

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 2203 0043AC and 2203 0045AC

Trial Court File Number 1103 14112

Registry Office 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")

Applicant (in this
appeal)

SAWRIDGE FIRST NATION

APPLICANTS

**ROLAND TWINN, MARGARET WARD,
TRACEY SCARLETT, EVERETT JUSTICE
TWINN AND DAVIE MAJESKI, as Trustees
for the 1985 Sawridge Trust ("1985
SAWRIDGE TRUSTEES")**

Status on Appeal **Respondent**

Status of Application **Respondent**

RESPONDENT **THE OFFICE OF THE PUBLIC TRUSTEE OF
ALBERTA (the "OPGT")**

Status of Appeal **Appellant**

Status on Application **Respondent**

RESPONDENT **Catherine Twinn**

Status on Appeal **Appellant**

Status on Application **Respondent**



Document

MEMORANDUM OF ARGUMENT OF THE APPLICANT, SHELBY TWINN, ON HER APPLICATION FOR INTERVENOR STATUS

Address for Service and Contact Information for Party Filing this Document

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File Number: 64203-7EHM
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Counsel for Catherine Twinn

PART 1 – INTRODUCTION

1. Shelby Twinn applies, pursuant to Rule 14.58(1), for intervenor status in the Appeals from “Sawridge #12” a decision of the Case Management Justice, Mr. Justice J.T. Henderson (the “CMJ”).¹ #12 is a collateral attack on the un-appealed 2016 Consent Order, avoiding creating new law² for a desired result. That Order confirmed the termination of the 1982 Trust, by a proper transfer of its assets into the resettled and renamed 1985 Sawridge Band *Inter Vivos* Settlement (the “1985 Trust”) **for the 1985 Trust beneficiaries “who own that property in equity”**³. By asking, “what flows” from the Consent Order, Justice Henderson shape-shifted reality. The original 1982 and 1985 Trust beneficiaries are identical, determined by s.11 entitlement rules of the 1970 Indian Act. Their vested status preceded Bill C-31 and was determined by the Registrar of Indian Affairs who maintained the Sawridge First Nation (SFN) membership list. 1985 Trust beneficiaries’ never “enfranchised”: taking a per capita payment from the SFN’s Capital and Revenue accounts, completing forms and signing Releases and Surrenders to Band property, as done by enfranchised Indians, including those enfranchised under s. 12 disentitlement rules⁴. Shelby descends from the vested class of persons who never enfranchised⁵. S.11 entitlement rules continue today through s.6(1)(a) of the Indian Act. S. 12 disentitlement rules were repealed by Bill C-31. Pre-Bill C-31 acquired rights are protected by s.6(1)(a) and other provisions.

2. The parties advised they consent to Shelby Twinn being granted intervenor status on the same terms as the SFN; her submissions will comply with timelines; her filed application is

¹ *Alberta Rules of Court*, [Alta Reg 124/2010](#), Rule 14.58(1) [ARC]; *Twinn v Trustee Act*, [2022 ABQB 107](#) [Sawridge #12]

² April 25, 2019 Transcript, page 4, lines 1-23

³ 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299, Para 30

⁴ Shelby Twinn Affidavit, paras 11, 18, 19, 21

⁵ *Ibid* 4, para 21

before Facta, Authorities and Key Evidence extracts are filed. She was granted intervenor status in the court below and is directly, significantly, affected by the outcome. Decision #12 strips assets from the 1985 Trust, forever depriving, denying and discriminating against Shelby benefiting from equal opportunities and privileges enjoyed by SFN members. Shelby's special expertise, fresh perspective and knowledge is not advanced by the parties and the SFN.

3. Shelby Twinn will not argue issues not already raised by the parties to the Appeals. On September 26, 2019, the trustee's admitted their conflict in representing Shelby, conflicting with their prior submission to this Court on this point⁶.

PART 2 – STATEMENT OF FACTS

4. The 1982 Trust was settled on April 15, 1982, amended on June 15, 1983 by Court Order, and on April 15, 1985, resettled under the name of the Sawridge Band Inter Vivos Settlement. The Settlor, Walter Patrick Twinn, is Shelby's grandfather, who built the Sawridge Group of Companies financed by grants, leveraging assets, personal guarantees and other means⁷. It is misleading to say that the 1985 Trust deed defines beneficiaries differently than the 1982 Trust deed when the 1982 Deed relied on s.11 and the Registrar's membership determinations. The 1985 Trust is to flow benefits to never enfranchised beneficiaries. The s.11 entitlement rules date to 1850, "in accordance with the ancient customs and practices of the Indians themselves"⁸, reconcilable with Cree laws (wahkohmtowin) governing kinship transmission and responsibilities.

⁶ Twinn v Twinn, 2017 ABCA 419 (CanLII), para [18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

⁷ Shelby Twinn Affidavit, paras 5, 6, 7, 8; various Affidavits of Catherine Twinn and other court records

⁸ 1850 Drummond Memo

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5. Bill C-31 was introduced in Parliament February 28, 1985, received Royal Assent June 28, 1985 and took effect on April 17, 1985⁹. Very few groups supported the amendments. President Marilyn Kane of NWAC, rejected Bill C-31's distinction and splitting of status from membership arguing that it would - and did - create more divisions within the Indian Community,¹⁰ proven by continuous litigation¹¹. Bill C-31 removed some forms of gender discrimination while creating new forms of discrimination relating to status and membership and other forms of discrimination on prohibited grounds such as family status¹² and discrimination by Bands under s.10. Bands are required but not enforced to comply with the Act and Canadian law. If Canada cannot discriminate, Bands cannot. Those least able, like Shelby, carry the enforcement burden¹³. A continuing injunction was issued against the SFN prohibiting it from imposing pre-conditions to membership on persons Parliament had vested with acquired rights to membership¹⁴. Leo Morawski was born before Bill C-31 with an acquired right to SFN membership. Instead of adding his name, the SFN sent him a Membership application¹⁵.
6. The asset transfer of Trust property, frozen as of April 15, 1985, would benefit beneficiaries with vested rights under s. 11 and their descendants, like Leo Morawski.¹⁶
7. Shelby Twinn's grandfather settled the 1986 Trust. It's 'read down' beneficiary definition

⁹ Timeline Important Events leading up to Bill C-31's passage, University of Toronto Library, <https://library.law.utoronto.ca>

¹⁰ Ibid 8

¹¹ See cases such as *McIver, Deschneneaux, Gehl v. Canada (Attorney General)*, 2017 ONCA 319, *Salmaniw et al v Canada* - 16 plaintiffs from three families filed a constitutional challenge June 2021 in the Supreme Court of British Columbia challenging discrimination based on gender in voluntary enfranchisement; and Canada's 2018 report Remaining inequities related to registration and membership <https://www.rcaanc-cirac.gc.ca/eng/1540403281222/1568898803889>

¹² Ibid 11

¹³ Shelby Twinn Affidavit, para 1, 14

¹⁴ Exhibit 10, Shelby Twinn Affidavit- *L'Hirondelle v Canada* 2003 FCT 347, Continuing Injunction decision against SFN

¹⁵ Exhibit 9 and para 23 Shelby Twinn Affidavit

¹⁶ Shelby Twinn Affidavit, para 23

enables discrimination against Shelby, Debra Serafinchon, Leo Morawski and others¹⁷ by discriminatory rules, bias, unfair practices & fiduciary breaches like not defining customary laws.

8. This Action was used to deny benefits to 1985 Trust beneficiaries like Shelby Twinn, while 1985 Trust funds paid SFN legal bills for its aggressive participation in this Action. In contrast, Trust and SFN benefits conferred on 1986 Trust beneficiaries, are generous and substantial¹⁸.

