

Clerk's Stamp:

COURT FILE NUMBER: 1103 14112

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

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

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

APPLICANTS ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT,
EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the
1985 Sawridge Trust;

DOCUMENT **REPLY SUBMISSIONS OF THE OFFICE OF THE PUBLIC
GUARDIAN AND TRUSTEE ("OPGT") TO THE NOVEMBER
27, 2020 SUPPLEMENTARY SUBMISSIONS FOR THE ASSET
TRANSFER ORDER HEARING**

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Self-Represented Party

I. Reply to the 1985 Trustees' Supplementary Submissions

1. The OPGT is not in complete agreement with the Trustees' list of 1985 beneficiaries but agrees it shows how severe the impact on the 1985 beneficiaries would be if it were found that the assets in the 1985 Trust are in fact held for the 1982 Trust beneficiaries. Approximately 26 current beneficiaries of the 1985 Trust would lose all their interest in the trust assets because they would not qualify as beneficiaries under the 1982 Trust.¹ This extinguishment of their beneficiary status would occur without their ever having received any distribution from the 1985 Trust. They also would not qualify as beneficiaries under the 1986 Trust definition.

2. The Trustees' information also suggests there are currently 15 persons who are SFN members but who are not beneficiaries of the 1985 Trust under its current beneficiary definition.² The OPGT notes those members are currently beneficiaries of the 1986 Trust from which benefits have been provided to its beneficiaries.³ If it were found that the transferred assets are held for the 1982 beneficiaries, they would become beneficiaries of those assets also.

3. The Trustees' November 27, 2020 supplementary submissions imply that the process of beneficiary identification under the 1985 Trust is a particularly arduous task. The OPGT disagrees. The interpretation and application of the former *Indian Act* provisions, on which the 1985 beneficiary definition is based, was carried out effectively by the Registrar under the *Indian Act* for decades while that legislation was in effect. The application of the 1985 Trust beneficiary definition is not an exercise beyond the resources or abilities of the Trustees, the parties or, if required, the Court.

4. The Trustees' submissions at paragraph 15 could be read to suggest that the discrimination issues raised by the 1985 Trusts' provisions on illegitimate children would not arise to the same degree under the 1982 Trust. However, the 1982 Trust provisions concerning illegitimate children are virtually identical to those in the 1985 Trust. They provide:

¹ Supplementary Brief of the Sawridge Trustees, List of Authorities, filed November 27, 2020 [Tab 2, List of Authorities]

² *Ibid*

³ March 7, 2017 Questioning on Affidavits of Paul Bujold, page 46 line 3 to page 48 line 6 [Appendix Tab A]

“...that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under Section 12(2) thereunder;”⁴

5. The Court cannot give any weight to the Trustees’ suggestions that the 1985 beneficiaries who would otherwise lose beneficiary status may be “grandfathered” into the 1982 Trust. The Trustees cite no law or precedent for the Court to amend the 1982 Trust to grant such beneficiary rights. As for the Trustees’ suggestion that such 1985 beneficiaries might apply for SFN membership and thereby become 1982 beneficiaries, the OPGT notes the SFN is under no obligation to approve such membership applications and has traditionally taken a restrictive approach to them. In any event these suggestions are not relevant to the interpretation of the ATO.

6. Overall, the Trustees’ submissions appear focused on demonstrating to the Court that administration of a trust would be easier under the terms of the 1982 Trust. Ease of administration is not a relevant factor in the interpretation of a trustee’s powers and authority nor in the interpretation of the ATO, and does not provide any basis to find the assets in the 1985 Trust are held for the 1982 Trust beneficiaries.

II. Reply to the Supplementary Submissions of the SFN

A. The decision in *Berg*

7. The SFN continues to assert the 1982 Trustees had no authority to effect the asset transfer to the 1985 Trust and cites the recent Ontario decision in *Berg* in support. This case bears no resemblance to the facts here and does not support the SFN’s position.

