may I ask that they be payable forthwith, which has been the order below?

HETHERINGTON, J.A. (for the Court):

[7] Yes, I would think that since he is not a party to the litigation, those costs should be paid forthwith. That should follow in connection with any person not a party to the litigation.

Tab 8

In the Court of Appeal of Alberta

Citation: Esso Resources Canada Limited v. Lloyd's Underwriters & Companies, 1990 ABCA 144

Date: 19900529
Docket: 11313
Registry: Calgary

Between:

Esso Resources Canada Limited, Canadian Occidental Petroleum Ltd., Gulf Canada Limited, Petro-Canada Inc., Alberta Energy Company Ltd., PanCanadian Petroleum Limited, HBOG-Oil Sands Limited Partnership, Syncrude Canada Ltd.

Plaintiffs
(Respondents)

- and -

Lloyd's Underwriters & Companies, *et al*

Respondents
(Insurers)

- and -

Stearns Catalytic Ltd., Felix Dinielle, A. Contreras, C. Silva, Jun-Ki Kim and J. Hadfield
Air Products & Chemicals Inc.

Defendants
(Appellants)

- and -

Bechtel Canada Limited and Sequanda Ventures Inc.

Third Parties

- and -

Her Majesty the Queen

Intervenor

The Court:

The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stevenson
The Honourable Madam Justice Hetherington

Memorandum of Judgment

COUNSEL

R.J. Simpson, Esq., for the Plaintiffs (Respondents)

W.E. Code, Q.C. and Ms. L.A. Taylor, for the Respondent (Insurers)

M.A. Putnam, Q.C., D.J. Cichy Esq., S.F. Goddard, Q.C. and J.K. McFadyen, Esq., for the Defendants (Appellants)

Ms. C.A. Kent, for the Third Parties

Ms. S.I.E.M. Lobay, for the Intervenor

MEMORANDUM OF JUDGMENT

STEVENSON, J.A.:

[1] At the conclusion of argument for the appellants, we advised counsel that the appeal was dismissed. We were not persuaded that the Chief Justice was in error. We advised counsel that this memorandum would follow.

[2] The defendants applied for a declaration that the action was brought for the benefit of the plaintiffs' insurers within the meaning of rule 187, thus entitling the defendants to production of documents by the insurers. They alternatively sought to require the insurers to produce a series of documents under rule 209, which permits the court to order the production of documents which could be required for the purposes of trial.

[3] The issue with respect to the first application is whether the insurers come within the rule, as "persons for whose benefit an action is prosecuted". The second application depended upon the defendants' identifying any document which they could compel the insurer, as a non party to produce at trial.

[4] The facts were agreed upon and for the purpose of this appeal may be shortly stated. The plaintiffs' claim arises out of a fire which caused substantial damage to an oil sands plant necessitating extensive repairs and giving rise to a loss of income. The plaintiffs had insurance against some, if not all, their losses and made claims against their insurers. Those claims have not been resolved in full, but some payments have been made. The insurers acknowledge that they will seek to share in the proceeds of any recovery and claim a "subrogated" interest to that extent. The plaintiffs acknowledge that they have insurance for some of the loss but do not admit that the insurers are subrogated. The action was brought by the plaintiffs, not the insurers. The plaintiffs produced documents relating to their claims under the policies, but the defendants now seek the documents held by the insurers.

[5] In my view, the question of whether the insurers came within rule 187 has already been decided by a decision of this court, *Gullion v. Burtis* [1945] 1 W.W.R. 242. The defendants sought, firstly, to distinguish that case. At a later stage in the argument they took the position that it was not distinguishable, but wrongly decided. They pressed us with a comment in the Civil Procedure Guide, at 539, that the case "seems odd and may be distinguishable on special facts." In that case the Workmens' Compensation Board was, by statute, subrogated to the claim of an injured workman. The plaintiff had the concurrence of the Board to sue but the Board expressly declined to participate in the action except to assert that it would have a right to share in the judgment.

[6] In the case at bar, the insurers' position is not distinguishable. No claim for subrogation in the proper sense of that word can be made until the plaintiffs are fully indemnified by the insurer. The insurers here are not subrogated in the correct sense of that expression. Even if they can be said to be "subrogated" by statute their position cannot be distinguished from that of the Board in *Gullion.*

[7] In the *Gullion* case, the statute said the Board was subrogated if a workman applied for compensation. The Board, in that case, had made some payment, but the amount was not settled and the Board declined to participate in the case, but expressly reserved its rights to participate in any recovery.

[8] The case is not distinguishable. The insurers are not "participating" in this case any more than the Board was a participant in *Gullion.* The issue is settled by *Gullion.* The defendants were, in my view, correct in finally conceding indistinguishability. We do not ordinarily entertain an argument that a decision of this court is wrong without a panel having

granted leave to so argue. There is some authority for the proposition that the court is not, strictly speaking, bound by its own practice decisions. That view arose at a time when the court considered itself bound by its own previous decisions in other cases. Since then we have established a procedure for obtaining leave, in a proper case, to argue that any previous decision was wrongly decided.

[9] We would have been inclined, in this case, simply to refuse to permit the argument that *Gullion* was wrongly decided. We add, however, that the defendants failed to persuade us that *Gullion* was wrongly decided. It is clearly not enough that the person sought to be equated to a party will benefit, that would permit the examination of a mere creditor. It is not enough that the person has some legal entitlement to share in the proceeds.

[10] This is a counterpart of rule 201, dealing with oral discovery. While there is a tendency to broaden discovery, there are countervailing considerations in not unnecessarily subjecting persons who are not party litigants to the examination process and in not permitting "fishing trips". There is no material here to show that the insurers are the real litigants or, more significantly, that they have any real part in formulating the claims. I am not persuaded that, in these circumstances, there is any injustice in applying the previous decision.

[11] I turn now to the second application. The defendants now take the alternative position that the insurers are not parties, and seek production of groups of documents under rule 209.

[12] Again, I am not persuaded the chambers judge erred. I agree with him that what was sought here is, in essence, document discovery of a non-party. We challenged the defendants, during argument, to show us one identifiable document that met the tests for production under this rule. We were taken to the plaintiff's production and referred to documents showing correspondence with an insurer with reference to enclosures which were not separately produced by the plaintiffs. In my view this rule should not be used against a non-party unless it can be shown that the document is in existence and not available through other means, in this case, through a party. If the document is relevant, and was in the possession of the plaintiffs they are required to disclose its existence under rule 186, and may be asked about its disposition in the course of oral discovery.

[13] I also agree with the Chief Justice that this form of production should be related to specific documents of at least probable relevance and is not a form of discovery of a non-party.

[14] The appeals must be dismissed. The respondents will have their costs of the appeal.

[15] Counsel for Her Majesty the Queen, plaintiff in a parallel action, sought to intervene. We reserved that application, expressing doubt about whether the tests for intervention have been met. At the conclusion of argument counsel for the other parties indicated their view that the crown should have been permitted to intervene and to have costs as it had filed a factum. In these particular circumstances the Crown is given leave to intervene to support the plaintiffs (on the appeal only) and will have its costs.

DATED at CALGARY, Alberta
this 29th day of MAY,
A.D. 1990

HETHERINGTON, J.A., (HARRADENCE, J.A. concurring);

[16] The facts which are relevant to this appeal are set out in the judgment of Stevenson, J.A.

[17] The appellants applied under Rule 187 of the Rules of Court for a declaration that this action was brought for the benefit of the insurers of some of the respondents. Had they been successful, the insurers would then have been regarded as parties for the purposes of discovery of documents. However, the chambers judge refused to make the declaration sought. This appeal followed.

[18] In our view the chambers judge did not err in refusing to declare that this action was brought for the benefit of the insurers. Even if the insurers are subrogated to the rights of the respondents, which we need not and do not decide, the decision of this court in Gullion v. Burtis, [1945] 1 W.W.R. 242 (1944), prevents the appellants from succeeding in their application under Rule 187. It cannot be distinguished and is binding on us.

[19] The appellants also applied under Rule 209 for a direction that the insurers produce documents. The chambers judge refused to make this direction. For the reasons given by Stevenson, J.A. we are of the view that the chambers judge made no error in arriving at this decision.

[20] We would therefore dismiss the appeal. We agree with the disposition as to costs proposed by Stevenson, J.A.

DATED at CALGARY , Alberta
this 29th day of MAY,
A.D. 1990

Tab 9

In the Court of Appeal of Alberta

Citation: Gainers Inc. v. Pocklington, 1995 ABCA 177

Date: 19950509
Docket: 9403-0717-AC
Registry: Edmonton

Between:

Gainers Inc.

Plaintiff/Defendant
by Counterclaim
(Respondent)

- and -

Peter H. Pocklington

Defendant/Plaintiff
by Counterclaim
(Appellant)

- and -

**Her Majesty The Queen in Right of
The Province of Alberta**

Defendant by Counterclaim
(Respondent)

The Court:

**The Honourable Mr. Justice Côté
The Honourable Mr. Justice O'Leary
The Honourable Madam Justice Russell**

**Reasons for Judgment of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice O'Leary
Concurred in by The Honourable Madam Justice Russell**

APPEAL FROM THE REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE D. C. McDONALD DATED THE 21ST DAY OF JULY, 1994

COUNSEL:

T. A. Kowalchuk, for the Appellant

N. C. Wittmann, Q.C., for the Respondent Gainers

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE COTÉ

A. Issue

[1] When can a law firm act for its former client, against a former owner of that client? That is the question here. After preliminary explanations, I will return to the fact that the client was and is the same, in Part E below.

B. Facts

[2] Gainers Inc. is a large meat-packing company. In 1986 its two Edmonton plants underwent a long nasty strike. The plants kept producing during the strike, but that led to a lot of media attention, with widespread suggestions that the public boycott the products of Gainers. Gainers had a number of lawyers, in-house and otherwise, but they naturally wanted experts in labour law. For that purpose, Gainers retained the McLennan Ross law firm and secured the services of a number of the lawyers there, especially Mr. Ponting. Eventually the company got some financial assistance from the provincial government and the strike was settled. When the strike was over, McLennan Ross' retainer ended.

[3] The financial assistance led some time later to the government's becoming the sole owner of Gainers Inc. Gainers Inc. then sued Mr. Pocklington, alleging that when he had previously controlled the company, he had improperly diverted assets from it to other companies which he owned. After that lawsuit had gone on for some years, Gainers Inc. decided to change lawyers and to retain the McLennan Ross firm to act for it in that suit. Mr. Pocklington objects to that firm's acting, and has unsuccessfully moved for an order disqualifying that firm.

[4] Mr. Pocklington's complaint arises from these facts. At the time of the strike, some kind of holding company owned the shares of Gainers Inc. But "through a series of Canadian companies", one could trace all the beneficial share ownership back to Mr. Pocklington. In law he was a director and officer of Gainers Inc., and in common business parlance, he owned the company. There is no doubt that Mr. Pocklington was its big boss and made the important

decisions, and the public knew that and so regarded him. His business office suite was not in Gainers' building, but was in the same city. He had other important business interests as well.

[5] Only Gainers Inc. retained McLennan Ross at the time of the strike. Gainers Inc. was the only one billed, and it paid McLennan Ross.

[6] But during the strike, Mr. Pocklington had a lot of personal contact with Mr. Ponting. Mr. Ponting dealt with Gainers through a number of people, of whom Mr. Pocklington was one and gave him instructions on behalf of Gainers. Furthermore, Mr. Pocklington told Mr. Ponting a good deal about his business plans and philosophy, both in general and with respect to some American food companies which Mr. Pocklington owned, directly or indirectly. That included differences between the Alberta and U.S. meat markets, and the possibility of using other related companies. He also learned Mr. Pocklington's approaches to litigation. (Whether Mr. Ponting can remember or has records of any of that is another matter.)

[7] Mr. Pocklington now says that those business plans and philosophy and differences were taken into account (among other things) in deciding upon the transactions which the present suit impugns. The transactions occurred a year or two after the strike had ended and McLennan Ross had ceased to act for Gainers Inc. In addition, the strike settled after Mr. Pocklington represented Gainers at a meeting with the Premier of Alberta, and Mr. Pocklington reported the results of the meeting to Mr. Ponting.

[8] Counsel for Mr. Pocklington argues that if one ignores mere legal technicalities, substantially he was one of McLennan Ross' clients at the time of the earlier retainer. Therefore, argues counsel, that firm cannot act against Mr. Pocklington because they possess relevant confidential information. But the close relation between Mr. Pocklington and Mr. Ponting was Mr. Pocklington's dealing on behalf of Gainers Inc.

[9] McLennan Ross and its members have never represented Mr. Pocklington nor any other company controlled by him, except Gainers Inc. At all times Mr. Pocklington had a senior in-house lawyer, held out as his personal lawyer. Mr. Pocklington swears that that lawyer and the Ogilvie law firm (of which he was a partner) were Mr. Pocklington's personal lawyers.