9. The morning of April 25, 2019, the CMJ adjourned the Jurisdiction application to raise concerns about the August 24, 2016 Consent Order. The Trustees filed an Application on September 13, 2019 to determine the effect of that Order (the “Asset Transfer Application”).

10. In re-opening the August 2016 Consent Order, the CMJ said he was bringing “*fresh eyes...fresh perspective*” to a long settled issue¹⁹. Scant evidence was produced about the Asset Transfer²⁰ despite abundant and credible evidence (e.g. Justice Maurice Cullity and others), or Michael McKinney, SFN and Sawridge Companies legal counsel from 1988 to the present.²¹

PART 3 – ISSUE

11. Should Shelby be granted intervenor status in the Appeals pursuant to Rule 14.58(1)?

PART 4 – ARGUMENT: LAW & ANALYSIS

(a) The applicable test and factors on an intervenor application are well established.

12. This Court has discretion under Rule 14.58 to grant intervenor status on appeal subject to any terms, conditions, rights and privileges.²² A two-stage analysis occurs: the subject matter of

¹⁷ Shelby Twinn Affidavit, paras 12, 14, 15, 22, 23, 24

¹⁸ Shelby Twinn Affidavit, para 19

¹⁹ Tab F, April 25, 2019 Transcript, April 25, 2019 Transcript, page 2, lines 17 – 22; page , 7 lines 20-27

²⁰ Tab F, April 25, 2019 Transcript, page 3 line 40 – page 3, line 40

²¹ Shelby Twinn Affidavit, paras 5-8

²² ARC, [Alta Reg 124/2010](#), Rule 14.37(2)(e) and Rule 14.58(1); *Suncor Energy Inc v Unifor Local 707A*, [2016 ABCA 265](#) [*Suncor*] at para 9 in the SFN Memorandum and Authorities

the appeal and whether Shelby's interest warrants granting her intervenor status²³. Directly and significantly affected, she offers special expertise or a fresh perspective to resolving the appeal²⁴.

13. These factors were and are relevant:²⁵ Shelby Twinn was granted intervenor status in the court below. There is no risk that her intervention will unduly delay the proceedings, prejudice the parties, widen the *lis*, or transform the court into a political arena.²⁶

(b) As below, Shelby Twinn should be granted intervenor status: she is directly and significantly affected bringing a different, useful perspective to resolving Appeal issues

14. Shelby is not represented by the parties in these Appeals²⁷; the Trustees admitted their conflict vis a vis her interests. Her perspective is that the CMJ appears to have focused on and been motivated by historical discrimination of Bill C-31 women, perceiving this to have occurred through the 1982 trust transfer. The CMJ's interpretation of the Consent Order confirming the 1985 transfer, decades passing without challenge by anyone, ironically and unintentionally, allows far more discrimination currently and into the future, harming a larger vulnerable group including Shelby.

PART 5 – RELIEF SOUGHT

15. Shelby seeks an Order granting her intervenor status: right to file a factum, make oral submissions and (if necessary) Book of Authorities and Extract of Key Evidence²⁸.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF JUNE, 2022.

²³ *Suncor*, [2016 ABCA 265](#) at para 10, in the SFN Memorandum and Authorities.

²⁴ *Manitok Energy Inc (Re)*, [2021 ABCA 323](#) at para 9-14; *Suncor*, [2016 ABCA 265](#) at para 11 in the SFN Memorandum and Authorities.

²⁵ *Suncor*, [2016 ABCA 265](#) at para 12 in the SFN Memorandum and Authorities. is Shelby directly affected by the appeal; is her presence necessary to protect interests, unprotected by the parties; are her submissions useful and different or bring particular expertise to the subject matter of the appeal; will her intervention unduly delay the proceedings; are parties prejudiced, is the *lis* widened, or will the Court be transformed into a political arena if intervention is granted

²⁶ *Suncor*, [2016 ABCA 265](#) at para 20 along with Justice Paperny's comments at paras 15-19 in the SFN Memorandum and Authorities.

²⁷ Notice of Appeal 2203 0043AC at para 5 [**Tab B**]; Notice of Appeal 2203 0045AC at para 5 [**Tab C**] in the SFN Memorandum and Authorities. The subject of the Appeals is the CMJ's advice and direction in Sawridge #12 that the 2016 Consent Order only approved transfer of legal title in the 1982 Trust assets to the 1985 Trustees; not approving transfer of the beneficial interest to the 1985 Beneficiaries; the beneficial interest in the trusts has not changed since 1982 and remains with the 1982 Beneficiaries (members of SFN) on the terms of the 1982 Trust deed

²⁸ Notice of Appeal 2203 0043AC at para 6 [**Tab B**]; Notice of Appeal 2203 0045AC at para 6 [**Tab C**] in the SFN Memorandum and Authorities.

List of Authorities and Other Materials Relied On

AUTHORITIES

1.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010 , Rule 14.37(2)(e) and Rule 14.58
2.	<i>Twinn v Trustee Act</i> , 2022 ABQB 107 (Sawridge #12)
3.	<i>Suncor Energy Inc v Unifor Local 707A</i> , 2016 ABCA 265
4.	<i>Manitok Energy Inc (Re)</i> , 2021 ABCA 323

OTHER MATERIALS RELIED ON

TAB	Description
A.	January 19, 2018 Consent Order (Issue of Discrimination)
B.	Notice of Appeal 2203 0043AC
C.	Notice of Appeal 2203 0045AC
D.	March 29, 2022 Letter to the CMO
E.	March 29, 2022 Letter from the CMO
F.	April 25, 2019 Transcript
G.	1850 Solicitor General Drummond Memo
H.	Timeline of Important Events Leading Up to Bill C-31's Passage

Clerk's stamp:



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

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

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

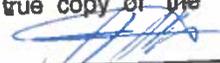
APPLICANT ROLAND TWINN, CATHERINE TWINN, BERTHA
 L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX
 TWIN, as Trustees for the 1985 Trust and the 1986 Trust
 ("Sawridge Trustees")

DOCUMENT CONSENT ORDER (ISSUE OF DISCRIMINATION)

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT Dentons Canada LLP
 2900 Manulife Place
 10180 - 101 Street
 Edmonton, AB T5J 3V5

*JUSTICE: DR. B. THORNTON
 DATE: JAN 19, 2018
 LOCHTEON: FIDRONTOS*

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


 for Clerk of the Court

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

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

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

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

- 2 -

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

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

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

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

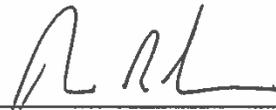
AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

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

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust.
2. The remaining issues in the Application, including the determination of any remedy in respect of this discriminatory definition, are to be the subject of a separate hearing. The timeline for this hearing will be as set out in Schedule "A" hereto and may be further determined at a future Case Management Meeting.
3. The Justice who hears and determines the remaining issues in this Application may consider all forms of discrimination in determining the appropriate relief.

