

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 2203-0043AC

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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: PUBLIC TRUSTEE OF ALBERTA

STATUS ON APPEAL: Appellant

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

STATUS ON APPEAL: Respondents

RESPONDENT: SAWRIDGE FIRST NATION and SHELBY TWINN

STATUS ON APPEAL: Respondent

RESPONDENT: CATHERINE TWINN

STATUS ON APPEAL: Respondent

DOCUMENT: EXTRACTS OF KEY EVIDENCE OF THE APPLICANT, THE PUBLIC TRUSTEE OF ALBERTA

Appeal from the Decision of
The Honourable Mr. Justice J.T. Henderson
Dated the 4th day of February, 2022
Filed the 4th day of February, 2022

EXTRACTS OF KEY EVIDENCE OF THE APPELLANT

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Action No.: 1103 14112
E-File No.: EVQ15SAWRIDGEBAND
Appeal No.: _____

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

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

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

Applicants

P R O C E E D I N G S

Edmonton, Alberta
June 24, 2015

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

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

2

3 June 24, 2015

Morning Session

4

5 The Honourable

Court of Queen's Bench

6 Justice Thomas

of Alberta

7

8 M.S. Poretti/ D.C.E Bonora

For the Trustees of the 1985 Sawridge Trust

9 K.A. Platten, Q.C.

For the Applicant Catherine Twinn

10 E.H. Molstad, Q.C.

For the Sawridge First Nation

11 J.L. Hutchison

For the Office of the Public Trustee

12 J.J. Kueber, Q.C.

For all Trustees (Except Catherine Twinn)

13 M. O'Sullivan

Court Clerk

14

15

16 **Discussion**

17

18 THE COURT:

What is the next number matter you have got

19 on, Madam Clerk?

20

21 Ma'am, what are you on?

22

23 MS. PLATTEN:

I'm -- My Lord, I'm here on the Sawridge

24 matter.

25

26 THE COURT:

Sawridge. Okay.

27

28 So is everybody here on Sawridge? Okay. We will wait for Mr. Molstad to come back.

29

30 MR. PORETTI:

I think we're all here on Sawridge --

31

32 THE COURT:

So come on forward, yes.

33

34 MR. PORETTI:

-- My Lord.

35

36 THE COURT:

Sorry. I did not recognize some of you.

37

38 Okay. Yes, you are excused, thanks, and you are excused too.

39

40 THE SHERIFF'S OFFICER:

Oh.

41

1 THE COURT: I do not --
2

3 THE SHERIFF'S OFFICER: Thank you, My Lord.
4

5 THE COURT: -- think we will need security for this.
6

7 MS. BONORA: My Lord, while we are waiting for
8 Mr. Molstad, do you know everyone?
9

10 THE COURT: Well, actually --
11

12 MS. BONORA: Do you know --
13

14 THE COURT: -- thanks, Ms. Bonora. I was just going to ask
15 you if somebody would not mind doing that.
16

17 MS. BONORA: Not at all, so Doris Bonora from Dentons
18 Canada, Marco Poretti from --
19

20 THE COURT: Mm-hm.
21

22 MS. BONORA: -- Reynolds Mirth --
23

24 THE COURT: Right.
25

26 MS. BONORA: -- Joe Kueber from Bryan & Company --
27

28 THE COURT: Yes.
29

30 MS. BONORA: -- Karen Platten from McLennan Ross, and
31 Janet Hutchison from Hutchison Law --
32

33 THE COURT: Mm-hm.
34

35 MS. HUTCHISON: Good morning, My Lord.
36

37 MS. BONORA: -- and Ed Molstad I think you know.
38

39 THE COURT: Who needs no introduction.
40

41 MS. BONORA: And in the courtroom is also Catherine Twinn.

1
2 THE COURT: Mm-hm. And the other gentleman at the back?
3
4 MS. BONORA: And Glenn Godfrey --
5
6 MS. HUTCHISON: Oh --
7
8 MS. BONORA: -- from the Public Trustee's --
9
10 MS. HUTCHISON: -- of the --
11
12 MS. BONORA: -- office.
13
14 MS. HUTCHISON: -- Public Trustee's office.
15
16 THE COURT: Oh, Public Trustee, okay. All right.
17
18 MR. MOLSTAD: This is my application, My Lord.
19
20 THE COURT: All right. Now, I know there was a flurry of
21 material that --
22
23 MR. MOLSTAD: Do you have that, My Lord?
24
25 THE COURT: I saw it --
26
27 MR. MOLSTAD: I --
28
29 THE COURT: -- land on my desk, but --
30
31 MR. MOLSTAD: -- I've got extra --
32
33 THE COURT: -- I do not have --
34
35 MR. MOLSTAD: -- copies if you'd --
36
37 THE COURT: -- of it.
38
39 MR. MOLSTAD: -- like it? I'm not sure that -- I don't even
40 refer to, but others may. This is the package there. This is just the correspondence that
41 has --

1
2
3
4
5
6
7

THE COURT:

Okay.