8. The relevant facts in *Berg* are that a trustee who held property in trust for himself and his wife transferred the property to a new trust of which he was the sole beneficiary. In doing so the trustee made a number of false declarations, including that he had always been the sole beneficial owner of the property. The transfer documents also contained various false statements. The Court

⁴ 1982 Trust, para. 6; Affidavit of Paul Bujold sworn September 12, 2011, Exhibit “A”; [Tab “C” to the Responding Brief of the OPGT filed November 15, 2019]

found the transfer failed because of the trustee’s “many misstatements” and because he had no authority to vary the trust so as to divest his wife of her beneficial interest.

9. *Berg* bears no analogy to the case before the Court here. Unlike the trust in *Berg* which was “fixed” in nature, the 1982 Trust was a discretionary trust. The asset transfer did not vary the 1982 Trust but was an exercise of the Trustees’ discretionary authority thereunder and no beneficiary lost any interest in the assets. The Trustees made no misstatements in carrying out the transfer. On the contrary, they were scrupulous in setting out the circumstances and reasons for the transfer as well as the source of their authority. They clearly and explicitly considered the transfer to be in the best interests of the beneficiaries, an opinion shared by the SFN and the Sawridge Trustees in their submissions to the Court on August 25, 2016.

B. The effect of the ATO

10. The SFN also continues to contend that the effect of the ATO was to confirm the passage of legal title to the transferred assets only, and not the beneficial interest. With respect, this contention is completely inconsistent with the context of the ATO, the objective evidence concerning the intention of the parties, the parties’ submissions to the Court, and the entire purpose of the proceedings.

11. The ATO was sought by way of advice and direction. As Justice Nation recently observed with respect to such proceedings:

It is the job of the trustee to run a trust, and if there are legal issues, to seek legal advice in relation to its obligations. The trustee should not ask for advice and direction, without a full disclosure of what it has done, and the decision it desires to make, **and the reason that advice or direction or Court involvement is sought**⁵ (emphasis added)

The reason in this case was as stated by Mr. Bujold in his affidavit and by the Trustees in their submissions to the Court. They believed the transfer had been carried out properly and sought the

⁵ *Eng Family Trust (Trustees of) v. Eng*, 2019 ABQB 758 at para. 10 [Authorities Tab 2]

Court's confirmation this was so, and that "...the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust."⁶

C. The \$12 Million debenture

12. The SFN engages in extensive argument to the effect that this debenture never became an asset of the 1985 Trust, but continued to be held by Walter Twinn as a sole trustee for the SFN. In support of this position they cite his continued dealings with the debenture. This argument overlooks two things:

- Walter Twinn was also a 1985 Trustee and would have been entitled to deal with the asset in that capacity;
- The assignment of the debenture to the 1985 Trust provided that the Chief Twinn, as assignor, "will, upon the request to do so from the Assignees, do, perform or execute every act necessary to enforce the full performance of the covenants or any other matter contained in the debenture."

13. The SFN has failed to provide positive evidence within their power to support their assertion that the debenture remained an asset of the SFN and not the 1985 Trust. Their failure to provide financial statements or other bank records supporting their claim renders that claim suspect at best and at worst gives rise to an adverse inference against it.

14. The OPGT recognizes that a final determination concerning the debenture's status is not possible in the context of the ATO hearing. The Trustees' objections to questions concerning financial records of the Trust and their refusal to produce the accounting report they have commissioned concerning the debenture, combined with the absence of SFN records concerning the debenture, leave the record incomplete and preclude a final determination.⁷ An accounting of the 1985 Trust or other proceedings on a full record will be required at an appropriate time to determine this.

⁶ Affidavit of Paul Bujold sworn September 12, 2011, *supra*, at paragraphs 24 and 25; Brief of the Trustees for the Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust, filed August 17, 2016, paragraphs 18 and 20; [Tab "A" to the Brief of the Sawridge Trustees filed November 1, 2019].