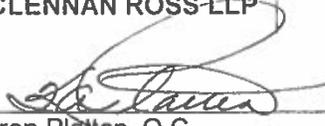
- 4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as the ~~sole determinative factor~~ that the 1985 Trust should be dissolved.
a ground upon which could.
- 5. ~~The provisions in paragraph 4, above, will not prevent reliance on this Consent Order for any purpose in the within proceedings.~~



 The Honourable D. R. G. Thomas
Thomas J

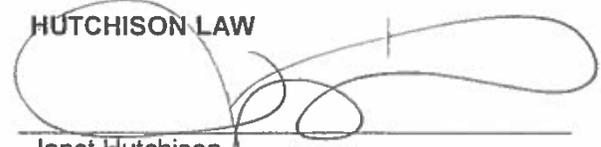
CONSENTED TO BY:

MCLENNAN ROSS-LLP



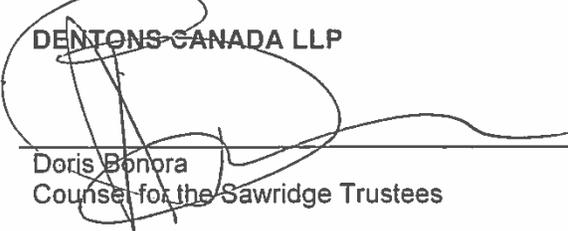
 Karen Platten, Q.C.
 Counsel for Catherine Twinn as Trustee for the 1985 Trust

HUTCHISON LAW



 Janet Hutchison
 Counsel for the OPGT

DENTONS CANADA LLP



 Doris Bonora
 Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

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

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

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

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

COURT OF APPEAL OF ALBERTA

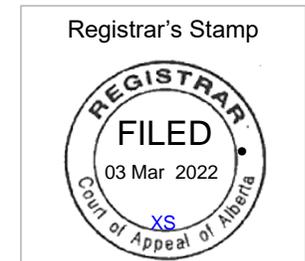
Form AP-1

[Rules 14.8 and 14.12]

COURT OF APPEAL FILE NUMBER: 2203-0043AC

TRIAL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: 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")

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

STATUS ON APPEAL: Respondents

RESPONDENT: THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Appellant

RESPONDENTS: CATHERINE TWINN

STATUS ON APPEAL: Respondent

INTERVENERS: SAWRIDGE FIRST NATION and SHELBY TWINN

STATUS ON APPEAL: To be determined

DOCUMENT: CIVIL NOTICE OF APPEAL

APPELLANT'S
ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION:

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File: 51433 JLH

Field Law
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Edmonton, AB T5J 0H3

Attn: P. Jonathan Faulds, Q.C.

Telephone: (780) 423-7625
Fax: (780) 428-9329
Email: jfaulds@fieldlaw.com
File: 551860-8 JLH

WARNING

To the Respondent: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. Particulars of Judgment, Order or Decision Appealed From:

Date pronounced: February 4, 2022
 Date entered: February 4, 2022
 Date served: February 4, 2022

Official neutral citation of reasons for decision, if any:
 (do not attach copy) *Twinn v. Trustee Act*, 2022 ABQB 107

(Attach a copy of order or judgment: Rule 14.12(3). If a copy is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated:**Alberta Court of Queen's Bench**

Judicial Centre: Edmonton
 Justice: Honourable Mr. Justice John T. Henderson

On appeal from a Queen's Bench Master or Provincial Court Judge?:
 Yes No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge:
 (do not attach copy) N/A

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required: Rule 14.18(1)(c).)

3. Details of Permission to Appeal, if required (Rules 14.5 and 14.12(3)(a)).

Permission not required
 Date: N/A
 Justice: N/A
 (Attach a copy of order, but not reasons for decision.)

4. Portion being appealed (Rule 14.12(2)(c)):

Whole

5. Provide a brief description of the issues:

The Trustees of the 1985 Sawridge Trust applied for advice and direction concerning the interpretation and effect of a Consent Order referred to as the Asset Transfer Order (ATO) which had been granted earlier in the proceedings in 2016. The ATO stated that a transfer of assets carried out in 1985 from a prior trust to the 1985 Trust was approved *nunc pro tunc*. The ATO was granted by the Court after hearing legal and factual submissions that the prior Trustees had the proper authority to effect the transfer, which the Court accepted. In the

decision under appeal the Case Management Justice advised the Trustees that the prior trustees had no such authority, that as a result the ATO approved only the transfer of legal title, and that the beneficial interest in the transferred assets remained with the prior trust. That advice involved errors of law, and palpable and overriding errors of mixed fact and law and errors of fact, including:

- 1.) Constituting a collateral attack on the Consent Order by substituting the Case Management Justice's legal analysis for that of the Court that granted the ATO in order to reach a different result;
- 2.) Failing to correctly apply the accepted principles for interpretation of a Court Order, including by failing to interpret the ATO on an objective basis grounded in the context, facts and circumstances of the proceedings that were before the Court at the time the ATO was granted;
- 3.) Misinterpreting and misapplying the applicable law governing the authority of the trustees of the prior trust to transfer trust assets to the 1985 Trust;
- 4.) Basing the advice and direction on findings of fact that were incorrect and involved palpable and overriding error;
- 5.) Exceeding the scope of authority of a Case Management Justice by making an order affecting substantive rights, which was effectively a final order, without the consent of all parties; and
- 6.) Such further and other issues as may arise from the Appeal Record.

6. Provide a brief description of the relief claimed:

An order granting the appeal, confirming the ATO approved the transfer of both legal title and beneficial interest to the 1985 Trust, and remitting the matter to the Case Management Justice for further proceedings in accordance with this Court's order.

7. Is this appeal required to be dealt with as a fast track appeal? (Rule 14.14)

Yes No

8. Does this appeal involve the custody, access, parenting or support of a child? (Rule 14.14(2)(b))

Yes No

9. Will an application be made to expedite this appeal?

Yes No

10. Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate? (Rule 14.60)

Yes No

11. Could this matter be decided without oral argument? (Rule 14.32(2))

Yes No

12. Are there any restricted access orders or statutory provisions that affect the privacy of this file? (Rules 6.29, 14.12(2)(e),14.83)

Yes No

If yes, provide details:

(Attach a copy of any order.)

13. List respondent(s) or counsel for the respondent(s), with contact information:

Dentons LLP
Suite 2500 Stantec Tower
10220 – 103 Avenue NW
Edmonton, Alberta T5J 0K4

Attention: Doris Bonora and Michael Sestito
Counsel for the Sawridge Trustees

Phone: 780-423-7100
Fax: 780-423-7276
Email: doris.bonora@dentons.com

Parlee McLaws
Suite 1700, Enbridge Centre
10175 – 101 Street NW
Edmonton, Alberta T5J 0H3

Attention: Edward Molstad, Q.C. and Ellery Sopko
Counsel for the Sawridge First Nation

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Fax: 780-423-2870
Email: emolstad@parlee.com /
esopko@parlee.com

McLennan Ross LLP
600 McLennan Ross Building
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Edmonton, Alberta T5N 3Y4

Attention: Crista Osualdini and David Risling
Counsel for Catherine Twinn

Phone: 780-482-9200
Fax: 780-482-9100
Email: crista.osualdini@mross.com

Shelby Twinn
9918 – 115 Street
Edmonton, Alberta T5K 1S7

Phone: 780-264-4822
Email: S.twinn@live.ca

Self Represented Litigant

If specified constitutional issues are raised, service on the Attorney General is required under s. 24 of the Judicature Act: Rule 14.18(1)(c)(viii).