MR. MOLSTAD:

-- been exchanged.

THE COURT:

All right. Thanks, Mr. Molstad.

**8 Submissions by Mr. Molstad (Adjournment of Matters Directed at the Sawridge First
9 Nation Only)**

10

MR. MOLSTAD:

And briefly, My Lord, I represent Sawridge

12 First Nation who are not a party to these proceedings. If you recall a few years back, we
13 did appear. They were served with notice in relation to the Public Trustee's application,
14 and following that, enquiries were made as to whether we wished to become a party; and
15 we indicated that we did not feel that was necessary and declined.

16

17 But notwithstanding that, on May 15th, 2015, we received a letter from Ms. Hutchinson
18 on behalf of the Public Trustee, and you have a copy of that in material I have provided
19 to you, advising you that I was included in this communication to deal with the
20 possibility, and I emphasize that word, that Sawridge First Nation may wish to participate
21 or take a position in the pending application. There was nothing in this letter indicating
22 that an application would be made with Sawridge First Nation as a respondent and that
23 this application would substantially affect the rights of Sawridge First Nation.

24

25 On June 15th, 2015 -- and I think the correspondence indicates that my friend had it
26 delivered Friday at 4:51, but on June 15th, the following Monday, the box arrived on my
27 desk; and it was a box that was close to being full of material. It included the Public
28 Trustee's application. Sawridge First Nation was not named as a respondent; however, no
29 one was named as a respondent in that application. It did appear obvious that the
30 application intended to request relief directly affecting Sawridge First Nation. It also
31 included a lengthy affidavit of a deponent for the Public Trustee. Mr. Roman Bombak,
32 and excerpts from pleadings, transcripts, exhibits, and answers to undertakings, and the
33 written brief of the Public Trustee.

34

35 The application, in reviewing it, purports to require production from Sawridge First
36 Nation, a non-party, pursuant to Rule 5.13; and included is a request for documents
37 described as, quote:

38

39

Documents produced in Federal Court Action T-66-86.

40

41 In fact, those were two actions in the Federal Court, T-66-86A and 86B, which were

1 commenced in 1986 and over a period of more than 20 years involved two trials in the
2 Federal Court; one of which, the second, I was counsel for part of the proceedings for the
3 Sawridge First Nation and Ms. Hutchison acted for one of the interveners.

4
5 The actions involved a number of parties. It involved Sawridge First Nation, Tsuu T-ina
6 First Nation, the Crown. It involved interveners including the Congress of Aboriginal
7 Peoples, Native Counsel of Canada Alberta, Non-Status Indian Association of Alberta, and
8 the Native Women's Association of Canada. The issue in that action was the
9 constitutionality of certain 1985 amendments to the *Indian Act*, which are referred to as
10 Bill C-31, and the plaintiffs argued that that statutory provision infringed their
11 constitutionally protected right to determine their own citizenship.

12
13 There was no determination on the issue on the merits, in our submission, as the case was
14 dismissed on the basis that no evidence was before the Court. A great deal of evidence
15 was stuck by the trial judge. The plaintiffs closed their case, and there was no evidence
16 upon which he could make a decision; and as a result, it was dismissed.

17
18 We spoke to all counsel on June 16th of 2015, and all counsel, with the exception of
19 Ms. Hutchison on behalf of the Public Trustee, agreed to consent to the adjournment of
20 matters that were directed at the Sawridge First Nation.

21
22 Our submission is trial by ambush is not part of our rules or our procedure, and we do
23 point out that Ms. Hutchison does state that the Public Trustee takes no issue with our
24 request for additional time to prepare a response; however, in the correspondence, you'll
25 see that she proposes conditions or compromise on matters that Sawridge First Nation
26 have no control over or any say in respect to.

27
28 So our request, My Lord, is that this Court order that the application directed at the
29 Sawridge First Nation be adjourned in order to allow a reasonable period of time to
30 respond, and that likely will include questioning on the deponent for the Public Trustee's
31 affidavit. It will include filing of evidence on behalf of the Sawridge First Nation and
32 obviously preparing a written brief on behalf of the First Nation.

33
34 We would also request that, if my friend intends to proceed with this application, that she
35 be directed to file a proper notice setting out precisely the relief requested as against the
36 Sawridge First Nation and the evidence that she relies in support of it in order to allow us
37 the opportunity to respond to it.