C. The Rules

[10] Is there a single rule of law applicable to this general topic? In my view, there is not. Instead there are a number of different rules, though sometimes two or more might apply to a

single situation. It is significant that none of the codes of professional conduct cited to us postulates a single rule to govern such situations.

[11] The codes of professional conduct governing lawyers do not govern the court, which must follow the law governing fiduciaries and confidences, not rules of professional ethics. But that theoretical distinction weakens in practice, for the rationales for the law and the ethics are similar, as are the problems. So professional ethics codes are suggestive, even persuasive in court: ***Macdonald Est. v. Martin,*** a.k.a. ***Martin v. Gray*** [1990] 3 S.C.R. 1235, at 1245-46, and 1262. I rely fairly heavily on the codes here because Canadian cases directly on point are hard to find.

[12] The 1974 Canadian Bar Association Code must be treated with caution in Alberta now, as the Law Society of Alberta has repealed it, and replaced it with a new more detailed Code. (That was adopted in 1994 and is effective January 1, 1995.) The 1994 Alberta Code is the product of long deep study.

[13] For present purposes I can find only three rules or former rules which might possibly disqualify the law firm here. Without trying yet to word them precisely, these are the three:

1. A law firm cannot act for a client when it has a present but conflicting interest: ***Michel v. Lafrentz*** (1992) 120 A.R. 355 (C.A.); 1974 Canadian Bar Association Code of Professional Conduct, Chapter 5 "Rule"; 1987 Canadian Bar Association Code, Chapter 5 "Rule"; 1994 Alberta Code of Professional Conduct, Chapter 6, Rules 1, 2, 6, and 7.

2. Maybe a law firm cannot act against its former client in "the same or any related matter"? 1974 Canadian Bar Association Code, Chapter 5, Commentary 11, and Footnote 5; 1987 Canadian Bar Association Code, Chapter 5, Commentary 8; but the 1994 Alberta Code does not bar this as such.

3. A law firm cannot reveal to unauthorized persons confidential communications: 1974 Canadian Bar Association Code, Chapter 4 "Rule"; 1987 Canadian Bar Association Code, Chapter 4 "Rule"; 1994 Alberta Code, Chapter 7, Rules 1, 5, 6, and 7.

[14] A case binding all courts in Canada is ***Martin v. Gray, supra.*** It says that a law firm cannot act against its former client if there is a possibility that real mischief will result because any lawyer in the firm has relevant confidential information got from the former client during

the former retainer: see pp. 1259 ff. The case deliberately adopts a strict test, and makes sound observations about the need to preserve public confidence in consulting lawyers.

[15] As noted in ***Michel v. Lafrentz, supra,*** the case of *Martin* v. *Gray* is not about rule #1 above. It seems to me that it is about rule #3 above. The rationales which it discusses may have underlain former rule #2 above, but they are not the same thing. Former rule #2 did not require confidential information, so a law firm could not have escaped former rule #2 by proving that it got no relevant confidential information. But a law firm can escape rule #3 by proving that it got no relevant confidential information: much of ***Martin v. Gray*** is devoted to saying that, and defining the precise test for so escaping.

[16] A good deal of confusion can result if one mingles former rule #2 with rule #3, and slips back and forth soundlessly between the two when discussing a case. At times the argument on behalf of Mr. Pocklington tended to hop back and forth between #2 and #3. That conceals the fact that one cannot say that either rule clearly and obviously bars McLennan Ross from acting for Gainers. That confusion will be worse if in fact rule #2 no longer exists.

[17] But that is not enough to dispose of the appeal. The argument for Mr. Pocklington makes a number of worthwhile suggestions, so a thorough analysis is necessary.

[18] There are some very important differences between this case and the fact situations in the reported Canadian cases.

D. Near Clients

[19] The first difference is that Mr. Pocklington was not the client of the McLennan Ross firm. ***Martin v. Gray,*** for example, speaks repeatedly of the client or the former client, and that was the fact situation there. The distinction between clients and those who never were clients is clearly drawn in ***Re Robinson*** (1992) 114 N.S.R. (2d) 73. The relevant parts of the Alberta 1994 Code are limited to clients and those who reasonably believe that they are clients, throughout Chapters 6, 7 and its definitions. Chapter 7 of the 1987 Canadian Bar Association Code on confidentiality is similarly so limited.

[20] Mr. Pocklington's counsel admits that, but he meets it three ways. First, he says that that is something of a technicality. And second, he says that Mr. Pocklington was in effect the owner of Gainers Inc. during the earlier retainer, and so it would be proper to pierce the corporate veil. But the 1974 Canadian Bar Association Code, Chapter 5, contained Footnote 4:

> "As to corporations, cf. ABA EC 5-18: 'A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests ...'"

The 1987 Canadian Bar Association Code, Chapter 5, Commentary 12 says much the same.

[21] Third, counsel for Mr. Pocklington argues that a lawyer can owe obligations of confidence to one who is not technically a client; he points to a brief passage in the 1994 Alberta Code, Chapter 7 part of Commentary G.1, p. 70. However, the sentences before and after that passage suggest that that passage refers to would-be clients, or to those obtaining free advice. I do not read it as referring to employees, officers, or shareholders of a client company speaking to the lawyer as part of his representation of his client the company. That topic is covered elsewhere in Alberta's 1994 Code.

[22] After extended argument and consideration, I conclude that Mr. Pocklington's counsel raises relevant considerations, but that one cannot adopt a simple all-or-nothing rule. At one extreme, courts should look at more than just whose name was on the law firm's file cover or ledger as "client". But at the other extreme, courts should not ignore the existence of companies, and pretend that they are all unincorporated associations of their shareholders, officers and directors. An Oregon case suggesting that in this context was cited, but I disagree. Most companies are not a mechanism for doing business by an individual; still less was Gainers Inc. Still less should courts pretend that the spokesperson for a company is the "real client" when a law firm represents the company in litigation. One must examine all the relevant facts, including the reasonable expectations of those involved.

[23] It is interesting that the 1994 Alberta Code of Professional Conduct does not lump a company and its shareholders together; still less does it presume that acting for the company means acting for its shareholders, directors, etc. Quite the contrary. It contains this passage:

> "If a lawyer is proposing to act for both a corporation and one or more of its shareholders, directors, managers, officers or employees, the lawyer must be satisfied that the dual representation is a true reflection of the will and desire of the corporation as a separate entity."
>
> (Chapter 6, Part of Commentary 2.2, pp. 57-58)

Again much the same is found in the 1987 Canadian Bar Association Code, Chapter 5, Commentary 12.

[24] One cannot assume that a company and its indirect owners are the same person and that acting for one is acting for the other. To do so is likely to create a conflict and to violate the Code, not to avoid conflicts or violations.

[25] Counsel for Mr. Pocklington points out that the former 1974 Canadian Bar Association Code referred to "persons who were involved in or associated with [the former client] in that matter" (Chapter 5, Commentary 11). (Similar is the 1987 Canadian Bar Association Code, Chapter 5, Commentary 8.) But those words in the former 1974 Canadian Bar Association Code do not appear in the 1994 Alberta Code. Nor do any equivalent words.

[26] Only a fact-specific approach can weigh the policy considerations mandated in the cases, including ***Martin v. Gray.*** Only this approach can match rules to risks.

[27] The appellant refers to ***Bell v. Nash*** [1994] 1 W.W.R. 94 (B.C. C.A.). That is plainly distinguishable. It is the classic ***Martin v. Gray*** situation except for the immaterial fact that the two incompatible representations were simultaneous (by accident), and that one was abruptly terminated (when the accident was uncovered). I do not see any difference between being the client and being the intended client. But here Mr. Pocklington was not the client, and was not suggesting that he become the client.

E. Acting for the Old Client

[28] Aside from the foregoing, there is a critical way in which this case differs from most of the reported cases. The client who wishes to retain McLennan Ross and to whom Mr. Pocklington now objects is McLennan Ross' former client, Gainers Inc. In the other reported Canadian cases, the proposed client is someone new. In none of them is it the old client, nor even an old client, nor anyone related to any old client. (See my comments on ***Bell v. Nash, supra.***)

[29] There is one vital point in the reported Canadian cases, such as ***Martin v. Gray.*** The evil which they guard against is violating confidences. If the "new" client is also the "old" client, then he knows the facts already, and the evil cannot arise. As against him the information is not "confidential". Nor can it be.

[30] Mr. Pocklington's position boils down to this. He can expect the company's lawyer to keep what he said confidential from their mutual employer. But if he can expect that today, he could expect that the day that he spoke. But why could a company officer expect that the lawyer will keep information from the company? The answer is that he could not expect that.

> "Similarly, a lawyer should decline to accept information from another lawyer or a third party on condition that it be kept confidential from the lawyer's client, and should refrain from requesting a colleague to accept such a condition."
>
> (1994 Alberta Code, Chapter 7, Commentary G.1, p. 70 lines 8-10)

Similar is the 1987 Canadian Bar Association Code, Chapter 4, Footnote 6, and Chapter 5 Commentaries 5 and 12 and Footnote 3.

[31] See further my Part G, below.

[32] The 1994 Alberta Code limits confidential information to that relating to a client's business interests and affairs acquired in a lawyer/client relationship: Interpretation Chapter, s. 4(e) (p. viii), and Chapter 6, Commentary 3 (p. 59). The 1994 Alberta Code specifically deals with new retainers when past confidential information from old retainers might be relevant. But that bars only acting for "another client": Chapter 7, Rule 6(b), and Commentary 6. And it bars that without the consent of the first client. Needless to say, the first client consents here.

[33] Of course, sometimes a company shareholder might seek legal advice about his personal position and his shareholding from the same law firm which also acts for the company. That can pose serious dangers of a conflict for the law firm.

[34] It is doubtful that Mr. Pocklington and McLennan Ross treated each other like client and solicitor. But even if they did, the very highest description of the facts which Mr. Pocklington could possibly suggest is that he and Gainers Inc. were in fact both old clients. He admits that Gainers Inc. was McLennan Ross' client then. On Mr. Pocklington's strongest hypothesis, McLennan Ross now wishes to act for one former client against the other.

[35] In my view, the chambers judge here was correct in stressing how weighty that is. Suppose for the sake of argument that Mr. Pocklington were one of the former clients, or that McLennan Ross had implicitly promised him to hold confidential what he told them during the strike. Even so, that could not end the matter. That hypothesis would doubtless prevent McLennan Ross from revealing any such confidences to the media, or the public, or the union, or indeed some stranger. And that hypothesis would doubtless stop the McLennan Ross firm from acting for the union or some stranger if there were a possibility of real mischief because of the relevance of such confidential information: ***Martin v. Gray, supra.*** But does that hypothesis stop McLennan Ross from revealing those confidences to its (other) old client Gainers Inc., or from acting again for Gainers Inc.?

[36] It is vital to identify the beneficiary when one deals with trust, fiduciary duties or confidences. Otherwise they may work backwards, the fiduciary's interests ruling the beneficiary.

[37] Once more, one must make a fact-specific inquiry, and not simply lay down a rigid rule which always permits or always forbids a lawyer to act for his old client. These are the reasons.

[38] On the one hand, often an unsophisticated small business person has a one-person company whose separate existence he does not really understand, and he and the company always use the same lawyer. To let the lawyer later use the confidences from the individual against him would likely be wrong, even if the company had been the only client respecting that specific transaction.

[39] But on the other hand, sometimes a big company will use a law firm for years and thereby repeatedly expose to the firm an employee of the company and all that employee's personal strengths, weaknesses, attitudes, and way of thinking. The employee has no shares in the company, and uses a different law firm for his own affairs. What if the company then fired the employee for some unrelated reason? It would be unjust to force the company to drop its long-standing lawyers on the theory that they had become familiar with the ex-employee.

F. Composite Rule

[40] Therefore, it seems to me that the only reasonable solution is to take a more flexible tailored approach. I would not adopt a rigid rule like the former "rule #2" discussed in Part C above, but since repealed in Alberta. Instead I prefer the following approach. Where a law firm proposes to act for someone who is or was its client, against an objecting person who never was its client, the court should weigh all the facts. It should do so to see whether

(a) the law firm gave the person objecting a reasonable expectation of confidentiality at the hands of the law firm; for example whether he had any reasonable ground to think that he was discussing confidentially with his lawyer his private interests as shareholder and not as officer of the company;

(b) if so, whether disclosure to its client would be contrary to that expectation;

(c) how strong is the likelihood of harm resulting;

(d) how great that harm is likely to be;

(e) whether acting for that client against the person objecting would work significant injustice for some other reason; and

(f) whether allowing the law firm thus to act would set a precedent working significant harm to future relations between lawyers and lay people.