14. Attachments (check as applicable)

Order or judgment under appeal if available (not reasons for decision) (Rule 14.12(3))

Earlier order of Master, etc. (Rule 14.18(1)(c))

Order granting permission to appeal (Rule 14.12(3)(a))

Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

COURT OF APPEAL OF ALBERTA

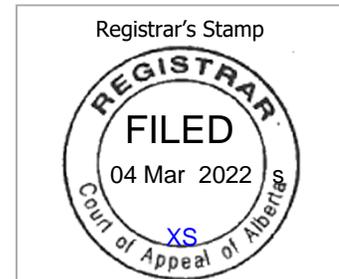
Form AP-1
[Rules 14.8 and 14.12]

COURT OF APPEAL FILE
NUMBER: **2203-0045AC**

TRIAL COURT FILE
NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

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")

RESPONDENT: CATHERINE TWINN

STATUS ON APPEAL: Appellant

APPLICANTS: ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN and DAVID MAJESKI, as TRUSTEES FOR THE 1985 SAWRIDGE TRUST ("1985 SAWRIDGE TRUSTEES")

STATUS ON APPEAL: Respondents

RESPONDENT: THE OFFICE OF THE PUBLIC TRUSTEE AND GUARDIAN

STATUS ON APPEAL: Respondent

INTERVENORS: SAWRIDGE FIRST NATION AND SHELBY TWINN

STATUS ON APPEL: Interveners

CIVIL NOTICE OF APPEAL

~ 2 ~

APPELLANT'S ADDRESS FOR SERVICE AND CONTACT INFORMATION:	McLENNAN ROSS LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyers: David Risling and Crista Osualdini Telephone: (780) 482-9114 Fax: (780) 733-9706 Email: david.risling@mross.com crista.osualdini@mross.com File No.: 144194
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WARNING

To the Respondents: If you do not respond to this appeal as provided for in the Alberta Rules of Court, the appeal will be decided in your absence and without your input.

1. Particulars of Judgment, Order or Decision Appealed From:

Date pronounced: February 4, 2022

Date entered: February 4, 2022

Date served: February 4, 2022

Official neutral citation of reasons for decision, if any:

(do not attach copy) *Twinn v. Trustee Act*, 2022 ABQB 107

(Attach a copy of order or judgment: Rule 14.12(3). If a copy is not attached, indicate under item 14 and file a copy as soon as possible: Rule 14.18(2).)

2. Indicate where the matter originated: **Court of Queen's Bench**

Judicial Centre: Edmonton

Justice: The Honourable Justice John T. Henderson

On appeal from a Queen's Bench Master or Provincial Court Judge?: Yes No

Official neutral citation of reasons for decision, if any, of the Master or Provincial Court Judge: (do not attach copy) N/A

(If originating from an order of a Queen's Bench Master or Provincial Court Judge, a copy of that order is also required: Rule 14.18(1)(c).)

 Board, Tribunal or Professional Discipline Body

~ 3 ~

Specify Body: N/A

3. Details of Permission to Appeal, if required (Rules 14.5 and 14.12(3)(a)). Permission not required, or Granted:

Date: N/A

Justice: N/A

(Attach a copy of order, but not reasons for decision.)

4. Portion being appealed (Rule 14.12(2)(c)): Whole, or Only specific parts (if specific part, indicate which part):

(Where parts only of a family law order are appealed, describe the issues being appealed, e.g. property, child support, parenting, etc.).

5. Provide a brief description of the issues:

An Order of the Honourable Justice J.T. Henderson in relation to the 1985 Sawridge Trustees' application filed on September 13, 2019 seeking, *inter alia*, interpretation of the Consent Order of Justice D.R. Thomas pronounced on August 24, 2016 (the "**Consent Order**").

Justice J.T. Henderson ("Justice") made errors in law, palpable and overriding errors in fact and/or palpable and overriding errors in mixed fact and law in regards to the following matters:

1. Failure to consider or properly apply the legal test for interpretation of Orders of this Honourable Court, including creating a record that did not exist at the time the Consent Order was granted.
2. In the alternative, the Justice failed to properly consider the evidence and/or apply the law in relation to the interpretation of Orders of this Honourable Court, including the prior orders of this Honourable Court in these proceedings.
3. The Justice acted without jurisdiction in initiating and providing relief on an application for advice and direction that affect the substantive rights of parties.

~ 4 ~

4. In case management the Justice initiated proceedings related to matters that occurred decades earlier and had been determined by previous court order, and then proceeded to provide final relief acting without jurisdiction.
5. In the alternative, the Justice failed to:
 - a. Properly apply the legal test for limitation periods for relief as against trustee exercises of discretion;
 - b. Properly apply the legal test for determining the scope of authority of the 1982 Trustees to effect advancements under the 1982 Trust Deed;
 - c. Failed to properly consider the evidence and/or apply the law in relation to the scope of authority of the 1982 Trustees to effect advancements under the 1982 Trust Deed;
 - d. Failed to properly apply the legal test for application of section 42 of the *Trustee Act*, RSA 1980 c. T-10;
 - e. Failed to properly consider the evidence and/or apply the law in relation to interference with the exercise of discretion by a trustee;
 - f. Failed to properly consider the Trust structure and transactions that were set up and occurred decades earlier leading to a failure to properly balance current discrimination occurring in relation to beneficiary families with a vested interest in 1985 Trust property with discrimination of a category of woman who suffered historical discrimination, of which only a few remain, resulting in allowing the First Nation to further their goals to enrich one group of beneficiaries from the 1986 Trust at the expense of the 1985 beneficiaries;
 - g. Failed to properly apply the law in relation to the scope of authority of the 1985 Trustees to hold property in trust for 1982 Trust beneficiaries; and
 - h. Failed to properly consider and apply the factors regarding the decision of the 1982 Trustees to arrange for an equitable structure in light of the complex environment existing decades earlier, which included significant per capita pay-outs to Bill C-31 persons restored to Band membership, which was not paid to 1985 Trust beneficiaries.

~ 5 ~

6. Such further and other matters as shall be raised at the hearing of this appeal.

6. Provide a brief description of the relief claimed:

1. Confirming that the meaning and effect of the Consent Order is to confirm that the subject assets are held subject to the terms of the 1985 Trust Deed;
2. Costs.

7. Is this appeal required to be dealt with as a fast track appeal? (Rule 14.14)

Yes No

8. Does this appeal involve the custody, access, parenting or support of a child? (Rule 14.14(2)(b))

Yes No

9. Will an application be made to expedite this appeal?

Yes No

10. Is Judicial Dispute Resolution with a view to settlement or crystallization of issues appropriate? (Rule 14.60)

Yes No

11. Could this matter be decided without oral argument? (Rule 14.32(2))

Yes No

12. Are there any restricted access orders or statutory provisions that affect the privacy of this file? (Rules 6.29, 14.12(2)(e), 14.83)

Yes No

If yes, provide details: _____
(Attach a copy of any order.)

13. List Respondents or counsel for the Respondents, with contact information:

Name of party and status: Sawridge Trustees
Respondent

Responsible lawyer: Doris C.E. Bonora Q.C. and Michael Sestito

~ 6 ~

Law firm: Dentons Canada LLP

Address of party or law firm: 2900 Manulife Place, 10180-101 Street,
Edmonton, AB T5J 3V5

Address for service: (same as above)

Phone number of lawyer: (780) 423-7188

File number of lawyer: Unknown

Electronic address of lawyer: doris.bonora@dentons.com and
michael.sestito@dentons.com

Name of party and status: Office of the Public Guardian and Trustee
Respondent

Responsible lawyer: Jonathan Faulds Q.C.,

Law firm: Field Law

Address of party or law firm: 2500, 10175 - 101 Street NW
Edmonton, AB T5J 0H3

Address for service: (same as above)

Phone number of lawyer: (780) 423-7625

File number of lawyer: Unknown

Electronic address of lawyer: jfaulds@fieldlaw.com

Name of party and status: Office of the Public Guardian and Trustee
Respondent

Responsible lawyer: Janet Hutchison

Law firm: Hutchison Law

Address of party or law firm: 190 Broadway Business Square, 130 Broadway
Boulevard, Sherwood Park, AB T8H 2A3

Address for service: (same as above)

~ 7 ~

Phone number of lawyer: (780) 417-7871 (ext.225)

File number of lawyer: 51433 JLH

Electronic address of lawyer: JHutchison@jlhlaw.ca

Name of party and status: Sawridge First Nation
Intervenor

Responsible lawyers: Edward Molstad, Q.C. and Ellery Sopko

Law firm: Parlee McLaws

Address of party or law firm: 1700 Enbridge Centre, 10175 - 101 Street NW,
Edmonton, AB T5J 0H3

Address for service: (same as above)

Phone number of lawyer: (780) 423-8506 and (780) 423-8536

File number of lawyer: 64203-7 / EHM

Electronic address of lawyer: emolstad@parlee.com and esopko@parlee.com

Name of party and status: Shelby Twinn
Intervenor

Responsible lawyer: Self Represented Litigant

Law firm: N/A

Address of party or law firm: 9918-115 Street, Edmonton, AB T5K 1S7

Address for service: (same as above)

Phone number: (780) 264-4822

File number of lawyer: N/A

Electronic address: stwinn@live.ca

If specific constitutional issues are raised, service on the Attorney General is required under s. 24 of the Judicature Act: Rule 14.18(1)(c)(viii).