38
39 Should you grant the adjournment we request, Sawridge First Nation -- and I understand
40 it's a half day that's scheduled for June 30th, the Sawridge First Nation will not be
41 attending on June 30th as the other matters that our friends intend to deal with have

1 nothing to do with the Sawridge First Nation.

2

3 So essentially, Sir, we're asking of an adjournment. My friend has not yet consented to
4 that. She has put conditions that we don't control; and subject to an opportunity to speak
5 to costs, those are our submissions.

6

7 THE COURT: It sounded to me as if there were some
8 conditions of an adjournment that you were seeking having to do with a more fulsome
9 notice, that sort of thing. Do you want to run those by me again?

10

11 MR. MOLSTAD: From our perspective?

12

13 THE COURT: Yes.

14

15 MR. MOLSTAD: Yeah. Yeah. We had no notice whatsoever
16 that any application involving Sawridge First Nation and the rights of Sawridge First
17 Nation was going to be addressed on June 30th. We had a letter on the 15th of May that,
18 in fact, suggested issues that would be dealt with that had nothing to do, frankly, with the
19 Sawridge First Nation; so we were led to believe that we would be getting a motion
20 involving all of these other parties. We would look at that. We would see, well, you
21 know, same old story. We're not going to show up and be in a position where we're not
22 going to attend; and on the 15th of June, we get served with this box of motion
23 material --

24

25 THE COURT: Mm-hm.

26

27 MR. MOLSTAD: -- where it's clear that my friend is seeking
28 relief as against Sawridge First Nation.

29

30 THE COURT: Yes. But later on in your submission, you
31 referred to if there is an adjournment, you would like the Court to impose some
32 requirements on the Public Trustee at least in respect to their motion for production, right?
33 That is what I am -- I am just trying --

34

35 MR. MOLSTAD: Yeah. No --

36

37 THE COURT: -- to get you to --

38

39 MR. MOLSTAD: -- their motion for production as it relates to
40 Sawridge First Nation, we're asking that anything that they directed at us be adjourned to
41 allow us --

1
2 THE COURT: Mm-hm.
3
4 MR. MOLSTAD: -- to respond to. Now, there are other parties
5 involved in this motion and other relief being sought, and my friend Ms. Bonora probably
6 is better able to respond to their position in relation to that --
7
8 THE COURT: Okay.
9
10 MR. MOLSTAD: -- than I am.
11
12 THE COURT: Okay. But I just want to get clear what you
13 want. If the Public Trustee is going to proceed with his production application, you
14 wanted some more detail with respect to relief --
15
16 MR. MOLSTAD: Well, I --
17
18 THE COURT: -- that --
19
20 MR. MOLSTAD: -- well, yes. In other words, the motion -- if
21 you read the motion, it's a motion that involves a number of issues. She purports to
22 include in that what we interpret to be an application as against the Sawridge First Nation
23 for production of documents and for production of documents that include production in
24 an action that went on for over 20 years that are in the thousands of documents. We want
25 to know precisely what it is she's seeking as against the Sawridge First Nation so that we
26 can respond to it. I mean, if we're left with the motion as it is, we're still in a position
27 that we can prepare a response; however, it would be more efficient to know exactly what
28 she is claiming as against Sawridge First Nation.
29
30 THE COURT: Okay. I get it.
31
32 MR. MOLSTAD: Yeah.
33
34 THE COURT: Thank you.
35
36 MR. MOLSTAD: Okay. Thank you, Sir.
37
38 THE COURT: Ms. Hutchison, or --
39
40 **Submissions by Ms. Hutchison (Adjournment of Matters Directed at the Sawridge First**
41 **Nation Only)**

1
 2 MS. HUTCHISON: My Lord, good morning. My Lord, as my
 3 friend, Mr. Molstad, has indicated, the Public Trustee has no objection in principle to an
 4 adjournment of the production application. Where counsel were unfortunately not able to
 5 reach agreement or a consensus was on the question of whether or not the -- or on the
 6 question of prematurity of the Sawridge Trustee's settlement application. It's the position
 7 of the Public Trustee that neither the Public Trustee nor the Court currently has adequate
 8 information or evidence before it to deal with that settlement application. That's a matter,
 9 we're suggesting to the Court, that we argue on June 30th when we have adequate time to
 10 do so. Our proposal to our friends was, given that there's a disagreement, frankly,
 11 about whether or not we can properly deal with the settlement application before we deal
 12 with some of the production issues, that all matters should be adjourned -- sorry, I
 13 shouldn't say all matters, My Lord, that the production application and the settlement
 14 application should both be adjourned to a later date.