⁷ See refused undertakings #8, 11, 12, 13, and 14 from the February 26/March 2 Questioning of Paul Bujold; List of Undertakings [Tab "U" of the Supplementary Submissions of the OPGT, dated November 27, 2020]; Answers to Undertakings of Paul Bujold [Tab "V" of the Supplementary Submissions of the OPGT, dated November 27, 2020].

15. That said, the OPGT's original point remains. At the time the ATO was granted all parties operated on the basis that the 1985 Trust contained this major asset that was not part of the asset transfer. This remains one of the contextual factors to be considered in interpreting the ATO.

D. The evidence of Catherine Twinn and her Questioning by the OPGT

16. The SFN challenges the Affidavit of Catherine Twinn as largely hearsay and contends the OPGT was not entitled to question her on it. These submissions ignore the nature, context and history of the proceedings.

17. As noted above, this proceeding is an application for advice and direction which is in case management. The parties have largely acted on the basis that they are engaged in a non-adversarial process and the Court has acknowledged this to be the case.⁸ The parties have also acted on the basis that given the significance and scale of the entitlements in issue, the Court is entitled to have all relevant evidence before it and to have that evidence explored and tested. The parties have entered into multiple litigation plans on this basis, allowing for the filing of affidavits and the questioning of one another's witnesses thereon.

18. With respect to the Affidavit of Catherine Twinn, it contains evidence based upon information and belief in the same manner as the Affidavits of Paul Bujold filed and relied on by the 1985 Trustees and the Affidavit of Darcy Twinn filed and relied on by the SFN. Such affidavits are acceptable in the context of case management of an application for advice and directions.⁹

19. As for the Questioning of Catherine Twinn by counsel for the OPGT, it is no different than the July 2016 Questioning of Paul Bujold by counsel for the SFN. The SFN was not adverse to the 1985 Trustees for whom Mr. Bujold gave evidence but conducted extensive questioning in any event. Such questionings are both appropriate and necessary in the context of these proceedings.

⁸ *Sawridge #4*, paragraph 26 [Authorities Tab 3]; Transcript of April 25, 2019 Case Management Hearing, pg. 7, l. 5-7; [Appendix Tab B]; The Trustees have recently suggested there is an adversarial element in advancing their privilege claims against the beneficiaries. See Questioning of Paul Bujold, February 26/March 2 at page 120 for example [Tab "U" of the Supplementary Submissions of the OPGT, dated November 27, 2020].

⁹ Alberta Rules of Court, Rule 13.18; [Authorities Tab 1].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2020

HUTCHISON LAW

Per:



JANET L. HUTCHISON
Solicitors for the Office of the Public
Guardian and Trustee of Alberta

FIELD LAW

Per: FOR



P. JONATHAN FAULDS, Q.C.
Solicitors for the Office of the Public
Guardian and Trustee of Alberta

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1.	Alberta Rules of Court
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3.	<i>Sawridge #4, 1985 Sawridge Trust (Trustee for) v. Alberta (Public Trustee)</i> , 2017 ABQB 299

TAB A

PAUL BUJOLD - March 7, 8, 9, 10, 2017
Questioned by Ms. Osualdini

1 **COURT FILE NUMBERS:** 1103 14112 and 1403 04885

2

3 **COURT:** COURT OF QUEEN'S BENCH OF ALBERTA

4

5 **JUDICIAL CENTRE:** EDMONTON

6

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

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

16

17 AND

18

19 IN THE MATTER OF THE SAWRIDGE
20 TRUST CREATED BY CHIEF WALTER
21 PATRICK TWINN, OF THE SAWRIDGE
22 INDIAN BAND NO. 19, AUGUST 15,
23 1986 (the "1986 Trust")

24

25 **APPLICANT:** CATHERINE TWINN, as Trustee for
26 the 1985 Trust and the 1986 Trust

27

28 **RESPONDENTS:** ROLAND TWINN, BERTHA
29 L'HIRONDELLE, EVERETT JUSTIN TWIN
30 AND MARGARET WARD, as Trustees
31 for the 1985 Trust and the
32 1986 Trust

33 -----

34 Questioning on Affidavits of **PAUL BUJOLD**,

35 sworn the 15th day of February 2017 C.E., held at the

36 offices of McLennan Ross LLP, Edmonton, Alberta,

37 on the 7th, 8th, 9th, and 10th days of March 2017 C.E.