G. Weighing the Facts Here

[41] Whether McLennan Ross here gave Mr. Pocklington a reasonable expectation of any kind of confidentiality is not clear to me. A number of aspects of it were argued. These factors point one way. He was not the client. He had his own lawyer or lawyers whom he consulted, and Gainers Inc. and his other companies were large and complex. He was not even a direct shareholder of Gainers Inc. He was a very experienced and sophisticated businessman; the notion that he did not understand corporate structures or the difference between a company and its shareholders is risible. But there are other indicia pointing the other way. There is no reason to lengthen this judgment by reciting them.

[42] I will simply assume for the sake of argument that Mr. Pocklington reasonably expected that McLennan Ross would not reveal what he told them to strangers, to the public, or to the union or other opponents of Gainers Inc. That takes care of question (a), an expectation of confidentiality.

[43] As for question (b), the chambers judge found no expectation that McLennan Ross would keep what Mr. Pocklington told them secret from Gainers Inc. I strongly agree. That must be true, for a number of reasons:

1. Gainers Inc. was the client, and a law firm holds the knowledge it acquires as a fiduciary for its client: cf. ***McInerney v. MacDonald*** [1992] 2 S.C.R. 138. Everyone concerned in 1986, lawyers, and non-lawyers, including Mr. Pocklington, held their information as fiduciaries for Gainers Inc. The 1994 Alberta Code says the same thing a number of times. It is particularly explicit in Chapter 12 on "house lawyers", but the same must be true of all lawyers. One may also compare Chapter 9, Rule 9:

> "When receiving instructions from a third party on behalf of a client, a lawyer must ensure that the instructions accurately reflect the wishes of the client."

And the first part of the commentary on it:

"It is not inherently improper for a lawyer to accept instructions on a client's behalf from someone other than the client. For example, a client may be indisposed or unavailable and therefore unable to provide instructions directly, or a lawyer may be retained at the suggestion of another advisor, such as an accountant, with the result that at least the initial contact is made by the advisor on the client's behalf.

In these circumstances a lawyer must verify that the instructions are accurate and were given freely and voluntarily by a client having the capacity to do so. The lawyer's freedom of access to the client must be unrestricted. In certain situations it may be appropriate for the lawyer to insist on meeting alone with the client. See also Commentary 12."

2. The object of the exercise was to help Gainers Inc.

3. It was impossible for McLennan Ross to carry out that aim (its retainer) without involving a number of employees, officers, and solicitors of Gainers Inc. The evidence shows that almost everything communicated to McLennan Ross was also communicated to or known to such people. Mr. Ponting never had any private meetings with Mr. Pocklington alone, he swears. Mr. Pocklington was not by any means the only or main channel of communication or instructions between Gainers Inc. and McLennan Ross. So Gainers Inc. already knows what Mr. Pocklington revealed, and has ways to refresh its corporate memory, many independent of McLennan Ross. It would have been impossible to defend Gainers without exchanging such information, and Mr. Ponting was to "quarterback" such defence. He had a right and a duty to tell Gainers and its officers what Mr. Pocklington told him. Mr. Pocklington never asked Mr. Ponting to keep any information from Gainers or its other officers.

4. It has long been settled that even if a law firm acts for two or more clients simultaneously on one transaction, it can keep no secrets from any of them, and there is no privilege or other confidentiality if the one seeking disclosure is the client and the one giving the information is not: Canadian Bar Association 1974 Code, Chapter 4, Footnote 6, id., Chapter 5, Commentary 5, especially lines 3-5; cf. id., Chapter 5, Footnote 3, ***Michel v. Lafrentz, supra;*** 1994 Alberta Code, Chapter 7, Rule 8(d) and commentary (to which the other Rules in Chapter 7 are subject). Similar is the 1987 Canadian Bar Association Code Chapter 4, Footnote 6, and Chapter 5, Commentary 5 and Footnote 3. Cf. ***Buttes Gas & Oil v. Hammer*** (***#3***) [1980] 3 All E.R. 475, 483-4. ***A fortiori*** if the one seeking disclosure is the client, and the person giving the information is not. Mr. Poeklington's counsel disagrees, citing ***Griffiths v. Evans*** [1953] 2 All E.R. 1364 (C.A.), but it is not on point. It is about duty to advise about the law, i.e. a negligence case, not an ethical case about liberty to reveal facts to anyone.

Counsel for Mr. Pocklington suggests that the lack of confidentiality between co-clients only arises if the lawyer first tells them that that will be so. With respect, that is backwards. The lack of confidence makes the warning desirable. The lack of confidence does not stem from a warning. Such a rule would be perverse or nonsensical.

5. If a law firm acts for two clients on one transaction and the two then have a falling out and the firm ceases to act, each client still has a right of access to the firm's file and information. ***A fortiori*** if the one seeking disclosure is the client, and the one giving the information is not. Cf. Manes and Silver, Solicitor-Client Privilege in Canadian Law ss. 3.10, 4.03 (1994), and cases there cited.

[44] Counsel for Mr. Pocklington argues that because McLennan Ross' mandate in 1986 was limited to labour matters, they had no right in a non-labour context to tell Gainers the facts which the firm had learned. The only authority cited is ***Griffiths v. Evans, supra,*** but that case has nothing to do with confidentiality or conflicts of interest or ethics, as noted. And it has nothing to do with two different clients.

[45] So the answer to question (b) is no. Telling Gainers Inc. is not a breach of the presumed expectation of confidentiality.

[46] Question (c) asks how likely is it that harm would result if McLennan Ross could act here? In my respectful view, that is very unlikely, maybe impossible.

[47] It is true that the facts learned have some relevance, but it is indirect relevance. Furthermore, it is almost 9 years since the events in question, so it is not surprising that Mr. Ponting swears that he can remember very little of the supposed secret communications. There is no set expiry date for confidences,

> "however, the passage of time may mitigate the effect of a lawyer's possession of particular confidential information, and may permit the lawyer to eventually act against a former client when the information becomes outdated or irrelevant to the point that it no longer has the potential to prejudice ..."
>
> (1994 Alberta Code, Chapter 6, Part of Commentary 3, pp. 59-60).

If this were information directly relevant, passage of time would not matter.

[48] The expiry of time is relevant for another reason. The McLennan Ross files appear to contain very few documents of much relevance to the present suit, and counsel cited none to us, despite production of documents and extended cross-examination on affidavits.

[49] It is also argued that relevant to the new lawsuit will be the section of the ***Alberta Business Corporations Act*** about relying on legal or other professional advice. Any advice germane to the present suit was admittedly not given during the strike period, and McLennan Ross had nothing to do with such advice. But it is suggested that Mr. Ponting saw Mr. Pocklington get legal and accounting advice on different (labour) matters, and then saw how he acted or reacted to advice generally. That is ingenious, but with respect, it sounds very thin. There is no suggestion that Mr. Pocklington is ignorant, uneducated, simple-minded, superstitious, gullible, unversed in the English language, hates accountants, or has some other unusual peculiarity relevant to taking advice.

[50] Gainers Inc. has a right to demand the 1986 information from McLennan Ross anyway, so it is highly probable that no harm whatever would be done by letting McLennan Ross act. If the strike had been a few months ago, possibly Mr. Ponting might later remember (or from time to time be reminded of) useful things nowhere recorded on the file. Maybe he could not recite them to Gainers Inc. if instructed by them to debrief them. But that is plainly not the case here; it was 9 years ago and he recalls little.

[51] The next question (d) is this. If any such harm materialized, how great is it likely to be? Small, for much the same reasons. Indeed, we have been shown no evidence of anything which is at all sensitive or harmful, or that such a thing exists.

[52] Courts should be a little cautious of supposed secrets which merely boil down to familiarity with an individual and his philosophy and thinking. If carried very far, such reasoning would link any two retainers and so prevent a law firm from ever acting on anything against someone they had ever met on a friendly basis. This case is stronger than that, but not much.

[53] The second-last question (e) is whether letting McLennan Ross act would work significant injustice for any other reason. The only thing which I can think of is this. It was argued that counsel cross-examining a witness has an advantage if the witness is someone whom he has got to know well and who has at one time spoken freely to him. This goes beyond a question of information, it is suggested. There is no real evidence to back that up here, but it is true that such a thing looks bad.

[54] Therefore, I would give Mr. Pocklington the benefit of the doubt on this narrow question, and order that Mr. Ponting not personally examine Mr. Pocklington for discovery,

nor personally cross-examine Mr. Pocklington. I am under the impression that McLennan Ross does not intend such a thing anyway. That does not prevent other members of McLennan Ross from conducting such examinations or cross-examinations.

[55] The last question (f) is whether (irrespective of any harm which might be done to Mr. Pocklington) letting a law firm act in such a circumstance would set a harmful precedent. The Supreme Court in ***Martin v. Gray, supra*** speaks repeatedly of the views of a reasonable bystander informed as to the facts. The bystander would therefore know all the facts and fact distinctions outlined above. Furthermore, I am suggesting a fact-specific case-by-case approach. I am not dealing with a one-person company, nor an unsophisticated putative client, nor the personal lawyer of that person. Mr. Pocklington had another personal lawyer close at hand throughout the strike period, and consulted him regularly.

[56] What is more, the fact that no Canadian case could be found on point, suggests that this decision will open no floodgates. It is rare that an ex-officer or shareholder of a company complains about the company's former lawyer again representing the company.

[57] Therefore, no case is made out to bar McLennan Ross from acting, after weighing questions (a) to (f) in Part F above.

H. Conclusion

[58] Mr. Pocklington's counsel suggests that we ignore his last ground of appeal (#6) about McLennan Ross' representing the government, as Queen's Bench may reconsider it. Counsel for Gainers does not object to that.

[59] Therefore, I would modify the order appealed from to prevent Mr. Ponting's personal conduct of examinations. Subject to that, I would dismiss the appeal.

[60] Costs of the appeal should be paid to the respondent Gainers in any event, immediately after taxation.

[61] Thanks are due for all the care which counsel took. Counsel for Mr. Pocklington cross-referenced his table of authorities to the pages of his factum where each authority was cited, a very useful device which more counsel should emulate.

JUDGMENT DATED at EDMONTON, Alberta,
this 9th day of May,
A.D. 1995

Tab 10

Weatherill (Estate of) v. Weatherill, 2003 ABQB 69

Date: 20030128
Action No. 0103 14560

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

BETWEEN:

MALORA LEE, TRUSTEE OF THE ESTATE OF
MARY LOUISE WEATHERILL

Plaintiff
(Respondent)

- and -

WILLIAM WEATHERILL, DIANE WEATHERILL and BONNIE WALD

Defendant
(Appellants)

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE F. F. SLATTER

APPEARANCES:

G. H. Crowe
for the Plaintiff/Respondent

S. Pride-Boucher
for the Defendant/Appellant

[1] This appeal from the Master involves the question of whether the Plaintiff is required to produce a certain document (a 1998 will of the Plaintiff) as part of the discovery process. The learned Master dismissed the application for production of the will, and the Defendants appeal.

Facts

[2] As this is an interlocutory application, and none of the facts have been proven, I will only comment on them to the extent that is necessary. I am merely repeating the allegations in the pleadings, without making any specific findings about matters in dispute.

[3] This is a family dispute about a particular piece of land. The Plaintiff and her late husband owned the land for many years. There is some evidence on the record that the lands were always "earmarked" for the Defendant William Weatherill. In the 1980's he entered into an agreement to purchase the land, but the agreement was frustrated by the untimely death of his father. At a meeting in 2000 there was a "family agreement" that William should purchase these lands, and not pay the full price in anticipation of an inheritance from the Plaintiff. In May of 2000 the Defendant William and his wife entered into an agreement with the Plaintiff to purchase these lands. On the face of it, the purchase price appears to be below the fair market value of the lands, and this transfer is now challenged. Allegations of undue influence are made in the pleadings, and the pleadings also question the capacity of the Plaintiff to contract at the relevant times.

[4] A little more background is necessary in order to understand the present dispute about discovery of documents. In May of 1998 the Plaintiff attended before a solicitor, Richard Wyrozub, and gave him instructions for the preparation of a will. The will was apparently prepared and executed, and it is the production of this will that is in dispute. It is alleged that after the will was executed the Plaintiff discussed her will with her children, and advised that "the lands would go to the boys".

[5] In November of 1998 Reginald Weatherill, another son of the Plaintiff and a brother of the Defendant William, had Mr. Wyrozub prepare a farm lease for the lands. This ten-year lease was executed in February of 1999. It is alleged that the other members of the family did not know about this lease. The validity of this lease is also being challenged in collateral litigation between William and Reginald, to which the present Plaintiff has been added as a third party.

[6] The Plaintiff had executed an enduring power of attorney. On September 7, 1999 this power was triggered when her physician issued a declaration of incapacity.

[7] On January 8, 2000, the Plaintiff prepared a holograph will. This will is listed in the affidavit of records filed by the Plaintiff.