15
 16 As I understand the position of the Sawridge Trustees, they take the view that the
 17 settlement application can and should proceed in substance on the 30th regardless of
 18 whether the production application is dealt with prior to or concurrently with the
 19 settlement application.

20
 21 So as far as I know, My Lord, the only issues that are before the Court today, the parties
 22 need some assistance on staging and scheduling essentially. Can we deal with the
 23 settlement application in substance before we deal with, at least, part of the production
 24 application in substance; and then secondly, given the number of issues that have now
 25 come up in the applications, what is our agenda for June 30th?

26
 27 And, My Lord, I'd just refer the Court to our letter of June 17th. What we were proposing
 28 to the Court in terms of what could usefully be done on June 30th would be certainly
 29 adjournment of Part 1 and 2 of the Public Trustee's application, so that's the production
 30 application --

31
 32 THE COURT: Okay. And let me just find that in your letter.

33
 34 MS. HUTCHISON: I am looking right on page 2 of my June 17th
 35 letter, My Lord --

36
 37 THE COURT: Right.

38
 39 MS. HUTCHISON: -- under:

40
 41 Compromise Solution and Adjournments.

1

2 THE COURT: Mm-hm.

3

4 MS. HUTCHISON: So Point 1, that the production application and
5 the application regarding Ms. Platten and Ms. Cumming's action, 140304885, would be
6 adjourned to a later date acceptable to all counsel, that the Sawridge Trustee's settlement
7 application proceed on June 30th but on a limited basis, My Lord, for the Court to
8 provide advice and direction to the parties on prematurity of that application and staging
9 of that application in relation to the production application.

10

11 If the Court determined that that application is not premature, the substance of that
12 settlement application would then be scheduled for, what I would suggest, My Lord,
13 might need to be a half day Special Chambers simply on that issue. The substance of
14 the -- I apologize, I also sought the direction of the Court, My Lord, that in that
15 discussion on prematurity, the parties be able to refer to all filed materials. I think that
16 that will be necessary for the Court to understand the Public Trustee's position on
17 prematurity.

18

19 In terms of setting the agenda for June 30th, My Lord, that would then -- the Public
20 Trustee is suggesting we deal with the prematurity issue. If we can't resolve that in
21 another way today, we deal with the issue around advice and direction about
22 communication between counsel, we deal with the Public Trustee's request for advice and
23 direction on the scope of the indemnity, cost indemnification order which, of course, ties
24 in to the Sawridge Trustee's application on costs, and we deal with the Sawridge
25 Trustee's application for advice and direction on its litigation plan.

26

27 It strikes the Public Trustee, My Lord, that those issues could be usefully dealt with on
28 the 30th and likely within the time allotted. The remaining issues which would be the
29 production application, the application regarding Court of Queen's Bench Action
30 140304885, and the substance of the settlement application would then be adjourned to
31 appropriate dates with adequate time to argue those issues before the Court, My Lord.

32

33 THE COURT: But the production application would be part of
34 that next phase?

35

36 MS. HUTCHISON: Correct, My Lord --

37

38 THE COURT: Yes.

39

40 MS. HUTCHISON: -- and to be clear, the Public Trustee is
41 suggesting to the Court that the Court will need to hear the issues on the production

1 application, decide those issues, and frankly see the result of at least part of that
 2 production before it can properly deal with the settlement application. If the Court is not
 3 amenable to that approach, the Public Trustee would agree to concurrent hearings of the
 4 production application and the substance of the settlement application, although frankly,
 5 My Lord, we suspect that that will not be a productive use of time; so the proposal is to
 6 look at the prematurity issue on the settlement application first, determine that, and then
 7 decide appropriate staging of the production and settlement applications.

8

9 THE COURT: All right.

10

11 MS. HUTCHISON: Thank you, My Lord.

12

13 THE COURT: Ms. Bonora?

14

15 **Submissions by Ms. Bonora (Adjournment of Matters Directed at the Sawridge First**
 16 **Nation Only)**

17

18 MS. BONORA: My Lord, with respect to the settlement -- our
 19 settlement application, we don't really understand the two-part process that is proposed by
 20 Ms. Hutchison. We have a settlement offer. We believe it is a complete settlement.
 21 Even if it's seen as a partial settlement, it would narrow the issues. I don't know how we
 22 could partially provide it to you or partially argue it. I think that the defence that
 23 Ms. Hutchison wants to put forward to the settlement is that it's premature because the
 24 Court doesn't have enough information. That may be a complete defence to adjourning
 25 the settlement offer because it may have to come before you on another day, but I believe
 26 that we should argue the full substance of the settlement. It's not that difficult.