38 -----



1 of the 1986 trust?

2 **A. Yes.**

3 **Q. And what are the major programs that the trust**
4 **provides for the 1986 beneficiaries?**

5 **A. It provides a number of benefits to the**
6 **beneficiaries. It provides a seniors' supplement to**
7 **assist seniors beyond Old Age Pension and**
8 **Canada Pension Plan, if they get Canada Pension**
9 **Plan. So it provides a monthly supplement.**

10:28

10 **It provides educational support benefits for**
11 **students who want to further their education and are**
12 **not covered by -- or not fully covered by the**
13 **Federal Government programs for post-secondary**
14 **education or completing of high school.**

15 **It provides child and youth development, which**
16 **provides childcare support for parents who are**
17 **working or parents who have problem children, you**
18 **know, children with mental or physical disabilities.**

10:29

19 **It provides a personal development and**
20 **alternative health care benefit, which provides for**
21 **physical health development and learning for**
22 **beneficiaries. It provides health insurance and**
23 **life insurance for beneficiaries.**

24 **Q. Is there a program that addresses addiction**
25 **counselling or treatment?**

26 **A. Yes. I was just getting to that.**

27 **Q. Okay. Sorry.**

1 **A. If you let me finish.**

2 **Q. Sorry. I thought you had finished when you paused.**

3 **A. Oh, no. No, no.**

4 **Q. My apologies --**

5 **A. I had to pause because --**

6 **Q. -- I thought you had.**

7 **A. -- my mouth is getting dry, so I may have to take a**
 8 **break.**

9 **MS. CUMMING: Do you want some water?**

10:30

10 **[DISCUSSION OFF THE RECORD]**

11 **A. There is a compassionate care benefit that takes**
 12 **care of medical transportation. So people going to**
 13 **doctor's appointments or people visiting relatives**
 14 **in hospital, and it provides some home support**
 15 **services.**

16 **It also provides a death benefit, so the**
 17 **complete funeral costs, burial plot, headstone. And**
 18 **that's done in coordination with the First Nation.**

10:31

19 **It provides -- like, as I was saying, health**
 20 **insurance, which gives a very complete package of**
 21 **health benefits. There's a counselling program that**
 22 **will provide for psychological and social**
 23 **counselling with professionals.**

24 **The other thing that the personal development**
 25 **and alternative health benefit does is allow people**
 26 **to consult Elders, to attend traditional ceremonies,**
 27 **and to do what's necessary -- like, you know,**

1 providing gifts to Elders or knowledge-keepers.

2 And there's -- then there's the addictions

3 treatment. So that will provide for people to go to

4 a treatment facility or to attend addictions

5 counselling.

6 Q. Okay.

7 A. And I think that's all of them, but I -- I sort of
8 lost track there somewhere.

9 Q. That was a lot.

10:32 10 And just turning back to the intergenerational
11 trauma paper --

12 A. Yes.

13 Q. -- that you prepared, from what you learned in
14 preparing that paper, how does intergenerational
15 trauma manifest itself in Aboriginal populations?

16 A. It manifests itself in a number of ways. You know,
17 certainly there's increasing evidence that it alters
18 the DNA of people. My concern -- and I think the
19 reason why my paper has never been considered -- is
10:33 20 that I think that -- that focussing on the victim
21 mentality is not productive, and I think that
22 there -- that we need to focus on resilience.

23 And that's primarily the focus of my paper, was
24 that across the world, many groups have experienced
25 trauma for various reasons. I mean, there's been
26 movement of peoples across the face of this globe
27 for years, and it's caused all kinds of hassles.