[8] In May of 2000, the challenged transfer of the lands took place.

[9] In 2001 a trustee was appointed for the Plaintiff, and this action was commenced. On March 18, 2002, it was ordered that this action and the action concerning Reginald's lease should be tried together. The Defendants in this action applied for production of a copy of the 1998 will, but on September 23, 2002 the Master dismissed that application. After referring to

Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 the learned Master stated in a brief memorandum that he had "concluded there is nothing in that case that leads me to believe that a will executed in 1998, before the declaration of incapacity [by the physician in 1999], can help the Defendants overcome the presumed undue influence in May of 2000."

The Duty to Discovery Documents

[10] The parties are in agreement as to the duty of a litigant to discover records. The only dispute is over the application of the law to the facts. Both parties note that Rule 187.1(2) requires the parties to "disclose relevant and material records". They both then refer to Rule 186.1 which reads:

> **186.1** For the purpose of this Part, a question or record is relevant and material only if the answer to the question, or if the record, 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.

The Defendants argue that the making of the will in 1998 is relevant to the capacity of the Plaintiff in 2000 when the disputed transaction took place. They also argue that the contents of the will are relevant to the issue of undue influence, because the will may show the intention of the Plaintiff to deal with the lands in a way that is consistent with the challenged transaction. In an argument that the Master accepted, the Plaintiff argues that the real issue is the capacity of the Plaintiff in the year 2000, and that the events of 1998 are too remote to be "relevant and material".

[11] Up until 1999 discovery in Alberta was very wide-ranging. Generally discovery was available on anything "touching the matters". This form of discovery was found to be excessive. It was requiring the production of documents and the answering of questions that were only relevant in the remotest sense. It was felt that some parties were abusing the Rule by relying on literal compliance with it; demands were being made for the production of endless lists of documents that had little bearing on any real issue. As a result, the Rules Committee recommended that discovery be limited to matters that are "relevant and material". The purpose of the Rule was to control abuses and to limit the costs of litigation, while still allowing an appropriate degree of pre-trial discovery.

[12] In my view the courts should take a pragmatic view of the scope of discovery. Too formalistic an application of the Rule serves to increase the costs of litigation, rather than decreasing them. This case is a good example. The cost of photocopying the disputed will would have been a few dollars. Instead of that, the parties have spent thousands of dollars

arguing about whether the document is producible. This was not the result intended by the amendment to the Rule.

[13] The pragmatic counsel who is called upon to produce a document which is arguably irrelevant, or at least not materially relevant, will analyze the situation as follows. First of all, the document cannot help or hurt counsel's client. If the document can help or hurt, then it is material. If the document is truly harmless, the pragmatic counsel will produce it rather than fight over it.

[14] The pragmatic counsel might nevertheless decline to produce such harmless documents for a number of reasons:

(a) Floodgates. Counsel may be concerned that the request for one or a few documents is merely a precursor to a flood of similar requests. At some point the floodgates must be closed. Controlling excessive demands for documents was one purpose of the new Rule.

(b) Confidentiality. Harmless documents may be confidential. The confidentiality in question may be personal, or it may relate to business secrets. While confidentiality is not a bar to discoverability, it may be a factor that prompts the pragmatic counsel to decline to produce a record which is not materially relevant, but which could easily and cheaply be produced.

(c) Expense. There may be harmless documents that will be very expensive to collect and obtain. This may be because the document is filed in a way that makes it difficult to access, or it may be in the control of a third party who demands a fee, or for other reasons. In these instances the pragmatic counsel might decline to incur the expense of producing what appears to be a marginally relevant document.

I do not suggest that the Rule over the discoverability of a document should be determined by the expediency of the day. Parties are not required to produce the documents that are not material and relevant, and they should be entitled to refuse to produce if they so choose. However, the above factors can be explored by the Court in trying to understand why production of a particular document is resisted. If the records being requested are modest in number, they are not confidential, and they are not expensive to obtain, then why is the litigant fighting so hard to avoid production, given that the documents are by definition supposedly harmless? Is the production of the document within the mischief the 1999 amendments were designed to prevent? These are factors that can certainly be taken into consideration when costs are considered.

[15] Examination for discovery now is narrower than it used to be. It is however still quite wide, and is perhaps still wider than the test for admissibility at trial. Certainly discovery is not

narrower than admissibility at trial. In interpreting the Rules, the Court should avoid creating an artificial situation where a litigant is not entitled to obtain information on discovery, which the litigant could quite clearly introduce at the trial.

[16] In determining whether a document is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. Where does the burden of proof lie? Is the issue something that is capable of direct proof, or is it something like a person's state of mind, which can only be proven indirectly. Does one party essentially have to try and prove a negative? How are cases of this type usually proven at trial? The less amenable a fact is to direct proof, the wider will be the circle of materiality. There are some facts that can only be proven by essentially eliminating all the competing scenarios, thereby leaving the fact in issue as the sole logical inference. When a state of mind is in issue, it can generally only be proven by demonstrating a pattern of conduct of the person whose state of mind it is. In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry.

[17] That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

[18] It is sometimes said that the new Rules prevent the discovery of "tertiary" issues. This is one way of saying that the 1999 amendments were intended to prevent excessive discovery. However, as a working tool the search for "tertiary" issues is unhelpful in many cases. There is no clear dividing line between primary, secondary, and tertiary evidence. As I have indicated, some facts can only be proven by tertiary or even more remote evidence. A good example is an attempt to prove a negative. The application of the new Rule to particular fact situations must be primarily pragmatic.

[19] The Defendants argue that the will is relevant to two issues. The first is the capacity of the Plaintiff. It seems clear from the record that the Plaintiff did not suffer any sudden and catastrophic loss of capacity. At worst she is experiencing the normal effects of the aging process. It is not uncommon for medical experts to testify that this sort of loss of capacity is gradual, and perhaps exists before it is apparent. The passage of time between the will in October of 1998 and the challenged transfer in May of 2000 is not so great that a court might not draw an inference on capacity in 2000, from capacity in 1998. Now that the two actions have been combined for trial, the capacity of the Plaintiff at the time of the 1999 lease is also

in issue. It would seem artificial to say that the will is producible in the lease action, but not in this action. It is not necessary for the purpose of this application to decide if the Court would draw any inferences on capacity in 2000, based on capacity in 1998; it is a possible line of reasoning and not mere speculation, and the record would appear to be materially relevant. It may assist in determining an issue at trial.

[20] The Defendants argue that the contents of the will are not relevant to any issue of capacity. It is true that the circumstances surrounding the making of this will perhaps have more to say about the Plaintiff's capacity than the actual contents. However, if the contents of the will bear a rational relationship to her family's circumstances and her estate as it existed at that time, that is some evidence of her capacity. Evidence of this type is routinely introduced in trials involving capacity and undue influence.

[21] Likewise, the will is relevant to the issue of undue influence. In such cases it is important to know whether it was truly the transferor's intention to transfer the property, or whether that intention was imposed on her. As I have indicated, there is some family history suggesting that these lands were always earmarked for the Defendant. If the 1998 will left the lands to William, that would be compelling evidence. Likewise, if the will said anything about Reginald being entitled to farm the lands, that too would be relevant. If the will is silent, or disposes of the land in some inconsistent way, that is also relevant. Again, whether the trial judge will draw any inferences from this need not be decided at this point; it is only necessary to show that the inference is possible.

[22] The Defendants argue that a person's intention in a testamentary instrument is not necessarily the same as that same person's *inter vivos* intention. That is undoubtedly true, but it is not uncommon for people to commence distribution of their estates prior to their death. The acceleration of inheritances is not unknown. These are all factors that the trial judge must take into account in deciding whether to draw the inferences the Defendants urge. The ability of a party to make the argument at trial should not be foreclosed by too limited a view of discovery.

[23] The Defendants point out that the law suggests that the onus of disproving undue influence will fall on them. There are cases that suggest that undue influence will be presumed where transfers are made at an undervalue and the donee is in a position of confidence with the donor: ***Tulick Estate v. Ostapowich*** (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381. If this law was found to apply to the facts of this case, the Defendants would have the burden of proving a negative, namely that there was no undue influence. They are also required to prove the mental state of the Plaintiff. Such issues are notoriously hard to prove, and they are impossible to prove directly. Accordingly, in a case like this there is a wider category of discovery that would be "material".

[24] It seems clear to me that on this record the Defendants would be entitled to call Mr. Wyrozub at trial as a witness, and ask him how he assessed the Plaintiff's capacity in 1998 when the will and the lease were prepared. It seems unlikely that the trial judge would rule that his evidence is so unlikely to be relevant that he could not even be called. If his evidence can

be called at trial it seems particularly artificial to say that documents surrounding his evidence are not producible on discovery.

[25] Viewed from the other side, no compelling reason has been shown why production would be abusive. Production of the will might well trigger production of Mr. Wyrozub's file, but that in itself would not be a major undertaking. There is no floodgates issue. The Plaintiff protests that the Defendants are asking for something which is "none of their business". The privacy interest in question would be that of the Plaintiff. Having alleged in this claim that she was unduly influenced, she does not have a strong argument that documents relating to her motivation to dispose of her property should now be kept confidential. Furthermore, there is evidence that she discussed the contents of her will with her family. Expense is not an issue. As I have mentioned, the will could be photocopied for a few dollars.

[26] In all of the circumstances, it appears that the document in question might well assist the Court in making the findings of fact that are required regarding capacity and undue influence. Those are notoriously difficult issues to prove, and they are almost invariably proved indirectly and by inference. The production of this document is not within the mischief that the 1999 amendments to the Rules were designed to prevent. I have concluded that the document is relevant and material, and it should be produced.

[27] The parties may speak to costs within 30 days of the date of these reasons, if they are unable to agree.

HEARD on the 21st day of January, 2003.
DATED at Edmonton, Alberta this 28th day of January, 2003.

J.C.Q.B.A.

Tab 11

Alberta Court of Queen's Bench
Re/Max Real Estate (Edmonton) Ltd. v. Border Credit Union Ltd.
Date: 1988-07-25

J.G. Skinner, for plaintiffs.

S.A. McLachlin, for defendant.

(Edmonton No. 8703-28941)

July 25, 1988.

[1] Master FUNDUK:– This is an application by the plaintiffs for an order requiring the defendant to deliver a further and better affidavit of documents.

[2] It is necessary to look at the issues raised in the pleadings.

[3] The plaintiffs say that in April 1987 land owned by Little Albert's was listed for sale with Borden. The plaintiffs say that if a sale occurred Borden would receive a commission. The plaintiffs say that the listing was to expire 1st August 1987.

[4] The plaintiffs say that in July 1987 they solicited an offer from one Torris and that a few days later a sale agreement was entered into for $125,000.

[5] The plaintiffs further say that the land was at all relevant times subject to a mortgage to the defendant. The plaintiffs say that on 3rd September the defendant acquired title to the land from Little Albert, that the defendant adopted the sale agreement with Torris or alternatively received an assignment of the vendor's interest in the agreement, and that the defendant completed the sale to Torris on 29th September.

[6] It should be noted that the allegations about when the defendant acquired title, when it adopted the agreement or had it assigned to itself, and when it completed the sale to Torris, indicate those steps occurred after the expiration of the listing. However, the plaintiffs also allege that the listing agreement provides that any sale made within 90 days after 1st August to any person who had been contacted about or had been shown the land during the currency of the listing agreement would entitle Borden to a commission.

[7] The plaintiffs say that they are entitled to a commission based on the listing agreement or alternatively on a quantum meruit basis. There is a further alternative claim which I need not detail.

[8] In its defence the defendant first denies everything except "where specifically hereafter admitted". It then goes on to make certain specific denials. There are no admissions.

[9] The effect of the defence is that *everything* alleged by the plaintiffs is denied by the defendant. That means that *everything* alleged by the plaintiffs is in issue.

[10] The plaintiffs say that the defendant has not *discovered* all relevant documents. The plaintiffs say that there are four files which the defendant has in its possession or power relating to the matters or questions in this action. The plaintiffs say that the defendant has not *discovered* all documents in those four files. The plaintiffs want a proper *discovery* of all documents relating to the matters or questions in issue. That is the scope of what the plaintiffs seek at this time.

[11] I emphasize discovery because it appears that counsel for the defendant has confused the discovery of documents with the production of documents.

[12] The sole criterion for discovering documents is that set out in R. 186(2). Any document which "relates to any matter or question in the action" *must* be discovered. A party cannot refuse to discover a document on the ground it is not producible, for whatever reason.