~ 8 ~

14. Attachments (check as applicable)

- Order or judgment under appeal if available (not reasons for decision) (Rule 14.12(3))

Not available at the time of filing the Notice to Appeal.

- Earlier order of Master, etc. (Rule 14.18(1)(c))
- Order granting permission to appeal (Rule 14.12(3)(a))
- Copy of any restricted access order (Rule 14.12(2)(e))

If any document is not available, it should be appended to the factum, or included elsewhere in the appeal record.

大成 DENTONS

Michael S. Sestito
Partner
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Dentons Canada LLP
2500 Stantec Tower
10220-103 Avenue NW
Edmonton, AB, Canada T5J 0K4

Distributed to CMO



March 29, 2022

DELIVERED VIA EMAIL

Court of Appeal of Alberta
Registrar's Office
Law Courts Building
1A Sir Winston Churchill Square
Edmonton, AB T5J 0R2

Dear Sir/Madam:

Re: The Office of the Public Trustee of Alberta. v. Roland Twinn and others
Appeal No. 2203-0043AC

Catherine Twinn v. Roland Twinn and others
Appeal No. 2203-0045AC

We write with respect to both of the above-captioned matters and with the permission of the parties. By way of reminder, we represent the 1985 Sawridge Trustees.

We have had the opportunity to discuss among the parties and intervenors. We are looking to prepare a Schedule for the exchange of materials in this appeal and propose the following:

1. April 25, 2022: The Appeal Record is to be prepared and served on all parties (the OPGT will prepare a single Appeal Record);
2. June 24, 2022: The Appellants' material (Factum and Book of Authorities) to be filed and served on all parties;
3. August 26, 2022: The Respondents' material (Factum and Book of Authorities) to be filed and served on all parties.

The parties can then be available the week of October 31, 2022.

The parties propose hearing these two appeals together. The parties propose that the OPGT and Catherine Twinn (appellants in their respective appeals) be listed as Appellants in both matters and only be required to provide material as the Appellants. We also propose that the Intervenors, assuming that they are successful in obtaining status as Intervenors, provide their material at the same as the Respondents.

Fernanda Lopes & Asociados ► Guevara & Gutierrez ► Paz Horowitz Abogados ► Sirote ► Adepun Caxton-Martins Agbor & Segun ► Davis Brown ► East African Law Chambers ► Eric Silwamba, Jalasi and Linyama ► Durham Jones & Pinegar ► LEAD Advogados ► Rattagan Macchiavello Arocena ► Jiménez de Aréchaga, Viana & Brause ► Lee International ► Kensington Swan ► Bingham Greenebaum ► Cohen & Grigsby ► Sayarh & Menjra ► For more information on the firms that have come together to form Dentons, go to dentons.com/legacyfirms

NATDOCS\62061168\W-1

We have canvassed with the Parties and confirm that none of the Parties (the 1985 Sawridge Trustees, Catherine Twinn or the OPGT) oppose the court providing intervenor status to either or both of the Sawridge First Nation or Ms. Shelby Twinn. The Parties reserve their rights to argue for time or page restrictions regarding the submissions of the intervenors.

Yours truly,

Dentons Canada LLP



Michael S. Sestito
Partner

MSS/mk

cc: Dentons Canada LLP
Attention: D. Bonora, Q.C., R. Johnsson (via email)

Hutchison Law
Attention: Janet Hutchison (via email)

Field Law
Attention: J. Faulds, Q.C. (via email)

McLennan Ross LLP
Attention : C. Osauldini and D. Risling (via email)

Parlee McLaws LLP
Attention: E. Molstad, Q.C. and E. Sopko (via email)

Shelby Twinn (via email)

Registrar's Office
26th Floor
450 – 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
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COURT OF APPEAL OF ALBERTA

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Email: bobbi.mcdevitt@albertacourts.ca
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March 29, 2022

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McLennan Ross LLP
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**Re: The Office of the Public Trustee of Alberta (A) v. Roland Twinn (R) and others
Catherine Twinn (A) v. Roland Twinn (R) and others
Appeal Nos. 2203-0043AC & 2203-0045AC**

I have reviewed the letter received today by counsel for the 1985 Sawridge Trustees.

The proposed filing deadlines are approved. Both appeals will be heard on November 3, 2022.

I agree with the proposal that the OPGT and Catherine Twinn be required to provide materials as appellants only, notwithstanding that they are listed as respondents in each other's notice of appeal.

I am not prepared to provide any direction regarding the proposed intervenors until an order granting intervention status is made. I would urge those applications to be made as soon as possible. Although rule 14.58 does not provide a deadline, such applications must be made in a timely way, to avoid disrupting the flow of an appeal. See *North Bank Potato Farms Ltd v. The Canadian Food Inspection Agency*, 2019 ABCA 88 at para. 7.

Thank you,

Bobbi Jo McDevitt, LL.B.
Case Management Officer
Court of Appeal - Edmonton
/bjm

Action No. 1103-14112
E-File Name: EVQ19TWINNR
Appeal No. _____

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

IN THE MATTER OF THE TRUSTEE ACT,
R.S.A. 2000, c. T-8, AS AMENDED, 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 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE,
EVERETT JUSTIN TWINN 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

Transcript Management Services
Suite 1901-N, 601-5th Street, SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

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

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3

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.
Twinn, and D. Majeski

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 around the issue.

2

3 THE COURT: Yes.

4

5 MS. BONORA: And I also in my discussions with Ms. Osualdini
6 was reminded that Mr. Molstad was also involved in that matter so I also called him.

7

8 I thought I'd just address a couple of points but I will tell you that Ms. Hutchison and Mr.
9 Faulds have advised that they would like time to consider this issue. Mr. Molstad has also
10 asked for some time. And I think all of the parties might benefit from some advice from
11 you in respect of exactly how it collides with the jurisdictional issue.

12

13 THE COURT: Sure. Would you like me to speak to that?

14

15 MS. BONORA: Sure.

16

17 THE COURT: Let me start by saying I've approached this case
18 with a fresh set of eyes. So the way I view it may not be the way you view it or the way
19 other parties have viewed it or the way other judges have viewed it. So I've approached it
20 from a fresh perspective with a view to ensuring that I have sufficient information available
21 to come to a correct decision with respect to the jurisdictional issue that you've properly
22 raised.

23

24 So I went back to the original documentation, the 1982 trust deed, and I compared it to the
25 1985 trust deed, Declaration of Trust, and I guess I was a little surprised to see the close
26 parallels between the two. And I also would premise all of my comments on this: I've not
27 made any decision about anything. I'm raising concerns that I have. I'm sure we've got
28 more than enough capable lawyers here to sort out my concerns. These are my concerns
29 and I can tell you they're genuine, otherwise, I wouldn't be taking your time with them.