TAB B

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

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

IN THE MATTER OF THE SAWRIDGE BAND INTER VIROS
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")

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

Applicants

P R O C E E D I N G S

Edmonton, Alberta
April 25, 2019

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4 April 25, 2019

Afternoon Session

5

6 The Honourable

Court of Queen's Bench

7 Mr. Justice Henderson

of Alberta

8

9 D.C.E. Bonora

For R. Twinn, M. Ward, B. L'Hirondelle, E.

Twinn, and D. Majeski

10

11 M.S. Sestito

For R. Twinn, M. Ward, B. L'Hirondelle, E.

12

13 C. Osualdini

For Catherine Twinn

14 D.D. Risling

For Catherine Twinn

15 J.L. Hutchison

For the Office of the Public Trustee

16 R.J. Faulds, Q.C.

For the Office of the Public Trustee

17 N. Varevac

Court Clerk

18

19

20 **Discussion**

21

22 THE COURT:

Good afternoon, please be seated. Okay.

23

24 MS. BONORA:

Good afternoon, Sir. Perhaps I'll just start with

25 some introductions.

26

27 THE COURT:

Sure.

28

29 MS. BONORA:

So Doris Bonora on behalf of the trustees with

30 my partner Michael Sestito. And then for Catherine Twinn is Crista Osualdini and Dave

31 Risling. And then for the Office of the Public Trustee and Guardian Janet Hutchison and

32 John Faulds.

33

34 THE COURT:

Okay, good.

35

36 MS. BONORA:

Sir, you've asked us to address a foundational

37 question --

38

39 THE COURT:

Yes.

40

41 MS. BONORA:

-- by email and there have been some discussions

1 So you could spend a lot of time and effort going down a path which is premised on a
2 consent order which could fall and take you right back. Not wanting to alarm anyone but
3 it did occur to me that you've got people here who -- I mean, one, we've got enough lawyers
4 here to sink a ship but not all of the interests are properly cared for. Not everyone is
5 represented here. And I read someplace and I think it's quite appropriate, this is not a truly
6 adversarial process. This is a problem that we need solved. So it's a problem that needs to
7 be solved collectively but if we try to do that and we leave out one interested party who
8 steps up at the end of the day and says not for me and we have to unwind the whole thing,
9 we haven't advanced the situation very far. So in my mind we need to see if we can't do
10 this correctly the first time.

11
12 MS. BONORA: Well, and, Sir, that's why we raised the issue of
13 the transfer because we didn't want to go through this whole process --

14
15 THE COURT: Yes.

16
17 MS. BONORA: -- only to have somebody suggest that the
18 transfer wasn't proper right from the start.

19
20 THE COURT: Well, it looks like Justice Thomas said the
21 transfer is proper but what flows from that I don't know.

22
23 MS. BONORA: Right.

24
25 THE COURT: And I wouldn't, as I said earlier, immediately
26 conclude that what flows from that is that these trust assets are subject to the definition of
27 beneficiary in the 1985 trust.

28
29 MS. BONORA: So we'll address the issue of services as well for
30 you and whether it binds all people, certainly. Okay. So we will try and work out a
31 schedule. We'll try and find time before you or agree that it will be in writing, and we thank
32 you very much today. So subject to anything my friends might have to say, I think we're
33 perhaps concluded for today.

34
35 THE COURT: Okay.

36
37 MS. BONORA: So thank you.

38
39 THE COURT: Good. Anything else? No. Any concerns? No,
40 okay. All right. So we'll adjourn then and we will resume when we can.

41

TAB 1



ALBERTA

RULES OF COURT

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Subdivision 2 Form and Contents of Affidavits and Exhibits

Types of affidavit

13.18(1) An affidavit may be sworn

- (a) on the basis of personal knowledge, or
- (b) on the basis of information known to the person swearing the affidavit and that person's belief.

(2) If an affidavit is sworn on the basis of information and belief, the source of the information must be disclosed in the affidavit.