[13] If any judicial authority is needed for the statement that discovery and production are different things, and that discovery does not hinge on producibility, resort can be had to *Skoye v. Bailey,* [1971] 1 W.W.R. 144 (Alta. C.A). Johnson J.A., speaking for the court, states at pp. 145-46:

> This appeal is concerned solely with what documents must be included in the affidavit of production. We are not concerned with what documents must subsequently be produced.
>
> Since the inception of this province, a party to a cause or matter has been required to discover all documents "in his possession or power" relating to the matter in question in the cause. The words used until recently in the English Rule were "possession, custody or power". The authorities agree that there is no difference in the scope of the documents that are required to be discovered under these Rules. Possession as it relates to discovery of documents has a much wider meaning than when applied to the actual production of the documents. As Jessel M.R. said during argument in the case of *Swanston v. Lishman* (1881), 45 L.T. 360 at p. 361:
>
> "The rule as to discovery is the exact contrary to that as to production. You must set out every document you have in your possession, whether you are bound to produce them or not,..."

> It is conceded by the grounds for appeal which have been quoted that Alberta Gas Trunk Line Company Limited has documents in its possession which relate to the pipe line and the explosion which caused the tragedy. It is not disputed that some or maybe all of the defendants have had possession of these documents for the purpose of their employment. These documents have been retained by the company and are in its possession and certain of these defendants, as officers or employees of the company who are charged with the preservation of these documents, are in possession of them within the interpretation of this Rule and they should be disclosed.
>
> It was suggested that because of changes in the Rules of Court, these older decisions can no longer be applied. No changes have been made in these Rules which would have that effect.
>
> It is true that by R. 191 a party is entitled to obtain production for inspection of any documents referred to "in the pleadings, particulars or affidavits of any other party" but the Rule specifically does not apply to any documents referred to in the affidavit of documents, "the production of which is therein objected to". Rule 193 provides that a party who omits to give notice of the time for inspection "or objects to give the inspection, the party desiring it may apply to the court for an order of inspection." On such an application the Chamber Judge will consider any objection to the production of documents. That stage has not been reached in these proceedings.

[14] *Skoye* probably says it all in relation to the present application.

[15] Counsel for the defendant says that the affidavit of documents is conclusive: *Jones v. Monte Video Gas Co.* (1880), 5 Q.B.D. 556 (C.A.). I do not agree.

[16] One Court of Queen's Bench judge recently said that any practice decision more than 20 years old is not worth considering. He might point to *Jones* as justification for that proposition.

[17] An affidavit of documents is the discovery of documents. The scope of discoveries, be it a discovery of documents by affidavit or at an oral discovery, or the usual pre-trial oral discovery, is a "broad... process": *Nova, An Alta. Corp. v. Guelph Engr. Co.,* 30 Alta. L.R. (2d) 183, [1984] 3 W.W.R. 314, 42 C.P.C. 194, 5 D.L.R. (4th) 755, 80 C.P.R. (2d) 93, 50 A.R. 199 (C.A.).

[18] The judicial trend to requiring a full disclosure is summed up in two sentences by Moir J.A. in *Strass v. Goldsack,* [1975] 6 W.W.R. 155, 58 D.L.R. (3d) 397 (Alta. C.A.), at p. 165:

> ... one must not forget the object of litigation is to assist the court in arriving at the truth. In reaching the truth, and a just result, anything that stands in the way of justice must be restricted.

[19] The matter is really one of practice, not substantive law. As indicated in *Nova,* the courts are the masters of their own practice. There is no good reason why today the courts of this province should be bound by English practice decisions, if we ever were.

[20] In the face of the plain language of R. 194(1), the matter should be approached in the same manner as any other application is approached. The applicant has the burden of satisfying the court that it should grant the order sought.

[21] How the applicant makes it "appear to the court" that a document has been omitted is a matter of evidence. What evidence is allowable is dictated by the rules of evidence. It is a matter of relevancy and it then becomes a matter of the probative value of that evidence which is properly admissible and whether the applicant has made out a case for what it seeks on a balance of probabilities.

[22] The burden lies on the plaintiffs to make out a case for the order sought: *Lazin v. Ciba-Geigy Can. Ltd.,* [1976] 3 W.W.R. 460, 66 D.L.R. (3d) 380 (Alta. CA).

[23] *Jones* is an 1880 English Court of Appeal decision on a matter of practice. It is not, and never was, binding on Alberta courts. The principle enunciated is not acceptable to this court.

[24] Counsel for the defendant also relies on *Hutchinson and Dowding v. Bank of Toronto,* 48 B.C.R. 315, [1934] 1 W.W.R. 446 (S.C.); *Farrer v. Kelso,* [1917] 2 W.W.R. 1024 (Sask. Dist. Ct.); *Loudon v. Consol-Moulton Trimmings Ltd.,* [1956] O.W.N. 552, 15 Fox Pat. C. 167, 24 C.P.R. 77 (H.C.); *Irwin v. Jung* (1912), 17 B.C.R. 69, 1 W.W.R. 524, 1 D.L.R. 153 (CA.); *British Assn. of Glass Bottle Mfr. Ltd. v. Nettlefold,* [1912] A.C. 709 (H.L.).

[25] I do not see how *Hutchinson* assists the defendant. It merely states that which should be self-evident. A party need not discover a document which is not relevant to the issues raised in the pleadings. The point is summed up in two sentences at p. 447:

> The point made upon the present application is this: That upon the case set up in this pleading all questions relating to the company's insolvency or the bank's knowledge thereof are irrelevant. With this contention I agree.

[26] In Alberta, the relevancy of documents is determined within the framework of R. 186(2), for the purpose of R. 194(1).

[27] *Fairer* applies *Jones.* I say no more about *Farrer.*

[28] *Loudon* says that prima facie an affidavit of documents is conclusive. If it is following the principle in *Jones,* I do not agree. If it says that, *without more*, the party cannot be ordered to provide a further and better affidavit of documents, I agree. An order under R. 194(1) is not granted merely by the asking. He who wants the order must "make it appear" to the court that relevant documents have not been discovered.

[29] *Irwin* also follows *Jones.* I say no more about it other than that I agree with one point, that the matter is a "rule of practice".

[30] *British Assn.* says that as a general rule an affidavit of documents is conclusive. If that means that *without more* the affidavit stands, I have no difficulty. If it means the affidavit is unimpeachable and cannot be contradicted, I do not agree.

[31] In any event, this court is not bound by a 1912 English practice decision.

[32] *Stapley v. C.P.R.* (1912), 5 Alta. L.R. 341, 2 W.W.R. 1010, 6 D.L.R. 180 (CA.), also states that [p. 1011]:

> The general rule is that an affidavit on production is conclusive and must be accepted as true by the opposite party respecting not only the documents that are or have been in the possession of the party making discovery and their relevancy...

[33] However, *Stapley* has been overtaken by what is now R. 194(1), which clearly negates the "conclusive" effect that was given to an affidavit of documents.

[34] R. 194(1) can be traced back to the 1914 Rules and R. 372(1).

[35] *Stapley* was decided in 1912, which is obviously prior to the 1914 Rules.

[36] I do not find it necessary to research if in 1912 there was a like rule to the 1914, R. 372(1). That would involve going back to the North West Territories Judicature Ordinance as it stood in 1905 when Alberta became a province and also seeing if there were any changes by Alberta between 1905 and 1912.

[37] In *Gainers Ltd. v. C.N.R.*, [1926] 2 W.W.R. 79 (Alta. S.C.), Master Blain indicates that the relevant rule did not exist in 1912. He states at p. 80:

> *Stapley v. C.P.R.* was decided in 1912 and C.R. 372 came into force in 1914. The English practice and procedure was being followed in Alberta in 1912, but is not now and for some years has not been in force in this province. C.R. 372 provides that:
>
> "If it be made to appear to a judge that any document in the possession or power of a party has been omitted or that a claim of privilege has been improperly made in an affidavit of documents filed, he may order a further and better affidavit."

> C.R. 382 provides for the cross-examination of the person who has made an affidavit of documents. As I stated, on the argument, the right to so cross-examine was to get away from the practice in England, which was not thought to be a good practice for this province, and to enable a party to discredit the affidavit of documents of the opposite party. I have since the argument consulted Mr. Justice Beck, a member of the Rules Commission, who tells me he suggested this right of cross-examination for the express purpose of getting away from the English practice.

[38] I would conclude that Master Blain did the research which led him to say that in 1912 there was not a rule like the 1914, R. 372.

[39] Stevenson and Côté, Alberta Rules of Court, also appear to be of the view that the 1914, R. 372 is new. They say that the present R. 194(1) is designed to get around the principle of unimpeachability found in *Stapley.*

[40] I agree.

[41] There is a troubling statement in *Chertkow v. Retail Credit Co.,* 26 Alta. L.R. 291, [1932] 1 W.W.R. 905, [1932] 3 D.L.R. 390 (CA), that [pp. 908-909] "the true facts cannot be established by any other affidavit contradicting [the affidavit of documents]." That appears to be a reversion to the English practice of not allowing a contrary affidavit. In light of the scope of R. 194(1), I am not able to rationalize *Chertkow.* I would say that was not the issue before the court, so the statement was made without the benefit of submissions by counsel on that point.

[42] In my view, the better approach to this kind of issue is that found in *Mark Fishing Co. v. United Fishermen & Allied Wkrs. Union* (1968), 64 W.W.R. 530, 68 D.L.R. (2d) 410 (B.C.CA.).

[43] Counsel for the defendant submits that the plaintiffs are going on a "fishing expedition". That description of some thing has been so overworked it is virtually meaningless.

[44] The plaintiffs merely want the defendant to discover documents in accordance with R. 186(2). That can never be called a "fishing expedition".

[45] Counsel for the defendant submits that the plaintiffs are hoping to find something to show there was an adoption by the defendant of the agreement for sale between Little Albert's and Torris, but that there is nothing which would show this.

[46] Again, the simple answer is R. 186(2). If a document "relates to any matter or question" in the action it must be discovered. Its probative value is another matter.

[47] It is not an answer to say that the documents will not assist the plaintiffs. That is for the trier of fact to decide. The defendant does not sit in judgment.

[48] The comments in *Chertkow,* at p. 911, negate that kind of answer.

[49] The plaintiffs' witness says that there are four "files" relating to the issues, all being files which it is alleged the defendant's counsel had opened.

[50] There is an alleged "mortgage file", an alleged "quit claim" file, an alleged "sale to Torris" file, and the file that is "listed" in the affidavit. It is the contents of the first three files that are the subject matter of this application. The plaintiffs' witness has even given the solicitors file numbers.

[51] The affidavit of documents does list some documents which would appear to come from some of these "files".

[52] The simple evidentiary answer to the application is the written admission by counsel for the defendant, found in a letter dated 29th June 1988 by him to counsel for the plaintiffs. It reads:

> We have your letter of May 31, 1988.
>
> We have disclosed in our Affidavit of Documents *all relevant non-privileged documents* both in our possession and in the possession of Border Credit Union Limited in each of the four files referred to in your letter and in the files of Border Credit Union Limited.
>
> All documents passing between our office as solicitors for Border Credit Union and Border Credit Union on each of those four files are privileged as between solicitor and client. Solicitor and client privilege is not dependant upon litigation being in progress or contemplated. [emphasis mine]

[53] It is that letter which leads me to conclude that counsel for the defendant has confused discovery of documents with production of documents.

[54] Rule 186(2) requires the discovery of all relevant documents, producible or not.

[55] The clear conclusion from the letter is that there are other relevant documents which have not been discovered because counsel thinks they are not producible. That is not the way to deal with relevant documents which, it is claimed, are not producible, for whatever reason.

[56] I do not interpret the letter as saying that other documents are privileged from production because they are irrelevant. That would be an illogical position. If a document is irrelevant it is irrelevant. A claim for privilege from production cannot logically arise for that

kind of document. That kind of fallacy is pointed out in *Ritholz v. Man. Optometric Soc.* (1958), 66 Man. R. 226, 24 W.W.R. 504 (Q.B.).

[57] The claim for privilege founded on a "solicitor-client" basis necessarily means counsel for the defendant concedes that there are other relevant documents.

[58] Counsel for the defendant has made a "mistake in principle" to use the phrase in *British Assn.* Even the English decisions accept that as a basis for ordering better discovery of documents.

[59] There will be an order in accordance with the plaintiffs' notice of motion originally returnable on 11th July for both items 1 and 2.

[60] Any claim to not being required to *produce* documents should be claimed in the affidavit in accordance with the Rules.

[61] Any possible dispute about the production of any documents is a future issue. I have already referred to *Nova.* It is the latest (and probably final) decision on that kind of issue. It is recommended (mandatory) reading.

[62] For the record, the counsel who appeared for the defendant on this application is not the counsel conducting the action for the defendant and he is not the author of the letter.

Application granted.