30

31 So I compared these two trust deeds and I said to myself, my goodness, this isn't really
32 what I expected to see. I saw such close parallels that really the only fundamental difference
33 between 1982 and 1985 from my perspective, other than some flowery language in some
34 portions which is largely irrelevant -- the only difference is the definition of beneficiaries.
35 I did also see a prohibition on -- in the 1982 trust deed, a prohibition on the use or diverting
36 any of the trust assets for any purpose other than for the purposes identified in the trust, i.e.
37 for the benefit of the beneficiaries who are defined to be present and future members of the
38 band.

39

40 So I then began to look to see how we transition from 1982 to 1985. Saw very little
41 information but I was able to locate the August 2016 materials and I read your materials. I

1 saw that there was limited evidence available to provide an explanation for what had
2 transpired. But we do also have other background information of a circumstantial nature
3 that does assist in understanding what went on and we know, at least one can infer -- and
4 I'm happy to hear if you don't accept the inferences or where I'm headed but we do see
5 that the 1985 trust was created for a very specific purpose. That purpose was to ensure that
6 the trust assets were not going to be shared with a group of people who were likely to
7 become members of the band as a result of proposed modifications to the *Indian Act* in
8 1985, which were imminent, and which would permit women, primarily, to re-join the band
9 as members. And, therefore, if that happened without the trust being changed, they would
10 then become beneficiaries of the trust.

11
12 So I confess that I had some concern with respect to what I was seeing. I asked myself how
13 it could possibly be that we had really substantial assets -- I don't know, there's evidence
14 or numbers kicking around 70 million or 220 million or whatever they are -- whatever the
15 number is, it's a lot of money. So I had concerns with respect to how we were seeing a
16 modification of a trust without any judicial approval, without any compliance with section
17 42, without anything other than simply the creation of a new trust. So I questioned -- and I
18 could totally be wrong about this and I'm more than happy to hear all of you out -- I
19 question the legitimacy of the 1985 trust declaration at all.

20
21 I did consider Justice Thomas' order -- a consent order of August 24th, 2016. You may
22 consider that to be the total answer to all of the problems and you could well be right and
23 I'm happy to hear you on that. On the surface I don't accept that but I'm open minded and
24 I'm happy to hear from you. But I can tell you that I have fundamental concerns. So how
25 does that relate to the issue that the parties together have defined for today the jurisdictional
26 issue. I think you are all on board that there are three ways in which a trust can be varied.
27 One is the reservation in the trust declaration. All of you are in agreement that that's not
28 the case here so we put that aside.

29
30 Secondly is section 42 of the *Trustee Act*. We all agree that that's properly enforced and
31 must be complied with. There's some disagreement with respect to whether enough effort
32 has been made to try to comply but I would say -- again, without hearing more argument -
33 - that section 42 is definitely available. Whether it is practically available is really the issue
34 and because we have competing interests the likelihood of getting a hundred percent
35 approval is slim to nil and I would think nil is probably closer than slim. So practically
36 speaking, section 42 doesn't look like a way to achieve the result that everyone would like.

37
38 Which leads to the ability of the Court at common law through the exercise of discretion
39 to amend the terms of the trust apart from section 42 of the *Trustee Act*. And I think it's
40 fair to say that the law in terms of my ability -- any Court's ability to modify the terms of
41 a trust on that basis is quite limited. And to achieve that result through the common law or

1 through the exercise of my discretion as a result of the inherent powers that the Court may
2 have is limited and I would have to go probably further to achieve that in this case than the
3 law has gone to date, which means that I would need to proceed very cautiously. Not that
4 I wouldn't proceed -- not that I wouldn't proceed cautiously but I would need to proceed
5 cautiously.

6
7 If I am going to go down a path where I need to consider whether or not to exercise my
8 discretion to develop the common law in a way that it hasn't quite been developed before,
9 I need to consider as part of that analysis the other alternatives. What other alternatives are
10 available that would make it unnecessary for me to go down the path which would extend
11 the law beyond where it is today. One of the possibilities -- and again, I want to emphasize
12 I've not made any decisions on any of this, I'm at the moment just talking so that you will
13 collectively have an understanding as to what my level of concern is here and what the
14 concern is.

15
16 One of the options here that is easily available is this 1985 trust doesn't have anything to
17 do with anything we're talking about here today. The assets, while they may be situated in
18 the 1985 trust -- because Justice Thomas said that they were -- are still subject to the 1982
19 trust terms. The definition of beneficiaries is members or future members of the band, that's
20 the end of it. There still is some discrimination in the 1982 trust, which we would need to
21 deal with because it -- it does contain identical language to the 1985 trust which deals with
22 illegitimate children. So we would still have that hurdle but I see that as a much smaller
23 hurdle than sort of the broader picture.

24
25 So the easiest thing to do here is just to say you haven't satisfied me that this 1985 trust is
26 relevant. I'm not going to exercise my discretion to modify the definition of beneficiaries
27 in the 1985 trust. 1982 is where we're going, that's where we are. Let's deal with
28 illegitimate children. I'm not saying I've come to that conclusion but that -- that is an
29 avenue that is in my mind available subject to counsel telling me that there are roadblocks
30 that prevent that from happening. And I would say that I would not come to that conclusion,
31 if that is my conclusion ultimately -- I would not come to that conclusion lightly because I
32 am conscious of the fact that there are potential consequences that could flow from that
33 and that would obviously be troubling to me. But my primary responsibility is to determine
34 what the facts are and apply the law to those facts. And if that drives me in one direction
35 that none of the parties like, that's an unfortunate consequence.

36
37 So my plan is to figure out what the facts are, determine what the law is. I'm not afraid to
38 extend the common law if that's where we need to go. Incrementally all that's probably
39 something more appropriately done in the Court of Appeal or higher courts but I -- I say
40 all of this only to let you know that this is a concern for me. I see that you tried to clean it
41 up in 2016 but to me that isn't the answer. So that's where we are.

1
2 MS. BONORA: Sir, given those comments, I think certainly we
3 would like an opportunity to research this issue and come --
4
5 THE COURT: Yes, that's --
6
7 MS. BONORA: -- back to you.
8
9 THE COURT: Yes.
10
11 MS. BONORA: I think Mr. Molstad probably does as well, that's
12 what he told me on the phone.
13
14 THE COURT: Sure.
15
16 MS. BONORA: Certainly we need some instructions from our
17 client. And I feel that, you know, short of making a few more arguments on public policy
18 and quasi-community trusts, you've essentially said my argument on the jurisdictional
19 issue. So I feel that perhaps today we should adjourn so that we can all consider this issue
20 for you and come back. Perhaps we could set -- I'm guessing some written materials would
21 be helpful to you --
22
23 THE COURT: Yes, it would.
24
25 MS. BONORA: -- and perhaps we could set some dates for those
26 materials and find some time with you.
27
28 THE COURT: Sure, yes. And I apologize for sort of raising this
29 issue at the last minute but I can tell you that this has been an evolving process for me --
30
31 MS. BONORA: Yes.
32
33 THE COURT: -- as I've read your briefs and I chipped away at
34 the ten boxes of materials downstairs that are not well organized. So when I write to you
35 asking for materials, it's not because the materials aren't here, it's just that they're not
36 readily available to me.
37
38 MS. BONORA: We are so happy to provide those to you and we
39 thank you very much for your comments today. I mean, obviously, that issue of the transfer
40 between the two trusts was an issue identified. We thought we had solved it but we
41 obviously need to satisfy you better that that is in fact solved and perhaps in our

1 investigations we'll find some other law that hasn't solved that issue entirely so ...