(3) If an affidavit is used in support of an application that may dispose of all or part of a claim, the affidavit must be sworn on the basis of the personal knowledge of the person swearing the affidavit.

Information note

Under section 28(1)(II) of the *Interpretation Act*, references to affidavits and to sworn statements permit a person to make a solemn affirmation or solemn declaration instead of an affidavit.

Requirements for affidavits

13.19(1) In addition to complying with rule 13.13 [*Requirements for all filed documents*], an affidavit under these rules must comply with all of the following:

- (a) be in Form 49,
- (b) state, on the front page, the full name of the person swearing the affidavit and the date the affidavit was sworn,
- (c) state the place of residence of the person swearing the affidavit,
- (d) be written in the first person,
- (e) be divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer,
- (f) be signed or acknowledged and sworn before a person empowered to administer oaths, whether that person prepared the affidavit or not,
- (g) contain a statement of when, where and before whom the affidavit was sworn, and
- (h) be signed by the person administering the oath.

(2) An affidavit is not invalid or otherwise improper just because it was sworn before a commencement document was filed.

AR 124/2010 s13.19;163/2010

TAB 2

Court of Queen's Bench of Alberta

Citation: Eng Family Trust v Eng, 2019 ABQB 758

Date: 20190930
Docket: 1901 02242
Registry: Calgary

Between:

MNP Ltd., as Trustee for Eng Family Trust

Applicant

- and -

Jimmy Eng and Lita Eng

Respondents

**Reasons for Judgment
of the
Honourable Madam Justice R.E. Nation**

[1] The Court's advice and direction was requested pursuant to section 43 of the *Trustee Act*, RSA 2000, c T-8, (*Trustee Act*) in relation to numerous questions relevant to the management of the Eng Family Trust (the Trust). It is appropriate for this Court to give advice and directions on some of the questions. However, others require more work by the Trustee, and more detailed evidence and are better suited to be dealt with in other court proceedings.

Issues

[2] MNP Ltd., the Trustee, asks the Court to address the following questions, expressed by the Trustee as follows:

trustees administer the trust by giving advice, not in respect of conflicting parties, but advice regarding the obligations of the trustee.

[7] *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) [*Waters*] at 1162 expresses this as follows:

The issue of "management or administration" as a limitation upon the Trustee Act power of the court to give its opinion, advice, or direction has been more particularly raised in connection with motions which turn out to involve a conflict as to ownership of the assets. The courts refuse to give such assistance when there is essentially a conflict between interested parties, and this is not merely because the court has not the necessary evidence before it, but because it is felt that a "fight" whether or not it is patent, is not a matter of management or administration.

[8] The *Alberta Rules of Court*, Alta Reg 124/2010 (*Rules*) surrogate rule 4(2) provides:

On an application for direction, the court may consider

(a) practice, procedural or other issues or questions and ways to resolve them, and

(b) any other matter that may aid in the resolution or facilitate the resolution of a claim, application or proceeding or otherwise fairly or justly resolve the matter for which direction is sought.

[9] These *Rules* are then setting out the considerations for a Court, and that the Court may consider if there is another way of proceeding towards resolution, once advice is requested.

[10] It should be emphasized that s 43 of the *Trustee Act* is not meant for a trustee to come to Court with a whole laundry list of questions, as one sees here, and ask the Court to direct what a trustee is to do in various possible scenarios. It is the job of the trustee to run a trust, and if there are legal issues, to seek legal advice in relation to its obligations. The trustee should not ask for advice and direction, without a full disclosure of what it has done, and the decision it desires to make, and the reason that advice or direction or Court involvement is sought. For a trustee not to seek a legal opinion, and come to the Court to have it do the trustee's work, is not the purpose of this legislation. Nor are these provisions to be used in any way to allow the Trustee to avoid carrying on its duties, or making decisions.