Tab 12

Court of Queen's Bench of Alberta

Citation: Dow Chemical Canada Inc v Nova Chemicals Corporation, 2015 ABQB 2

Date: 20150102
Docket: 0601 07921
Registry: Calgary

Between:

Dow Chemical Canada Inc. and
Dow Europe GmbH

Plaintiffs
(Defendants by Counterclaim)
Applicant

- and -

Nova Chemicals Corporation

Defendant
(Plaintiff by Counterclaim)
Respondent

Corrected judgment: A corrigendum was issued on January 6, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of Chief Justice Neil Wittmann

Introduction

[1] The Plaintiffs, Dow Chemical Canada Inc. and Dow Europe GmbH ("Dow") have brought two applications. On November 4th, 2014, no formal application was filed, only a brief ("the First Application") stating that "the Plaintiffs apply for relief in respect of Nova's multiple failures to make record discovery." The relief sought by Dow was that Nova be "directed

immediately to produce ... documents as more specifically discussed above". The second application by Dow seeks relief for "Defendant's non-compliance with Court Orders and other significant deficiencies". The Defendant, Nova Chemicals Corporation ("Nova") opposes the applications.

[2] The second application ("the Striking Application") does not appear to be dated but was returnable November 26th, 2014 at 10:00 a.m. at which time a case management court appearance was scheduled. Dow, by way of a Supplementary Brief has asked this Court for a remedy pursuant to the *Alberta Rules of Court* ("ARC"), specifically ARC 3.68(4). Dow submits that Nova's defence ought to be struck out as it relates to the capacity of E3 as well as any assertion or defence by Nova that there was an ethane shortage.

[3] The applications did not proceed November 26th, 2014 because, according to counsel for Dow, just prior to the scheduled hearing on November 24th, 2014, Nova served three affidavits and a brief seeking to avoid the relief sought in the First Application, that is a direction that the documents requested be ordered produced. Nova also raised fresh complaints about Dow's record production and about undertaking responses which Dow says were not yet due. The Court was notified by counsel that these matters were adjourned by consent to December 15th, 2014 at 10:00 a.m. The trial is scheduled to begin January 13th, 2015 for an estimated period of four months.

Background

[4] The nature of the dispute between Dow and Nova in this litigation has been described earlier by this Court in *Dow Chemical Canada Inc. v. Nova Chemicals Corporation*, 2014 ABQB 38 and 2010 ABQB 524.

[5] As previously stated in those decisions, there are three ethylene plants at or near Joffre, Alberta called E1, E2 and E3 by the parties, where ethylene is manufactured using ethane as a feed stock. The ownership of E1 and E2 is solely Nova but E3 is jointly owned by Nova and Dow. The operator of E3 is Nova by virtue of a Joint Venture Agreement made between Dow and Nova. There are other agreements, including an Operating and Services Agreement ("OSA") and a Plant Co-owners Agreement and a Liquid Co-Products Marketing Agreement.

[6] Key allegations by Dow include that Nova has improperly taken some of the ethylene from E3 owned by Dow and that Nova failed to optimize production at E3. The subsidiary allegations in dispute surrounding Dow's "Optimization Claim" include Nova's defence to it, namely, that it was necessary to reallocate ethylene during the period in issue in order to optimize production because of an ethane shortage. The documents in issue in this application, which Dow alleges Nova has failed to produce, surround the productive capability to optimize E3's ethylene production. Dow alleges this puts in issue the production capacity of E3, as well as whether there was an ethane shortage as alleged by Nova.

[7] A trial judge has been assigned and has met with the parties' counsel at least once and has corresponded with the parties' counsel with respect to technical requirements in the courtroom. According to Nova's brief, Nova has produced "102,671 records consisting of 653,566 pages." Moreover, expert reports have been exchanged according to previous Case Management Orders, not necessarily by the stated deadlines, but as modified by agreement of counsel. Thus, all of the witnesses to be called by the parties appear ready to proceed with the trial as scheduled, including the expert witnesses.

Recent History

[8] Dow's application surrounds allegations about Nova's failure to produce documents, first, documents relating to R3 as described; secondly, MIMI documents reflecting the alleged conversion of Dow's E3 ethylene; third, Nova's failure to produce many spreadsheets used to calculate its daily distribution of ethylene for Nova and Dow. Finally, Dow complains about Nova's "piece-meal" production of the Tulk ethane files.

[9] By way of a "Supplementary Brief" dated December 10th, 2014, Dow asserts striking is the only appropriate remedy in the circumstances. This remedy is based on ARC 3.68(4). Nova's brief in response was not received by the Court until approximately one hour before the application began on December 15th, 2014; that is at 9:00 a.m. Nova did transmit the brief electronically to the Court's Executive Assistant after 8:00 p.m. on Friday, December 12th, 2014, but of course neither the Executive Assistant, nor the Court was aware of this email until Monday, December 15th, 2014.

[10] During the oral hearing, it was disclosed that Dow intended to file a Fifth Amended Statement of Claim and that accordingly, Nova would be filing a Fifth Amended Statement of Defence and Third Amended Counterclaim. These pleadings were received by the Court by Friday afternoon, December 19th, 2014. Dow's Fifth Amended Statement of Claim alleges losses and damages "currently estimated to exceed $800,000,000."

[11] At the conclusion of the hearing, the Court indicated that it would not decide the Striking Application unless and until the amended pleadings had been received by the Court. Dow submitted that if I were inclined to accept the remedy asked for, that I simply state the concept and that later the pleadings could be struck accordingly. The Court rejected that notion and said that the Court wanted the pleadings so that the Court could see for itself those portions that may be affected by any Order the Court might make. Also, the Court indicated that it may not render a decision prior to the commencement of the trial but that it would not adjourn the trial absent any application to do so. None was made. In any event, it appears the Court is able to make a decision on the relief asked for by Dow in both the First Application and the Striking Application. It is also noteworthy that two additional days of questioning were scheduled for Nova to question Dow's corporate representative on December 18th and 19th, 2014. The Court made it clear that should any further document production be forthcoming, that parties would have the ability to question on it, even after the commencement of the trial, if necessary, assuming the trial proceeds as scheduled. I will detail each category of documents in controversy, come to a conclusion as to whether Nova ought to be subject to an Order for further document production and then deal with the ARC 3.68(4) remedy.

Document Production – Relevant and Material

[12] In bygone days, the process of document production and oral examinations for discovery was governed by the test of whether any question or document was "touching the matters in question", as per the old ARC 200, prior to 1999: *Czuy v Mitchell* [1976] 1 A.R. 434 (Alta CA).

[13] The Court of Appeal in *Hirtz v Alberta (Public Trustee)*, 2002 ABCA 29 made it clear that the 1999 amendments "narrowed the scope of relevance for written and oral discovery excluding tertiary relevance": (para. 2).

[14] The new ARC, applicable to both production of records and questioning is ARC 5.2(1) which states as follows:

> 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.

[15] The Court of Appeal in *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2014 ABCA 244 at paragraph 17, after quoting ARC 5.2(1), indicated that relevance is primarily determined with reference to the pleadings, but materiality concerns whether the information can assist directly or indirectly to prove a fact in issue (para. 17). The point is that the scope of document production or production of records as it is now called, and questioning, formerly oral examination for discovery, has been narrowed since 1999. Secondly, it is to be remembered that it is the legal obligation of the party producing records or delivering an Affidavit of Records to decide what is relevant and material and what is not. That is not to say that differences cannot arise. But it is the obligation of a party, assisted by counsel, where available, to disclose relevant and material records.

[16] Structurally, I will deal with the First Application asking the Court to order the production of certain documents followed by a consideration of the Striking Application.

The First Application

The R3 records

[17] R3 is a proposed polyethylene reactor that Nova plans to construct. R3 will make polyethylene from ethylene and the R3 reactor will require ethylene from Nova. Dow asserts that Nova has not added any ethylene producing capacity at Joffre and reasons that Nova plans to use some unused capacity from E3, for R3 or for new merchant ethylene sales. This Court ordered the production of R3 documents in paragraph 2(a) of its Case Management Order pronounced July 15th, 2014 which states as follows:

> 2. Nova shall provide the following by September 1, 2014:
>
> (a) Records created for senior management or the Board of the Defendant [Nova] during the R3 approval process relative to the projected ethylene production volumes or capacity of E3.

[18] Dow has made an argument that the R3 documents have not been produced in violation of this Court's July 15th, 2014 Order. Its first argument is based on the premise that there must be more documents from the R3 team than have already been produced because of the size of the team - over 50 members - and the lack of any e-mail traffic from or to 30 members of it, which Dow says is "inconceivable". Secondly, Dow submits that the Board of Directors of Nova, in their meetings, have materials prepared for the Nova CEO or Senior Executives, presenting

slides to the Board and that no complete Board Meeting Minutes for any one meeting have been produced.

[19] Dow goes on to suggest that of the Board Minutes produced, there are no pre-read materials or backups produced, but for four sets. Dow asserts that almost no corresponding speaker notes have been produced with slide decks from 19 Board meetings, nor has there ever been any drafts of speaker notes produced. In addition, Dow says Nova's consultant Bain, hired to analyze R3 and "Western Feed Stock Supply" issues from 2009 to 2012, has resulted in only a few of those emails produced. Nova, in response to its ongoing dispute with Dow over the R3 production wrote counsel for Dow, October 8th, 2014 and indicated that they had that day completed the R3 production.

[20] Randy Woelfel, the former Chief Executive Officer of Nova, was examined December 4th and 5th, 2014 in Santa Fe, New Mexico. He attended questioning and the entire transcript was put before the Court and excerpts were referred to by both Dow and Nova at the hearing of these applications. It is apparent to the Court that Dow's Supplementary Brief supporting the Striking Application was made based on the questioning of Woelfel. More detail on that questioning as it relates to any of the document production issues on the First Application, will be dealt with later under the Striking Application.

[21] Based on the filed materials and the submissions of counsel, this Court will not make a further Order for document production as it pertains to R3 records. Dow has not established, on the balance of probabilities that relevant and material records either exist, or if they exist, have been withheld by Nova. Nova has repeatedly stated that their outside counsel has reviewed all of the documents Dow says must exist, using the criteria of what is relevant and material. The Court comments parenthetically that drafts of speaking notes for a presentation to a Board or a CEO need not be produced, if they are not "relative to the projected ethylene production volumes or capability of E3." The Court has no reason to doubt the integrity or diligence of Nova's counsel when they make the assertions they have made in this regard. As will be seen below, where a mistake has been made or document overlooked, Nova has acknowledged its mistake or error. No such mistake or error has been made evident when it comes to the relevant and material records relative to the projected ethylene production volumes or capability of E3 during the R3 approval process. Thus, this Court dismisses Dow's request that more R3 Records be produced.

The MIMI Documents

[22] Next, Dow asserts that Nova has failed to produce MIMI documents "reflecting its conversion of Dow's E3 ethylene". MIMI is computer software that Nova used that was linked to meters at Joffre, in order to divide E3's ethylene between Dow and Nova. It is common ground between the parties that the MIMI software code had default settings to divide E3's ethylene production 50/50 between Nova and Dow, based on the relevant joint venture project agreements between the parties. According to the questioning of Joyce Choma, November 22nd, 2010, at the material time she was Nova's Ethylene Contract Administrator. Her practice would be to access the MIMI program by overriding the default on a daily basis and manually replacing the values deviating from 50% percent for Dow and 50 % percent for Nova.

[23] Apparently Ms. Choma personally maintained hard copy printouts of the input allocations for sharing E3 production back to 2000. What Dow has asked for is an Order that Nova be ordered "immediately to cease the rolling destruction of the data and to produce whatever remains of it to Dow". Dow also asked the Court to order the most knowledgeable Nova Information Technology person to be produced to state how the data came to be destroyed during the action.

[24] In her Affidavit sworn November 24th, 2014 (the Choma Affidavit), Ms. Choma confirms the 50% percent allocation on the input screen for MIMI as the default position and that there are situations when she would have to manually enter a number different from 50% percent. Exhibit "A" to the Choma Affidavit is a screenshot of the input screen dialogue box. Ms. Choma swears that it is not a "record" that she would preserve, use or refer to in the ordinary course of business and that it is nothing more than a data entry tool. Exhibit "B" to the Choma Affidavit is a report called "TOP 773-1". Ms. Choma swears that each co-owners' (Dow's and Nova's) percentage ethylene take is entered and the MIMI reporting reflects the change on the TOP 773-1 report. It shows what the historical input data was. She then states that some of her answers to questioning August 7th, 2012 were incorrect because she could not in fact review the historical input screens back to 2006 and that no historical input data was available prior to 2006. At paragraph 26, she states that "Historical Input Screens" are accessible for a rolling 12 month period that she can access historical input screens going back a year.

[25] During oral argument, Nova's counsel said that they could have Ms. Choma take screen shots back for 395 days and sit in front of a screen for 2 or 3 days "for absolutely no benefit whatsoever. It is abusive and it's a waste of time."