27

28 You appointed an independent party under your previous order because you believed there
 29 were 23 minors who may lose their benefits. That was a big part of the reason you
 30 appointed an independent party. Over and over in your decision, you said, We're worried
 31 that there might be a capital payment and these 23 people would lose their benefits. These
 32 23 people may be left out, and they need representation. Well, what we've said in our
 33 settlement is that we'll grandfather them. We will give them everything. So all of those
 34 concerns that have been raised in terms of appointing the Public Trustee have now, I
 35 think, been completely satisfied in the settlement.

36

37 With resp -- and I'm not going to try and argue my complete argument here, but I want
 38 you to understand that we believe we've provided a complete settlement. If you agree
 39 with us so that we can argue that in front of you, then Mr. Molstad never has to come
 40 back. We don't have to do any document production. We will never argue any of the
 41 rest of the application. The *Foundational Rules*, I think, require us to try and find

1 shortcuts to litigation, and we believe that our settlement is complete; but at a minimum,
2 it's a partial settlement and perhaps narrows the focus of the people we need to concern
3 ourselves with which may be another group of children which you identified as the
4 candidate children, so children of candidates for membership. And it may be that those
5 are the only people we need to deal with; and if those are the only people we need to deal
6 with, then the document production again is completely narrowed.
7

8 And so my submission to you is we need to focus again on why are we here. We're
9 here -- you recognize in your decision that the assets in this trust were set aside by the
10 Sawridge First Nation for the members of the Sawridge First Nation. You were very bold
11 in that finding. Well, that's all we're here for. We're trying to find a definition for where
12 these assets should -- who these assets should be paid to. It's not going to get different.
13 It's not going to be very complex. Ultimately, these assets belong to a group of members
14 of the Sawridge First Nation.
15

16 Remember that our application is we believe that our definition right now is
17 discriminatory. We're coming to the Court to fix that, to include those people who were
18 discriminated against. We provided lots of information already on process, and that was
19 one of things you said in your decision is that we do need to investigate the membership
20 process and criteria. Those were the words you used over and over again in several
21 paragraphs.
22

23 There's been lots of information provided on process and criteria to date, and so we're
24 saying to you please hear our settlement offer. The briefs have already been written. The
25 settlement offer is put forward. If we can convince you that it's either a full or partial
26 settlement using your *parens patriae* jurisdiction, then we perhaps eliminate a number of
27 issues or at least we can focus them. If Ms. Hutchison convinces you that we need to
28 deal with document production, well now we have our schedule. The settlement offer is
29 put on hold. We'll deal with document production at another application. We'd never be
30 able to deal with it in an afternoon in any event, and then you can make a decision on
31 that; and Ms. Hutchison is right, then documents would need to be produced. We'd come
32 back to you once that enquiry had concluded. So I would say that if you just agree to
33 hear the fulsome settlement offer and the arguments on the settlement, it could narrow the
34 issues. It could decide our plan in terms of what goes next.
35

36 I don't agree with Ms. Hutchison that the issue of communication between counsel should
37 be dealt with before the settlement offer because, again, that issue may come off the table
38 if the settlement is either full or partial. So I would suggest that we hear the settlement
39 discussion on June 30th as planned, and if -- as -- once we have a decision from you on
40 that, we can then go ahead with the litigation plan, the issue of the production of
41 documents, the issue of communication of counsel, all which may be narrowed or dealt

1 with differently --

2

3 THE COURT: Mm-hm.

4

5 MS. BONORA: -- because of the decision you may make on the
6 settlement offer.

7

8 The issue of costs is a very narrow one, and perhaps we can deal with that on June 30th
9 as well; but I guess to sum up, my submission is there is no harm in trying to find
10 whether there's a narrowing -- at least a narrowing of the issues in terms of looking at our
11 settlement offer, and we would ask that you would hear that application on June 30th in
12 full, fully understanding Ms. Hutchison can make arguments about the fact that it's
13 premature.

14

15 THE COURT: I have not have a chance to look at the briefs.

16 I mean, they have --

17

18 MS. BONORA: Yes, Sir.

19

20 THE COURT: -- they arrived on my desk this morning as I
21 was about to come down to deal with Family Law Chambers. Is the costs issue dealt
22 with in those briefs?

23

24 MS. BONORA: Yes.

25

26 THE COURT: Okay.

27

28 MS. BONORA: The issue is quite narrow, Sir. I think that we
29 just want some direction that at the end of the day, there would be a fulsome review
30 allowed to Sawridge First Nation. We don't have issues with Ms. Hutchison saying that
31 she needs to hire third-party agents to help her. That is not something we're arguing
32 against. We just want some direction based on what the Court of Appeal said that it's not
33 a blank cheque, that there needs to be some direction before we start hiring lots of agents
34 at expensive rates which, you know, of course, the Trust is paying for. So it's a -- that's
35 why we believe it's a narrow issue because we believe that we're just following up with
36 some specificity on what the Court of Appeal said.