2
3 THE COURT: Well, maybe it has been solved. I don't see it
4 right now but I'm looking with open eyes just to see what I can find. So I'm not sure if any
5 of the other counsel are concerned about the way we've gone but -- is everyone board with
6 simply adjourning the jurisdictional issue so that briefs can be filed to supplement what's
7 currently been filed to address some of the concerns that I've raised today?

8
9 UNIDENTIFIED SPEAKER: Yes, My Lord.

10
11 THE COURT: The problem that we're going to have, I tell you
12 this right now, is that you are not going to find time with my assistant any time soon. That's
13 -- you're certainly free to tell her that you need time quickly but there's -- the practical
14 reality is that you're going to have a hard time finding something until probably into
15 September.

16
17 MS. BONORA: Sir, maybe then we won't take more of the
18 Court's time this afternoon and we'll just speak with your assistant to try and find time.

19
20 THE COURT: Sure.

21
22 MS. BONORA: We'll speak amongst ourselves in terms of
23 setting times for briefs, I'm sure that we can do that on our own, and perhaps even consider
24 the possibility of just writing to you and seeing if you will make a decision just on bases
25 of written materials. We'll speak amongst ourselves whether that's a possibility as well.

26
27 THE COURT: If your written materials cover the waterfront, as
28 much as I'm happy to hear from you I could also deal with it in written form. The one other
29 thing I didn't say that I should say is I know that you presented a consent order to Justice
30 Thomas and he signed it and I know that all of you have agreed that that order should be
31 signed so it was truly a consent order. But you have to ask yourself a couple of questions
32 with respect to that order. One is how solid is that order in the sense that it is ex parte vis-
33 à-vis some potentially interested parties. I would not want to go down the path of spending
34 another year or two or three years of applications and spending money that's ultimately
35 coming out of the trust only to find that we have one individual who pops up and says,
36 well, just hold on a minute now. I was -- I was a band member in 1982, I got married in
37 1983. I lost my band membership. I was just ready to come back in and lo and behold I had
38 the rug pulled out from underneath me and I didn't hear about this application before
39 Justice Thomas. I want that set aside. And you know what, there's -- there's a good
40 argument to be made that it might be set aside there.

41

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.

1 MS. BONORA: Thank you, Sir.

2

3 UNIDENTIFIED SPEAKER: Thank you, My Lord.

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7 PROCEEDINGS ADJOURNED

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1 **Certificate of Record**

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I, Natalija Varevac, certify that this recording is the record made of the evidence of the proceedings in Court of Queen's Bench, held in courtroom 517 at Edmonton, Alberta, on the 25th day of April, 2019, and that I was the court official in charge of the sound recording machine during these proceedings.

1 **Certificate of Transcript**

2
3 I, Su Zaherie, certify that

4
5 (a) I transcribed the record, which was recorded by a sound recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record and

8
9 (b) the Certificate of record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

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18 TEZZ TRANSCRIPTION, Transcriber

19 Order Number: AL-JO-1003-0576

20 Dated: April 26, 2019

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DRUMMOND MEMO - 1851

On reference to the Attorney General (East) of a letter addressed by JM Napier, Sup. JA to Lt. Col. the Hon. R. Bruce Sup. Genl. JA on the 18th Sept. 1850 enclosing a letter from several Indians of St. Francois, complaining of certain provisions of the Act 13 and 14 Vict. Ch 42; and on reference by Mr. Chesley to the Solicitor General (East) of a copy of a petition presented to His Excellency the Governor General of several Indians of Sault St Louis on the same subject.

Crown Law Department Toronto, July 22, 1851

When these documents were referred to me in the City of Montreal I conceived it my duty to ascertain by every means within reach whether the complaints, preferred against the law of last session by some of the Indians, had any just foundation, and if so, to what extent the law might be amended so as to meet the views of the petitioners. For that purpose I placed myself in communication with the enlightened and zealous missionary of Sault St. Louis, as well as with some of the most intelligent of the inhabitants of that village, and invited the Chiefs to explain and discuss with me the objections raised against the Act. The Chiefs of the Iroquois Tribe stationed at Sault St. Louis, to the number of some six or eight, and a person deputed by the Abenakis of St. Francois accordingly met at my office in Montreal, and from the information derived from them, as well as from previous investigation into the affairs of the various remnants of the Indian tribes residing in Lower Canada, I convinced myself of the following facts, without due consideration of which the law of last session cannot be appreciated:

1 stly That in several of the Indian villages of Lower Canada there are comparatively few persons of unmixed Indian blood. It is said that the old Huron Chief Koska, who died some few years ago, was at the time of his decease the only individual of pure Indian blood in the extensive village of Lorette. It is doubtful whether a score of persons of unmixed Iroquois blood could be found in the village of Sault St. Louis, and amalgamation with the white races has manifestly taken place to a lesser extent in all the other Indian villages.

2 ndly That for many years, extending in some instances to more than half a century past, persons of unmixed European blood have resided in these villages and have been recognized as Indians, receiving their share of the Government presents and occupying, in common with the Indians, the lands appropriated to the use of the latter. Several of this class of persons, some of whom are descended from prisoners made by the Indians in the times of their wars with the old colonists, have been elected Chiefs; - one of the Grand Chiefs of Sault St. Louis, Jean Baptiste _____ being, as it is alleged, the grandson of Genl. Bourgorgone, and the son of an American woman of the name of Tarbol.

3 rdly That it has become customary among the aboriginal tribes of North America, from time immemorial, to recognize as members of a tribe all persons adopted by it, and to pursue the Roman rule of making the child follow the condition of the mother, so that the children invariably formed part of the tribe or band to which their mother belonged.

4 thly That the question raised as to the rights of the whites and mixed breeds to participate in the advantages belonging to the tribe amongst which they had been born or brought up has been, for many years, a cause of constant strife in these villages - a strife in which some

- 2 -

individuals of European descent were not unfrequently loudest and most vehement in demanding the expulsion of the half-breeds.

A striking proof of this strange conduct was given by the two Chiefs who were deputed from Sault St. Louis to remonstrate with His Excellency the Governor General against the law of last session. For, although they came to seek for the expulsion of the whites and half-breeds from their villages, one of them (if I am correctly informed) Charles Lafosaie _____ has not a drop of Indian blood in his veins and the other Louis Tarbol _____ is the grandson of an American prisoner of war.

In this condition of things I felt that it was the duty of the Government to endeavour to put an end to those conflicts by passing a law defining clearly the rights of all persons residing in these villages, in accordance with the ancient customs and traditions of the Indians themselves. The Act of last session was framed with a strict view to equity and to these customs and traditions; that part of it which confers upon all persons intermarried with Indians the same rights as the Indians themselves is obnoxious to the latter. Moreover, assuming that the system of isolating these remnants of the Indian Tribes must, at least for a considerable time to come, be persisted in, without reference to the policy in which it originated, it may be considered as a violation of the rights of the present proprietors to allow the white man who marries an Indian woman to claim a share in the rights of her tribe. I, therefore, propose to amend that portion of the law so as to exclude the white man who marries an Indian woman and his descendants, without depriving the Indian who marries a white woman, or his heirs, from a share in the rights of the tribe.

Another provision of the Act which has been complained of, especially by the Indians of St. Francois is that which confers Indian rights upon persons adopted in infancy and their descendants. I cannot, however, advise the repeal of these clauses, which was framed to protect a numerous class of persons who according to Indian Custom as well as justice and equity, are entitled to enjoy Indian privileges; but I propose to alter so as to exclude all persons who have not been brought up and continued to reside amongst the Indians. This alteration will, I trust, have the effect of excluding from the enjoyment of Indian privileges the persons against whom the complaints of the Abenakis of St. Francois are chiefly directed.