[26] Further, Nova's counsel said that Dow has minute by minute plant data, they have reports, they know exactly what came out of E3 and they know exactly whether they got 50% percent or not. Dow does not dispute that the percentage from E3 actually allocated to Dow on a daily basis has been disclosed on the TOP 773 Reports. But, it says the percentage allocation would be more easily ascertained were the screen shot input data to be produced. Counsel for Nova states that the MIMI Input Screen is not relevant or material and that the percentage for any given day can be calculated from the stated volumes on the TOP 773 Reports.

[27] I do not agree with Nova that the MIMI screen shots are not relevant and material. They are. I do agree that there is a practical difficulty in taking screen shots. In view of the difficulty and in view of the actual information produced to Dow as to their daily allocation and the ability to calculate a percentage, to require Nova to create screen shots would be abusive. Therefore, I am not going to order Nova to produce screen shots unless they intend to adduce screen shots in evidence at the trial. If so, they will be required to produce them to Dow forthwith.

[28] Secondly, there will be no order to Nova to change their technology methodology in terms of ethylene allocation. Therefore, this aspect of Dow's application for further documents as they relate to MIMI and the MIMI software program is dismissed.

The Striking Application

[29] Some of the submissions made by Dow and Nova in the Striking Application overlap with the First Application, in terms of content and the alleged failure of Nova to produce relevant material documents in a timely manner. The authority to strike a pleading or portions of a pleading is found in ARC 3.68(4)(b)(ii)(iii) which states as follows:

3.68(4) The Court may

(b) strike out all or any pleadings if a party without sufficient cause does not

(ii) comply with rule 5.10, or

(iii) comply with an order under rule 5.11.

[30] Rule 5.10 states that when a party, having served an Affidavit of Records on other parties, later discovers or obtains control of a relevant material record, it is obliged to notify the other party and serve a Supplementary Affidavit of Records. ARC 5.11 indicates that on application, the Court may order a Record to be produced, if relevant and material, if it has been omitted from an Affidavit.

[31] Nova, in response to Dow's Striking Application makes the case that the parties agreed, with the Court's concurrence, that they would not file and serve formal Affidavits of Records, so that the remedy asked for by Dow under ARC 3.68(b) (ii) or (iii) cannot be granted. Nova submits that this is "not merely a technical argument". In the context of the case management of this matter, I reject the submission that it is not a technical argument. It is. That said, Nova's submissions resisting Dow's claim, discussed in more detail below, are basically that Nova has diligently complied with its duty to disclose its records and that there is sufficient cause for not disclosing relevant and materials records in a timely fashion. Thus, Nova argues the Court, acting judicially, ought not to grant the remedy. Moreover, the Court is cautioned by Nova that the striking remedy in this case is tantamount to a summary judgment and Nova cites authority for the proposition that such remedy must be granted with great care, especially in the circumstances of this case.

[32] Dow has submitted that the history of this matter demonstrates unequivocally that the *only* proper remedy available to it, in light of Nova's antecedent conduct with respect to its production of relevant and material records, is the striking remedy. It follows that Dow argues there is no sufficient cause for Nova's alleged failure and Dow details Nova's failure to produce relevant and material records.

Authorities of the Parties

[33] Nova has cited *Sun Life Assurance Co. of Canada v Tom 2003-1 Limited Partnership #2*, 2010 ABQB 815; *Wagner v Petryga Estate,* 2001 ABQB 690; *Harden v Chang*, 2013 SKQB 419; *Stacey v Foy*, 2014 ABCA 394; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441; *McElheran v Canada*, 2006 ABCA 161; *Hryniak v Mauldin*, 2014 SCC 7; *Dow Chemical ULC v Nova Chemicals Corporation*, 2014 ABCA 244; *Lay v Lay*, 2012 ABCA 303.

[34] Dow has also cited *Wagner*, *Sun Life*, and *Harden.* Both parties rely on ARC 3.68(4)(b), 5.10, 5.11 and 6.11(1).

[35] ARC 6.11 mandates that a Court may consider certain types of evidence at an application hearing. During oral argument, the Court questioned counsel as to whether there was any dispute whatsoever about materials put before the Court for this application, including documents handed to the Court or included with their briefs, such as the Holloway expert reports which were not presented in an Affidavit. All counsel agreed that all of the materials before the Court could properly be considered to dispose of this application.

Factual Basis for the Striking Application

[36] It is plain and obvious from the ordinary meaning of ARC 3.68(4)(b) that the applicant must prove that a party failed, "without sufficient cause", to do an act it is otherwise required to do. As stated earlier, getting past the "technical requirements" referred to by Nova, in the context of this matter, Nova must have failed, without sufficient cause, to disclose a relevant and material record in a timely way, or at all, or pursuant to one of the Case Management Orders of this Court.

Submission of Dow

[37] Dow relies on Case Management Orders of this Court; April 26th, 2013, which states that Nova will have "completed its production in response to all outstanding document requests by May 31st, 2013"; September 26th, 2013, wherein Nova was ordered to produce documents from the files of David Tulk ("the Tulk files") and the July 15th, 2014 Order quoted above. Dow says Nova has failed to comply with these Orders. Dow also appears to complain that since on or about December 1st, 2014 Nova "has produced thousands of pages of engineering records concerning E3s maintenance, repair and operation dating all the way back to 2002". Dow says that these documents ought to have been produced long ago, that the pleadings clearly indicate that they ought to have been so produced. Dow was also adamant that the July 15th, 2014 Court Order as quoted above has been ignored and relies heavily on the December 4th and 5th, 2014 questioning of the former CEO of Nova, Woelfel.

[38] Dow says that all of the above "confirm that Nova continues to fail to comply with the Court's Order".

Submission of Nova

[39] Nova argues that it is largely complied with its obligations, has exercised due diligence at every turn and that to the extent there has been any failure or omission, there is sufficient cause to explain it within the meaning of ARC 3.68(4)(b). Nova argues that the Tulk Records delay in production is explained in the Affidavit of Alba Apuzzo, sworn November 24th, 2014 (the "Apuzzo Affidavit"). That Affidavit states that "some Tulk Records were misplaced as a result of Mr. Tulk leaving Nova's employment in 2009" and, that when answering undertakings Tulk identified and located Tulk records that were not previously known to Apuzzo who, as part of her responsibilities as Director, External Business Relations, Olefins & Feed Stock, has been responsible for coordinating the work of Nova personnel in the action, including record production and answers to undertakings. She also deposes that the Tulk Records in the "Litigation Hold Room" were reviewed in connection with the original production that occurred in late 2009 and that many of these records were produced. As the result of Tulk's questioning in September 2012 and the Court Order of September 26th, 2013, Apuzzo says all of the Tulk Records in the Litigation Hold Room were scanned and produced and that Nova did not know of any relevant Tulk Records other than those. Subsequently, additional Tulk Records were discovered, including electronic records discovered by Mr. Tulk, who was asked to assist in the production.

[40] Ms. Apuzzo was not cross-examined on her Affidavit.

[41] With respect to the MIMI data, Nova relies on the Choma Affidavit, referenced in the First Application. Ms. Choma was not cross-examined on her Affidavit which was filed in opposition to the Striking Application.

The Woelfel Questioning

[42] As indicated earlier on December 4th and 5th, 2014, the former CEO of Nova, Randy Woelfel was questioned by Dow's counsel. Dow frames its argument around the Woelfel questioning in conjunction with a previous questioning of Nova's corporate representative, Flint, as well as the Affidavit of Graeme Flint ("the Flint Affidavit"), sworn November 24th, 2014 in opposition to the Striking Application. Flint was not cross examined on the Flint Affidavit. Dow frames its argument on the basis that the Flint Affidavit deposes to the R3 polyethylene production can be achieved by running E1, E2 and E3 at 105 % percent of name plate capacity. The Flint Affidavit has attached to it as Exhibit "A" an August 31st, 2011 Memorandum setting forth the analysis. Dow complains that this is revision 2 of the Memorandum and that other versions have been "withheld" from production. When Woelfel was questioned, he indicated that he and the Board had never even heard of Flint's 105% percent theory. Dow did not include, in their written brief or their oral argument, any reference to Woelfel's testimony at pp 205-206, the following:

> Q.: So your understanding of the logic for the Nova planning of R3 and the ethylene for it was that Nova was intending to use the excess capacity at E1 and E2 with no consideration of E3 at all?
>
> A.: That's correct.

[43] Dow details through the Woelfel questioning that the Nova Management Board met every two weeks, a total of approximately 100 times during Woelfel's four years as CEO in 2009 through 2014 and there were agendas, minutes and presentations, including a website kept up to date which Nova's senior management had access to. Dow has identified many records from CEO Reports to the Board, which were not produced. What Dow has not identified is whether any of these documents are relevant and material to either E3 capacity or the alleged ethane shortage.

[44] I am not satisfied that Dow has satisfied the onus of showing that Nova has, without sufficient cause, withheld or failed to produce relevant material documents pertaining to these issues based on the Woelfel questioning, the Flint Affidavit or the previous questioning of Flint.

Recent E3 Ethylene Production Records – the Holloway Report

[45] Dow complains that Nova continues to produce a number of documents comprising of some 4,650 pages on November 13th, 2014 and that Nova states it's still in the process of producing many more such documents which include incident reports, and operator work team weekly meeting minutes dating back to 2005 and the cracking area work team minutes between 2001 and 2005. Dow notified the Court via a letter dated December 30th, 2014 that Nova has produced 63,884 pages of Nova records since December 12th, 2014. According to Dow, most of these records are operational, with more to come. Nova's answer to this alleged late production is that it arose because of the Surrebuttal expert report delivered by Holloway on September 24th, 2014 to Nova, which provided an assessment and recalculation of E3's alleged productive capacity throughout the claim period. Part of that report contained statements in opposition to Nova's expert witnesses, documented reasons for reduced ethylene production. There is disagreement between counsel because of the failure of the Court to set a deadline for the Surrebuttal Report which was already delayed because counsel agreed to delays for the Rebuttal Reports. The Rebuttal to the Holloway Report was to be delayed to May 31st, 2014 but by

agreement of counsel, this was extended to June 9th, 2014. Counsel did not agree as to when the Surrebuttal Report was to be delivered nor did the Court make an Order in that regard. Nova says it is producing relevant and material records, responding to the analysis contained in the Surrebuttal Report of Holloway and points out that had Dow had Holloway prepare a "True Report in Chief" in January 2014, or a timely Surrebuttal Report in July 2014, Nova would have been in a position to reassess relevance and materiality at an earlier date and would have proceeded with the production. Dow scoffs at this proposition and states that prudent operation goes to the issue of E3's capacity and that the documents ought to have been produced in any event.

[46] Again, on this issue, I am not satisfied that Dow has made out a case to strike the pleadings of Nova as it pertains to E3 capacity. There are many facets to the production capacity of any plant. Regular maintenance, unforeseen breakdown, perhaps even operator error are among them. Dow has put prudent operation in issue through its expert reports. Nova has now focused on that issue. It may have been an oversight not to do so earlier, but the Court need not decide whether those documents ought to have been produced earlier. The ARC 5.10 recognizes that a party may find relevant and material records later, after an affidavit of records has been served. Notice and disclosure to the other party is mandated. That is what happened here. There was sufficient cause within the meaning of ARC 3.68(4) and I so find.

The Redaction Issue

[47] There are previous confidentiality orders made in this action by consent. Dow and Nova are competitors. They have other competitors. When something is relevant and material in a document, there is no reason in logic or in fact why other parts of the document are not irrelevant and immaterial. If there is no reason for the opposite party to see irrelevant and immaterial information, the Court ought not to interfere with a valid redaction. The history of redacted documents, in terms of so called national security cases in this country, especially in a judicial inquiry setting, is such that the suspicion of truth seekers is excited when any document is redacted, for example by governments. To allay that concern, the Court orders that each redacted document produced by Nova be preserved and be available in its un-redacted form and accessible to the trial judge, in the event the redacted document is tendered in evidence. The process for determining whether the redaction is legitimate or not should, in the view of this Court, follow that which would be followed by a Court reviewing a document over which privilege is claimed. In other words, the un-redacted form will be compared to the redacted document and the Court will decide if it has been properly redacted to the extent that the party opposite wishes to raise this as an issue. That said, the details of the process will be solely up to the trial judge.

Electronic Disclosures - Relevant and Material Production

[48] The principle of timely and affordable access to civil justice, including proportionality, is now embodied in Canadian Law and in Alberta: *Hryniak* at paras 28-33; *CNRL* at para 5.

[49] In *Marcotte v Longueuil (City)* 2009 SCC 43 at paragraph 67, Deschamps J. observed:

> What is clear from these different sources is that the purpose of art. 4.2 C.C.P. is to reinforce the authority of the judge as case manager. The judge is asked to

> abandon the role of passive arbiter. At first glance, this case management function does not mean that it would be open to a judge to prevent a party from exercising a right. However, the judge must uphold the principle of proportionality when considering the conditions for exercising a right.