[11] As will become obvious in this decision, MNP has put a number of hypotheticals and questions to the Court, without the necessary evidence or specificity for the Court to give advice on the questions. In addition, after the argument, it became clear that no party had put before the court essential provisions of the *Income Tax Act* RSC 1985, c. 1(5th supp) (*Income Tax Act*), which could have a significant bearing on the determination of who bore tax liability, and thus the lens through which the questions should be answered, and the conduct of the parties be judged.

[12] In addition, where there are more specific statutory provisions to deal with questions being asked by the Trustee, for example fees and entitlement to fees. Thought should be given to using court procedure better suited to get the proper evidence before the court. For instance, if the Trustee here applied to pass accounts for the relevant period (2018 to 2019), and asked for its fees to be approved and paid: specifics of the trustee's fees, and how they were calculated would

TAB 3

1985 Sawridge Trust (Trustee for) v. Sawridge First Nation, [2017] A.J. No. 441

Alberta Judgments

Alberta Court of Queen's Bench

D.R.G. Thomas J.

Heard: August 24, 2016.

Judgment: April 28, 2017.

Docket: 1103 14112

Registry: Edmonton

[2017] A.J. No. 441 | 2017 ABQB 299

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

(30 paras.)

Case Summary

Aboriginal law — Aboriginal status and rights — Practice and procedure — Costs — Application by Public Trustee for directions allowed — Application by Band for costs dismissed — Public Trustee had been brought into proceeding to represent interests of potential minor beneficiaries in Sawridge Trust — Had refused to consent to adjournment of 2015 application and discontinued Rule 5.13 motion after Band, non-party, provided membership information — List of minor children of Band members satisfied evidentiary requirement for that category of minors — List of adults with pending applications met unresolved but completed Band applications category — No costs were awarded against Public Trustee, who was court-sanctioned participant conducting its statutory function — Alberta Rules of Court, Rule 5.13.

Civil litigation — Civil procedure — Applications and motions — Application for directions — Costs — When not awarded — Application by Public Trustee for directions allowed — Application by Band for costs dismissed — Public Trustee had been brought into proceeding to represent interests of potential minor beneficiaries in Sawridge Trust — Had refused to consent to adjournment of 2015 application and discontinued Rule 5.13 motion after Band, non-party, provided membership information — List of minor children of Band members satisfied evidentiary requirement for that category of minors — List of adults with pending applications met unresolved but completed Band applications category — No costs were awarded against Public Trustee, who was court-sanctioned participant conducting its statutory function — Alberta Rules of Court, Rule 5.13.

Wills, estates and trusts law — Proceedings — Practice and procedure — Application to court for directions — Costs — Application by Public Trustee for directions allowed — Application by Band for costs dismissed — Public Trustee had been brought into proceeding to represent interests of potential minor beneficiaries in Sawridge Trust — Had refused to consent to adjournment of 2015 application and discontinued Rule 5.13 motion after Band, non-party, provided membership information — List of minor children of Band members satisfied evidentiary requirement for that category of minors — List of adults with pending applications met unresolved but completed Band applications category — No costs were awarded against Public Trustee, who was court-sanctioned participant conducting its statutory function — Alberta Rules of Court, Rule 5.13.

Statutes, Regulations and Rules Cited

Alberta Rules of Court, Alta. Reg. 124/2010, Rule 1.1, Rule 1.2, Rule 5.13, Rule 5.13(2), Rule 10.29(1), Rule 10.31, Rule 10.33

Counsel

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

J.L. Hutchison, for Public Trustee of Alberta.

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

Attendances:

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

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

N.L. Golding Q.C., for Patrick Twinn et al.

S.A. Wanke, for Maurice Stoney et al.

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Reasons for Judgment

D.R.G. THOMAS J.

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 A.R. 90 ["*Sawridge #1*"] affirmed 2013 ABCA 226, 553 A.R. 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

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 S.C.R. 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.

Dated at the City of Edmonton, Alberta this 28th day of April, 2017.

D.R.G. THOMAS J.