It is proposed also by the accompanying Bill to exclude from the category of persons whom may be removed from the Indian villages under the provisions of the Special Council Ordinance the various classes entitled to Indian rights as well as all persons employed by them as servants, masons and other artisans.

This proposed alteration has a double object in view -

1 st To remove an opinion suggested to the inhabitants of these villages, amongst whom it has created much apprehension and distrust; namely, that under the provisions of the Ordinance they are all liable to be expelled from their lands by the command of the Governor of the Province - and

- 3 -

2 ndly To enable them to make some progress in improving their villages and farms, by employing for that purpose persons of superior skill and industry, and to relive such persons from the apprehension of being liable to expulsion before the expiration of their term of service.

The amendments which I have the honour to submit with this report will probably satisfy the persons who have remonstrated against the Act of last session, but, owing to the doubtful origin of many of the inhabitants of the Indian villages, difficulties must necessarily arise hereafter in the application of this law to individual cases. These difficulties cannot be obviated, unless an enumeration of all the heads of families entitled to the enjoyment of Indian rights in each village be made out, under legislative sanction. The Indian Commissioner might be entrusted in the performance of this duty, and the names of the persons for whose benefit it would be undertaken should be consigned in Registers, one duplicate of which should be deposited in some place of safety in each Indian village and the other in the archives of the Indian Department. A measure of this character involving, as it must, numerous details, cannot be laid before the Legislature during the present session, but I would humbly submit to His Excellency the Governor General whether authority should not be given to the Law-Officers of the Crown to carry out this suggestion, if approved, at the next session of Parliament.

The whole, nevertheless, respectfully submitted.

Lewis D. Drummond
Solicitor General

TIMELINE OF IMPORTANT EVENTS LEADING UP TO BILL C-31'S PASSAGE

IRIW – Indian Rights for Indian Women
 NIB – National Indian Brotherhood
 NCC – Native Council of Canada
 IAA – Indian Association of Alberta
 DIAND – Department of Indian and Northern Development
 SCIAND - Standing Committee on Indian Affairs and Northern Development

1969 – Trudeau releases White Paper on Indian Policy recommending termination of special rights for Indian peoples

1970 – (June) Alberta Chiefs presented the Trudeau government with their own policy proposal, the “Red Paper”

1971 – Lavell launched legal challenge against s. 12(1)(b) of the *Indian Act*

1973 – Lavell case reaches SCC, along with Bedard

1974 – (October) federal government agreed to unique policy-making experiment called the Joint NIB-Cabinet Committee; created two working groups to deal separately with the area of Aboriginal and treaty rights and *Indian Act* revisions; aboriginal women excluded from process

1977 – (December) Lovelace brings case to United Nations Human Rights Committee

1978 – (April) NIB withdrew from process due to lack of progress on agenda items; Joint Committee collapsed

1978 – (April) IRIW holds conference to discuss membership provisions of the *Indian Act*; conference developed a detailed policy paper that proposed defining Indian status through “1/4blood rule” and restoring “full rights” to women who lost status through discrimination

1978 – (June) DIAND presented Aboriginal leaders with a package of *Indian Act* amendments, had concerns about retroactivity; IRIW denounced proposals, asserting that concerns about retroactivity were unacceptable

1979 – (August) UNCHR found Lovelace’s 1977 complaint admissible

1981 – UNCHR rules in favour of Lovelace, finds Canada in violation of Article 27 of the Covenant on Civil and Political Rights

1982 – (August 4) Standing Committee on Indian Affairs and Northern Development (SCIAND) was mandated to study and recommend how the *Indian Act* might be amended to remove discriminatory provisions

1982 – Indian Affairs Minister John Munro released a discussion paper presenting some of the membership policy options being considered by the government

1982 – (September 1) SCIAND begins deliberations; SCIAND was instructed by DIAND to deal with discrimination against Indian women before dealing with band government issues;

1982 – SCIAND creates subcommittee on Indian Women and the *Indian Act* to review the discrimination issue separately from the self-government; AFN, NWAC, NCC, and NIB all appointed as ex officio members

1982 – NWAC president Jane Gottsriedson argued that Aboriginal women’s rights must not be kept in abeyance while Indian leader and federal provincial governments sort out the meaning of Aboriginal constitutional rights

1982 – (September 22) Subcommittee on Indian Women and the *Indian Act* tabled its report with recommended repeal of s. 12(1)(b), reinstatement of women who lost status and their children’s right to status and membership, and allowing bands to decide on the residency and political rights of non-Indian spouses; NWAC and AFN both publicly supported the Subcommittee report

1982 (December) – Special Committee on Indian Self-Government began its hearings on December 1982

1983 – (November 3) Special Committee’s final report was tabled, also known as the Penner Report

1984 – (March) federal officials unveiled plans to bring forward two legislative packages – one to deal with ending discrimination against Indian women, the other with Indian band government

1984 – (March 5) Munro tabled the government’s first official response to the Penner Report in the House of Commons; Cabinet rejected enshrining the notion of self-government into the Constitution

1984 – (March 8) Trudeau announced that the *Indian Act* amendments to end discrimination against Indian women would, in the near future, be brought forward because the current membership provisions conflicted with the Charter and UN covenants; many Indian leaders were greatly alarmed by reinstatement proposal while NWAC asserted that DIAND’s reinstatement proposal didn’t go far enough to include all the victims of past *Indian Act* discrimination

1984 – (May) Trudeau withdrew the government’s proposed amendments indefinitely in May, saying that he wanted to avoid any suspicion of paternalism

1984 (May 16-18) – AFN and NWAC met in Edmonton to attempt to formulate a common position; NWAC and AFN succeeded in establishing a consensus, but it was one that cost the AFN much of its support from western Indian leaders; agreement became known as Edmonton Consensus

1984 – (June 18) Liberals introduced Bill C-47, *An Act to Amend the Indian Act*

1984 – (June 26) SCIAND began its review of Bill C-47

1984 – AFN and NWAC made a joint presentation that demanded reinstatement of “all generations who lost status as a result of discrimination” and denounced the bill’s encroachment “on the fundamental Aboriginal right of each First Nation to define its own citizenship.”

1984 – (June 27) Munro tabled Bill C-52, the government’s Indian self-government legislation; Bill never made it past the first reading in the House of Commons

1984 – (June 29) Bill C-47 received third reading in the House of Commons, last sitting of the 32nd Parliament; MPs expressed concerns due in part to the short three-day period allocated to SCIAND to review the bill

*After third reading, bill required unanimous consent for it to be passed in the Senate. Two senators denied unanimous consent and the Parliament adjourned for the summer, and Bill C-47 died on the Senate Order Paper when an election was held that September.

1984 – (September) Conservatives take office with only six months to deal with discriminatory provisions of the *Indian Act* before Charter equality provisions come into effect

1985 – (February 28) – Crombie tabled Bill C-31, DIAND’s new legislation to amend the Indian Act; separating legal status and band membership for the first time

*After Bill C-31 was read for a second time in the House of Commons, it was referred to SCIAND for detailed review. They were given more time than with Bill C-47. In the next few months, Bill C-31 was subject to scrutiny from both SCIAND and the Standing Senate Committee on Legal and Constitutional Affairs (SSLCA). Very few groups supported the amendments.

*Notably, Marilyn Kane of NWAC rejected Bill C-31's legal distinction between status and non-membership arguing that it created more divisions within the Indian community.

1985 – (April 17) section 15 of the Charter comes into effect

1985 – (June 12) Bill C-31 read for the third time in the House of Commons

1985 – (June 28) Bill C-31 enacted into law