

June 13, 2022

File No.: 551860-1

DELIVERED VIA EMAIL

Court of Appeal of Alberta
1A Sir Winston Churchill Square
Edmonton, AB T5J

Sir/Madam:

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

Catherine Twinn v. Roland Twinn et al
Appeal No. 2203-0045AC

We represent the respondents the Sawridge Band Inter vivos Settlement (the "1985 Sawridge Trust") by its trustees Roland Twinn, David Majeski, Margaret Ward, Tracey Scarlett and Everett Justin Twin (the "**Sawridge Trustees**"), in the above captioned appeals. We write to provide brief limited submissions in respect of the Application filed by Shelby Twinn ("Shelby") on June 9, 2022 for Intervenor Status.

The Sawridge Trustees consent to Shelby being granted status as an Intervenor in these Appeals with some direction as set out below. While the Sawridge Trustees acknowledge they are in a difficult position as trustees of a trust in which Shelby is a beneficiary, as officers of the courts we are obliged to make the following submissions.

The arguments and affidavit provided in support of Shelby's application are concerning to the Sawridge Trustees. As Shelby points out, an Intervenor ought not to expand the scope of an appeal or turn the Court into a political arena. However, much of her affidavit and brief focus on issues surrounding membership in the Sawridge First Nation. She introduces new evidence related to membership. Membership in the Sawridge First Nation is not relevant to the appeal. Justice Thomas, the previous case management judge, ruled in Sawridge #3 that collateral attacks on the Sawridge membership process were not appropriate as (1) the Court of Queen's bench lacks the jurisdiction to address the Sawridge membership process (the Federal Court being the appropriate venue) and (2) the membership

process is not relevant to these proceedings.¹ In Sawridge #12, Justice Henderson also addresses this in paragraphs 46 and 47 and we do not believe this portion of his judgement is being appealed.²

Shelby also raises the issue of conflict discussed in Sawridge #1. Again Justice Thomas in Sawridge #3, in refocusing the role of the OPGT, ruled the OPGT is not to conduct a general inquiry into potential conflicts of interest between SFN, its administration and the 1985 Sawridge Trustees. Justice Thomas said the overlap of some of these parties is established and obvious. While the decision was directed to the OPGT not raising these issues, clearly the implication was that this direction applied to everyone and certainly would apply to an intervenor.³

We ask the Court of Appeal to review the arguments in her brief and in her affidavit in respect of enfranchisement, membership, conflict, land claims and cows and ploughs entitlements of members of the First Nation. These are all political issues which Sawridge First Nation has in its control and respectfully are not relevant to this appeal. The Sawridge Trustees have no control over these matters. The Trust operates separately from the First Nation.

We ask the Court to give direction to this Intervenor to focus her arguments on the issues before the Court and not to issues related to membership, conflict or other issues which can only be addressed in another forum by Sawridge First Nation.

We also ask the Court to consider directing that portions of Shelby's affidavit need not be addressed by the parties in the arguments on the appeal. We ask the Court to consider providing direction on paragraphs 8,10,11,12,13, 14,15, 16,19,21, 23, 24, 25, and Exhibits 3, 8, 9 of Shelby's affidavit.

With respect to the scope of Shelby's participation in the Appeal, it would appear reasonable and just that the Shelby be afforded the same rights as the other intervenor in this Appeal but as her arguments accord with the Appellants we suggest she file her factum 2 weeks after the Appellants. This allows the Sawridge Trustees to respond to her arguments in writing. Similar to the direction made about the Sawridge First Nation as it concerns the Sawridge Trustees, the Sawridge Trustees respectfully submit that Shelby ought to be directed not be repetitive of the arguments made by Catherine Twinn and the Office of the Public Guardian and Trustee.

All of which is respectfully submitted.

Dentons Canada LLP

Doris Bonora, Q.C. and Michael Sestito
Partners

¹ Sawridge #3 – attached-paragraphs 32-35, 49, 50-52, 54, 55, 69, 70-Tab 1

² Sawridge #12 –attached- paragraph 46, 47-Tab 2

³ Sawridge #3 – paragraph 36-Tab 1

DCB/mk

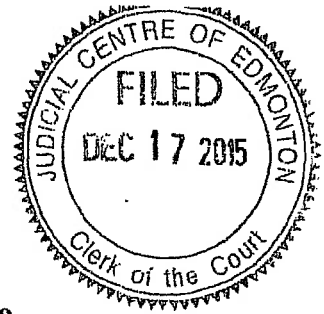
cc: Dentons Canada LLP
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Court of Queen's Bench of Alberta

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

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

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

Respondents

- and -

Public Trustee of Alberta

Applicant

**Reasons for Judgment (SAWRIDGE #3)
of the
Honourable Mr. Justice D.R.G. Thomas**

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I Introduction

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

II. Background

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

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

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

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

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

February 14, 2012 - The Public Trustee applied:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The 1985 Sawridge Trust

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

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately \$70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: *Sawridge Band v. Canada*, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: *Sawridge Band v. Canada*, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: *Poitras v. Sawridge Band*, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

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

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

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

IV. The Current Situation

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

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

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

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

V. Submissions and Argument

A. The Public Trustee

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

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

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

B. The SFN

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

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

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

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

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

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

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

C. The Sawridge Trustees

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

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

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

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

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

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

VI. Analysis

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

A. Rule 5.13

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

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

5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if

- (a) the record is under the control of that person,
- (b) there is reason to believe that the record is relevant and material, and
- (c) the person who has control of the record might be required to produce it at trial.