37

38 THE COURT: Okay. Right. Now, I see there are three law
39 firms involved for the trustees. Can somebody explain to my why that has happened?

40

41 MS. BONORA: Sir, when I left Reynolds Mirth --

1
2 THE COURT: Mm-hm.
3
4 MS. BONORA: -- we agreed that Reynolds Mirth and Dentons
5 would continue on, so Mr. Poretti and I --
6
7 THE COURT: Okay.
8
9 MS. BONORA: -- added value in terms of having continuing on
10 with the representation of the trustees. Mr. Kueber is on for the trustees in an entirely
11 separate action brought by Catherine Twinn --
12
13 THE COURT: Okay.
14
15 MS. BONORA: -- so -- and Ms. Platten represents Catherine
16 Twinn, so there's a separate action; and that is, in fact, the action where there's a question
17 about the communication between counsel.
18
19 THE COURT: And is there anything -- I mean, those counsel
20 can speak to it, but is that -- are there any issues proposed to be dealt with in that action
21 on June 30th?
22
23 MS. BONORA: Yes. The -- so the issue of communication
24 between counsel is the issue of --
25
26 THE COURT: Okay.
27
28 MS. BONORA: -- can we participate in communications that
29 Ms. Hutchison has had with Karen Platten, so there's those two actions; so the action that
30 involves Catherine Twinn and the other four trustees, that's one action.
31
32 THE COURT: Okay.
33
34 MS. BONORA: Our concern is our ability to attend if there's
35 meetings between counsel in this action and counsel in that action, so that issue is before
36 you and briefs have been filed on that by our office, by --
37
38 THE COURT: Mm-hm.
39
40 MS. BONORA: -- Ms. Hutchison's office, and by Mr. Kueber's
41 office.

1
2 THE COURT: Okay.
3
4 MS. BONORA: Karen, have you filed a brief?
5
6 MS. PLATTEN: We will.
7
8 MS. BONORA: You'll be filing a brief? Okay.
9
10 THE COURT: All right. Thank you. I take it you speak for
11 Mr. Poretti or --
12
13 MS. BONORA: Today, I speak for Mr. Poretti.
14
15 MR. PORETTI: That's correct, Sir.
16
17 THE COURT: All right. Mr. Kueber, do you want to say
18 anything about that -- I call it the 2014 action?
19
20 **Submissions by Mr. Kueber (Adjournment of Matters Directed at the Sawridge First**
21 **Nation Only)**
22
23 MR. KUEBER: Well, I think, Sir, being early -- or just recently
24 involved in this as I read through all the material, I read your decision, I looked at the
25 mandate given the Public Trustee's office, and I questioned if -- why it was not only more
26 appropriate as my friend has pointed out under the *Foundational Rules* but also because
27 we're dealing with trustees and we're dealing with -- you saw a potential conflict, and
28 you said, These minors should have their own independent protection because of the
29 application to define and bring the beneficiaries definition together, whatever my friends
30 are doing.
31
32 I get that, and I get the mandate the Public Trustee has is to look into the situation and to
33 try to assess the proposal that is now available to this Court; so why would we be trying
34 to deal with issues involving the other action that Ms. Platten and our has going that has
35 nothing to do with this with respect to my friend? Why would we spend the
36 beneficiaries' money dealing with all of that? Instead, why would we not on the 30th
37 deal with the proposal the trustees have, and if the Court -- if you feel that that's an
38 appropriate resolution, everything is done. Mr. Molstad's concerns, subject to costs, are
39 done. Our concerns are done. We don't have to deal with this issue of my friend
40 speaking with Ms. Platten and who should be in attendance. All of that gets resolved
41 when you address the proposal that my friends' have put forth. That's what I think

1 should happen on the 30th, and that's all that should happen.

2

3 THE COURT: Ms. Platten?

4

5 **Submissions by Ms. Platten (Adjournment of Matters Directed at the Sawridge First**
6 **Nation Only)**

7

8 MS. PLATTEN: Sir, we have understandably a different point of
9 view with respect to that. We believe that the facts in both actions are very, very similar,
10 that the -- and there needs to be information brought before the Court from the one
11 application, and it has to do with the other application.

12

13 Ms. Twinn, as one of the trustees, is of the view that the application for the settlement
14 proposal needs the Court to have all of the information before it; and if Ms. Hutchison's
15 application is not granted today, then the Court will not have all of the information before
16 it in order to properly hear that application.