[50] A helpful discussion is contained in "*The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery*", October 2010, The Sedona Conference. The *Sedona Canada Commentary* sets forth a number of principles including a statement that the concept of proportionality plays an important role in ensuring a fair and just outcome. Justice is not to be denied under the guise of proportionality. Also of significance is a fundamental assumption of cooperation, communication and common sense among and between counsel (page 3). The perception of this Court is that cooperation, communication and common sense among and between counsel has not been consistently present in this case. In *Weatherill Estate v Weatherill*, 2003 ABQB 69, Slatter J. (as he then was) admonished counsel to take a pragmatic view of the scope of discovery. He suggested that rather than spend thousands of dollars on disputing whether a document ought to be produced, counsel ought to produce an arguably irrelevant document, if it cannot help or hurt his client and that "the pragmatic counsel will produce it rather than fight over it" (para 13).

[51] It is the view of this Court, that this approach is highly dependent on context. In the context of that litigation, it is wise counsel. In the context of this litigation, producing irrelevant and immaterial documents, spawns a plethora of ill-advised and costly disclosure. The R3 documents appear to this Court, to be an example. Producing thousands of pages of materials that went before the Nova Board on R3 to show that none had anything to do with the capacity of E3, would be an example. What is needed is dimensional pragmatism in the context; otherwise records discovery will regress towards the pre 1999 scope or worse.

Nova's Affidavits in Opposition – The Rule in *Browne v. Dunn*

[52] Nova filed three affidavits in opposition to the Striking Application on November 24th, 2014: the Choma Affidavit, the Flint Affidavit and the Apuzzo Affidavit. None of these deponents were cross-examined. But their evidence was impugned by other evidence put forward by Dow in terms of excerpts from the evidence of the prior questioning of Flint, Choma and Apuzzo, the questioning of Woelfel and the questioning of Tulk. The Court was urged on the basis of the other evidence to discount or in fact to disbelieve the evidence contained in the three affidavits, in so far as it assisted Nova's argument that there was sufficient cause for failing to make a timely production of a relevant and material record or Nova's assertion that all relevant and material records had been produced.

[53] The rule in *Browne v Dunn* (1893), 6 R.67 (H.L.), briefly stated, concerns a party that undertakes a cross-examination, failing to put evidence to a witness that contradicts the witness' testimony. The rule later allows the Court to lessen the weight of contradictory evidence usually adduced later in the proceeding. Subsequent authority in Canada has shown that the rule is not a rule, but rather gives rise to the exercise of judicial discretion. It is a guide to fairness. It seems to this Court that the underlying concept or principle surrounding *Browne and Dunn* can be applied here. As stated earlier, the Woelfel questioning on December 4th and 5th, 2014 that seems to have given rise to the Supplementary Brief of Dow in support of its Striking Application. This is evidence led in the application after the three Nova affidavits in opposition to it were filed and

left unchallenged by cross-examination. The Woelfel questioning has been used by Dow as a platform for discounting or casting doubt on the veracity of the three affidavits. The lack of cross-examination in these circumstances, coupled by the use of other evidence, namely the questioning of Woelfel and the antecedent questioning of Flint, Tulk and Choma, gives rise to the exercise of this Court's discretion to discount the evidence relied on by Dow. Dow has not proven on the balance of probabilities that Nova's pleadings ought to be struck on the grounds alleged. Therefore, I dismiss that application.

Summary and Conclusion

[54] The First Application and the Striking Application are dismissed.

[55] Any records disclosed and produced by either party may be questioned on, if no questioning has occurred on those records, even after the commencement of the trial on reasonable terms.

[56] Nova will have its costs of these applications to be assessed on a party-and-party basis. In the event of a dispute as to costs, the parties may return to this Court for direction.

Heard on the 15th day of December, 2014.

Dated at the City of Calgary, Alberta this 2nd day of January, 2015.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:
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A.D. Grosse
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Dow Chemical Canada Inc. and Dow Europe GMBH

W. J. Kenny, QC
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T. Gelbman
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Nova Chemicals Corp.

Corrigendum of the Reasons for Judgment
of
The Chief Justice Neil Wittmann

The judgment number in the citation line has now been inserted.

Tab 13

TRUSTEE ACT

Chapter T-8

Table of Contents

(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

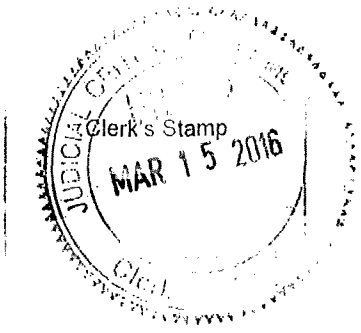
43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

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	**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

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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:

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[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

[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**]

Tab B

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**
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

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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;

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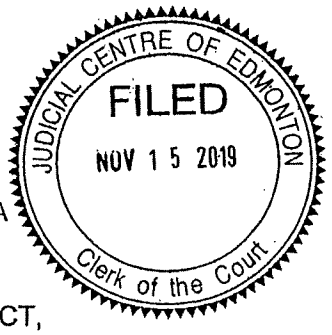
[46] *Rules of Court*, at 10.28. [**Tab 16**]
[47] *Manning v Epp*, 2006 CarswellOnt 6508 (Sup Ct J), at paras 18-20. [**Tab 17**]
[48] *Rules of Court*, at 10.33. [**Tab 16**]
[49] *Francescutto (Guardian ad litem of) v Strata Plan K227*, 1994 CarswellBC 741 (SC), at paras 5 and 6. [**Tab 18**]

Tab C



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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 ("Sawridge Trustees")
DOCUMENT	**BRIEF OF THE INTERVENOR, SAWRIDGE FIRST NATION, ON THE ASSET TRANSFER ISSUE**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP Barristers and Solicitors 1700 Enbridge Centre 10175-101 Street Edmonton, AB T5J 0H3 Attention: Edward H. Molstad, Q.C. Telephone: 780-423-8506 Facsimile: 780-423-2870 File No.: 64203-7/EHM

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Counsel for Catherine Twinn

VI. TABLE OF AUTHORITIES (ATTACHED TO BRIEF)

TAB	DOCUMENT
1.	"Treaty No. 8 – Indian and Northern Affairs", Woodward, *Consolidated Native Law Statutes, Regulations and Treaties 2019* (Thomson Reuters: Toronto, 2018)
2.	*Indian Oil and Gas Act*, RSC 1985, c I-7
3.	*Indian Act*, RSC 1985, c I-5
4.	*Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9
5.	*Trustee Act 1925* 15 Geo 5, c19 (UK)
6.	*Hunter Estate v Holton*, 1992 CarswellOnt 537, 7 OR (3d) 372, 46 ETR 178 (ON SC)
7.	*Fox v Fox Estate*, 1996 CarswellOnt 317, 28 OR (3d) 496 (ON CA)
8.	*Edell v Sitzer*, 2001 CarswellOnt 5020, 55 OR (3d) 198 (ON SC)
9.	Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012)
10.	*Trustee Act* RSA 2000 c. T-8

VII. BOOK OF DOCUMENTS RELIED ON (BINDED SEPARATELY)

A.	Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011
B.	Exhibit B to the Affidavit of Paul Bujold sworn September 12, 2011 (Meeting of the Trustees and Settlors of the Sawridge Band Trust June 1982)
C.	Exhibit C to the Affidavit of Paul Bujold sworn September 12, 2011 (Order of Mr. Justice D. H. Bowen dated June 15, 1983)
D.	Exhibit D to the Affidavit of Paul Bujold sworn September 12, 2011 (Agreement – December 19, 1983)
E.	Exhibit E to the Affidavit of Paul Bujold sworn September 12, 2011 (Transfer Agreement – December 19, 1983)
F.	Exhibit F to the Affidavit of Paul Bujold sworn September 12, 2011 (Bill C-31)

G. Exhibit G to the Affidavit of Paul Bujold sworn September 12, 2011 (1985 Trust – Declaration of Trust)

H. Exhibit H to the Affidavit of Paul Bujold sworn September 12, 2011 (Sawridge Band Trust Resolution of Trustees April 15, 1985)

I. Exhibit I to the Affidavit of Paul Bujold sworn September 12, 2011 (Sawridge Band Resolution April 15, 1985)

J. Exhibit K to the Affidavit of Paul Bujold sworn September 12, 2011 (1986 Trust – Declaration of Trust)

K. Relevant Pages from the Transcript of the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014

L. Affidavit of Darcy Twin sworn September 24, 2019, filed September 26, 2019

M. Exhibit A to the Affidavit of Darcy Twin (1982 Trust – Declaration of Trust)

N. Exhibit B to the Affidavit of Darcy Twin (Excerpts of Transcript of Walter Patrick Twinn October 1993)

O. Exhibit C to the Affidavit of Darcy Twin (December 23, 1993 letter)

P. Exhibit D to the Affidavit of Darcy Twin (August 24, 2016 Consent Order)

Q. Exhibit E to the Affidavit of Darcy Twin (April 25, 2019 email from Justice Henderson)

R. Exhibit F to the Affidavit of Darcy Twin (Transcript of the April 25, 2019 Proceeding)

S. Exhibit G to the Affidavit of Darcy Twin (Transcript of the September 4, 2019 Proceeding)

T. Exhibit H to the Affidavit of Darcy Twin (September 13, 2019 Application)

U. Exhibit I to the Affidavit of Darcy Twin (December 18, 2018 Consent Order)

V. Affidavit of Roland Twinn, sworn September 21, 2016, filed September 28, 2016 at para 7 and Exhibit 2 at para 2

W. Correspondence from INAC of attaching Band Lists, being documents SAW002316-2323 of the Supplemental Affidavit of Records sworn by Paul Bujold on April 27, 2018

X. Band Council Resolution 54-117-85/86, being document SAW001895 of the Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018

Y. Demand Debenture executed January 21, 1985, being document SAW000495-521 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

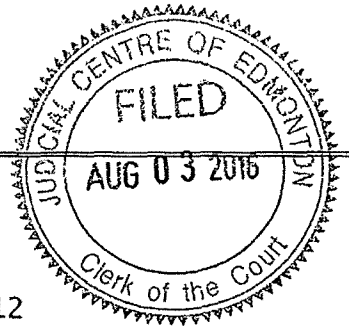
Z. Assignment of Debenture, being document SAW000537-539 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

AA. Affidavit of Paul Bujold sworn and filed February 15, 2017 at paras 75, 153-155

BB. Transcript from the October 30, 2019 Proceedings at page 30

CC. Financial Statement of Sawridge Band Inter Vivos Settlement Trust for 1985-1986, being document SAW000488-493 at 492 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

Tab D



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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
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")
APPLICANTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
APPLICANT in this Application:	OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA
RESPONDENT in this Application:	THE SAWRIDGE FIRST NATION

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD

E. H. Molstad, Q.C.	For Sawridge First Nation
D. C. E. Bonora, Ms.	For Sawridge Trustees
J. L. Hutchison, Ms.	For Office of the Public Trustee of Alberta
Allison Hawkins, CSR(A)	Court Reporter

Edmonton, Alberta
July 27, 2016

Q Okay. I'll just get that back, then, from you. I'm not going to -- or you can keep that. It's your document.

So I want to take you now to the affidavit that was sworn by yourself August 30th, 2011, and filed September 6, 2011. Do you have that in front of you?

A I do.

Q I'd like to direct your attention to paragraphs 10, 11, and 12 of this affidavit, where you describe a considerable amount of information in relation to beneficiaries and potential beneficiaries. Do you see that?

A I do.

Q Now, did you -- I understand you requested the assistance from the Sawridge First Nation in compiling these lists?

A I did.

Q And can you also confirm that the Sawridge First Nation cooperated with you fully and provided you with the information --

A It did.

Q -- you'd requested?

A It did, yes.

Q Other than with respect to legislation regarding protection and privacy, did the Sawridge First Nation ever refuse to provide you with any

information requested?
A No, they didn't.
Q Okay. I'll just now turn you to the next affidavit, the affidavit of yourself sworn September 12th, 2011, and filed September 13th, 2011. Do you have that in front of you?
A I do.
Q In paragraph 1, you state that you're the chief executive officer of the Sawridge Trust. You're speaking of the 1985 Trust and the 1986 Trust; is that correct?
A That's correct.
Q And when did you first become chief executive officer?
A In September 2009.
Q Okay. And in paragraph 3, it -- it states who the trustees were of the '85 Trust at that time. Who -- who are the trustees of the '85 -- 1985 Trust today?
A Bertha L'Hirondelle, Catherine Twinn, Roland Twinn, Justin Twin, and Margaret Ward.
Q Okay. And is Margaret Ward sometimes referred to as Peggy Ward?
A She is.
Q And in paragraph 4 and 5 of your affidavit, it's indicated that the trustees would like to make distributions in relation -- or from the 1985 Trust