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

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

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

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

4. Supervising the distribution process itself.

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

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

Task 1 - Arriving at a fair distribution scheme

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

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

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

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

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

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

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

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

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

Task 3 - Identification of the pool of potential beneficiaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and
2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;
2. allow timely identification of:
 - a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);
 - b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and
 - c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

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

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

Task 4 - General and residual distributions

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

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

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

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

- a) a potential future successful SFN membership applicant and/or child of a successful applicant, or
- b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

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

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
2. on a pro rata basis:
 - a) be distributed to the members of Pool 1, and
 - b) be reserved in Pool 2 for future potential Pool 2 recipients.

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

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

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

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

Heard on the 2nd and 3rd days of September, 2015.

Dated at the City of Edmonton, Alberta this 17th day of December, 2015.


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

Appearances:

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J.J. Kueber, Q.C.
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Bertha L'Hoirondelle and Clara Midbo

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For Catherine Twinn

Court of Queen's Bench of Alberta

Citation: Twinn v Trustee Act, 2022 ABQB 107



Date:
Docket: 1103 14112
Registry: 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")

**Roland Twinn, Margaret Ward, Tracey Scarlett, Everett Justin Twinn
and David Majeski, as Trustees for the 1985 Sawridge Trust ("1985 Sawridge Trustees")**

Applicants

-and-

**The Office of the Public Trustee and Guardian
and Catherine Twinn**

Respondents

-and-

Sawridge First Nation and Shelby Twinn

Intervenors

[44] Shelby Twinn has applied for membership in SFN; however, after three years, she has not received a response to her application.

[45] If Shelby Twinn and other 1985 Beneficiaries are able to gain status as SFN members then they would also become 1982 Beneficiaries and the controversy regarding the meaning of the 2016 Consent Order would be of much less practical significance.

[46] I make no comment on the legitimacy of the claims of any person to SFN membership. That is not an issue that is before me on this application and indeed, this Court does not have jurisdiction to rule upon the validity of the SFN membership rules or how those rules are applied.

[47] Membership issues are therefore simply not relevant to the issues I must decide and any perceived unfairness in the membership process is not relevant to the issues on the present Application. If there is an avenue for relief in relation to membership status in SFN then that remedy is available only in the Federal Court of Canada.

d) Procedural Order – Notice to Potential Beneficiaries

[48] On August 31, 2011, the Court granted a Procedural Order that required the 1985 Trustees to provide notice of the application for advice and directions to all potentially interested parties including all members of the SFN, all beneficiaries of the 1982 Trust, and all beneficiaries or potential beneficiaries of the 1985 Trust. The notice made it clear that the 1985 Trustees intended to seek advice and direction in relation to “the transfer of assets to the 1985 Trust”.

[49] Apart from Catherine Twinn, no beneficiaries of the 1982 Trust have come forward seeking to participate in this litigation. Many of the 1985 Beneficiaries are represented by the OPTG and others have also come forward, including Shelby Twinn. Some other 1985 Beneficiaries or potential 1985 Beneficiaries have not sought to participate in the litigation.

[50] The Procedural Order was only intended to give interested parties notice of the litigation and to give them the opportunity seek to participate if they wished. However, the Procedural Order did not affect the rights of any persons. It did not require that any beneficiary or potential beneficiary of either the 1982 Trust or the 1985 Trust participate. Nor did the Procedural Order suggest that the rights of any potential beneficiaries would be adversely affected by any failure to come forward.

[51] The rights of the beneficiaries of the 1982 Trust and the 1985 Trust are not dependent upon them coming forward to participate in the litigation. Instead, the rights of all beneficiaries and potential beneficiaries must be considered by the Court when making any decisions in the litigation. That was true in relation to the 2016 Consent Order and it is true in relation to the present application.

e) Trusts are Discriminatory – “Grandfathering” Possible Remedy

[52] All of the parties acknowledge that the terms of the 1985 Trust are discriminatory. The 1982 Trust Deed also contains discriminatory provisions although the extent of the discrimination is somewhat less extensive than in relation to the 1985 Trust Deed. The 1985 Trustees take the position that they are not able to distribute any of the trust assets while the discrimination remains.

[53] From the outset the 1985 Trustees have sought to amend the definition of “Beneficiaries” so as to eliminate discrimination. Some of the potential amendments that have been