17

18 Ms. Twinn does not believe that appropriate due diligence has been used with respect to
19 the list that is being offered as part of the settlement offer, and as a trustee, she is very
20 concerned about that; and that is why she brought her original application because as a
21 trustee, she's concerned about the administration of the trust from many perspectives, one
22 of them being the beneficiary designations.

23

24 So she believes that the application should not go forward and that it is important to have
25 information from one of the applications in the other application.

26

27 THE COURT: Mm-hm. Okay. You want to --

28

29 **Further Submissions by Ms. Hutchison (Adjournment of Matters Directed at the**
30 **Sawridge First Nation Only)**

31

32 MS. HUTCHISON: My Lord, thank you. My Lord, do you have
33 any of the materials filed with you today?

34

35 THE COURT: None.

36

37 MS. HUTCHISON: May I pass up a few items to you just so
38 you've got them available to look at? They're --

39

40 THE COURT: Oh.

41

1 MS. HUTCHISON:

-- in the filed briefs.

2

3 THE COURT:

All right.

4

5 MS. HUTCHISON:

The first item is Exhibit 23 to the Roman

6 Bombak affidavit filed by --

7

8 THE COURT:

Oops.

9

10 MS. HUTCHISON:

-- the Public Trustee.

11

12 THE COURT:

I am going to have a water disaster. Hand

13 them up over here, okay?

14

15 MS. HUTCHISON:

And the second item, My Lord, is your decision

16 from 2012 which is Tab 4 of the Public Trustee's June 12th, 2015, brief.

17

18 I'll start, My Lord, with Exhibit 23 in this regard: My friends and the Public Trustee
19 have a very different view about the importance of the communication issue, My Lord. In
20 fact, it's really the communication issue that first brought the parties, or at least the Public
21 Trustee, to the point where it felt it had to seek the advice and direction of the Court
22 rather than continue to engage in discussion and attempts to resolve things by consent, My
23 Lord; and indeed, you'll see in many of my friends' cor -- items of correspondence in
24 recent times including -- and also in their briefs, there's a certain tone of concern that the
25 Public Trustee is not communicating fully enough or is not canvassing matters with other
26 counsel fully enough. And to be clear, My Lord, that situation to the extent there's any
27 merit to those concerns, that arose after April 27th; and I'm just going to read to you the
28 portions of that email that --

29

30 THE COURT:

Mm-hm.

31

32 MS. HUTCHISON:

-- were a concern. This is an email from

33 Mr. Poretti to myself, to Ms. Platten, Ms. Cummings, and Ms. Bonora; and Mr. Poretti
34 states:

35

36 We act for the trustees of the Sawridge Trust including Catherine
37 Twinn. Obviously it would be improper for Ms. Hutchison to
38 meet directly with our client without our consent. Ms. Hutchison
39 proposes to meet with Ms. Platten who acts for Catherine Twinn.
40 Our concern is that through such a meeting, Ms. Hutchison is
41 accomplishing, indirectly, what she cannot do directly. To the

1 extent that as a result of any such meeting Ms. Hutchison is in
2 receipt of any relevant confidential information that is prejudicial
3 to our client, it may be that Ms. Hutchison could no longer act
4 against our client.
5

6 Those are the words of counsel for the Sawridge Trustee, My Lord. It was at that point
7 that out of an abundance of caution and in recognition that the Public Trustee must
8 operate at a high standard that it was determined the Public Trustee would come to the
9 Court to seek advice and direction on proper communication. And when the Court has an
10 opportunity to review the briefs, My Lord, you will note that there has not been anything
11 in the briefs where the Sawridge Trustees resiled from those concerns. Indeed, there's
12 been further assertion that communications between the Public Trustee and Ms. Platten
13 should be limited.
14

15 So that's a central issue, My Lord, in terms of the ability of counsel to meet the purposes
16 of the rules. Normally counsel in litigation can communicate to one another openly,
17 clearly, with or without prejudice. That's all established as between counsel, but there are
18 no other concerns pending. The Public Trustee has to operate at a different level, My
19 Lord, and can't operate under the potential taint of those kinds of allegations until they're
20 cleared up with the Court or with the parties, and it has not been cleared up with the
21 parties.
22

23 So to be clear, My Lord, the Public Trustee takes the position that it's rather essential that
24 those particular issues about communication be addressed on the 30th.
25

26 Turning then, My Lord, to our friend's comments about settlement, and that was in
27 response, of course, to the Public Trustee's submissions about the settlement application
28 being premature and our submissions about the need for staging on those issues.
29

30 The concern is -- the concern about the settlement application is multiple, My Lord, and
31 we're not here to argue the substance; but I do want to take the Court to its decision, that
32 would be Tab 4 of the authorities of the Public --
33

34 THE COURT:

Mm-hm.

35
36 MS. HUTCHISON:

-- Trustee, paragraph 46 and 47, where it's
37 quite clear that the Court was aware of and agreed that the need to investigate or examine
38 the Sawridge band membership process and its efficacy related not only to identification
39 of candidate children, My Lord, but to certainty of objects. So -- and again, without
40 getting into some of the reply submissions, there's a suggestion that we've now gotten
41 into Federal Court jurisdiction. The Court also dealt with that in its June 2012 decision,

1 My Lord, and was very clear in saying that this Court has jurisdiction to examine the
 2 membership process to the extent that it effects certainty of objects. The reality, My
 3 Lord, and the Court, although you've been told by counsel that there's been much
 4 evidence filed about membership process and membership information, you don't have
 5 that before you. Some of it is in Roman Bombak's affidavit.

6
 7 As you'll gather from our submissions, the Public Trustee is strongly of the view that the
 8 information obtained through the questioning process to date has likely raised as may
 9 questions as it has answered about that membership process, My Lord. It has not put the
 10 Public Trustee or the Court in a position of identifying candidate children. It has not put
 11 the Public Trustee or the Court in the position the Court sought to be in in paragraph 54
 12 of your decision where you state:

13
 14 Put another way, this Court has authority to examine the band
 15 membership processes and evaluate, for example, whether or not
 16 those processes are discriminatory, biased, unreasonable, delayed
 17 without reason, or otherwise breach *Charter* principles in the
 18 requirements of natural justice.

19
 20 We do not have that information, My Lord. That information will not be available to you
 21 in considering a settlement application. It's not available to the Public Trustee to evaluate
 22 a settlement application and take a position on it. So while my friends are characterizing
 23 the settlement as a complete victory, that's only true, My Lord, if this Court can grant a
 24 final order without regard for at least one of the three certainties.

25
 26 So the Public Trustee isn't coming before the Court to ask for staging to try and overuse
 27 resources or to take up more time, My Lord, but actually to be efficient and to ensure that
 28 we deal with the issues that have to be dealt with first up front and then deal with the
 29 issues that rely on those determinations second.

30
 31 THE COURT: Thank you.

32
 33 MS. HUTCHISON: Thank you, My Lord.

34
 35 THE COURT: Ms. Bonora?

36
 37 **Further Submissions by Ms. Bonora (Adjournment of Matters Directed at the Sawridge**
 38 **First Nation Only)**

39
 40 MS. BONORA: My Lord, I think that obviously an adjournment
 41 application won't hear all the evidence, but I do believe that when you hear the evidence

1 of what is happening at the Sawridge First Nation in respect of its membership process,
2 the fact that decisions have come from the Federal Courts that have gone to judicial
3 review and come from the Federal Court, that all processes of the appeal process are
4 working, that that may be sufficient for you and it may not be; but what we're asking you
5 to do is to hear it.

6
7 Secondly -- and again, without getting into the full substance, I think that what
8 Ms. Platten made reference to and what Ms. Hutchison made reference to is a very narrow
9 group of people. It's the candidate children because we've identified who we believe are
10 the children who would be excluded, and we're giving them full status.

11
12 Another part of our settlement is that in the event that any other child comes forward who
13 would have -- who can prove that they would have been a beneficiary and they -- we
14 didn't identify them at this point, we believe we've done our due diligence; but let's say
15 there is one, we would grant them the ability to make an application and we would fund
16 legal counsel for them to make that application. So we have identi -- set -- dealt with that
17 that, you know, maybe there was a ping pong ball loose, and we didn't identify it. We're
18 prepared to provide funding to make sure that happens.

19
20 But even if that isn't the case and that isn't acceptable to the Court, I believe the
21 arguments you've heard this morning show that there is a narrowing of the issue because
22 we have identified that we can grandfather these 20 -- it's now down to 20 because some
23 of them have become members. Some of the minors have become members. That will
24 be part of our evidence in respect of the membership process working. So these 20, now,
25 children will be grandfathered, and maybe all we need to investigate is the candidate
26 children. Well, if all we're investigating is the candidate children, that entirely narrows
27 the scope in terms of document production, and then it narrows the scope in terms of
28 what we need to deal with.

29
30 Let's look at the -- who the candidates are and who the candidates children are. We don't
31 even know if there are any. We don't have that evidence, but that could be something
32 that we could just narrow the focus on; so that's why we're asking you to hear that
33 settlement proposal and have a decision about whether it at least narrows the focus. I
34 think that's so important at this point rather than just embarking on a crazy document
35 production as Mr. Molstad told you encompasses thousands of documents, why would we
36 do that if we could narrow that focus? So I'm ask you to -- we're asking you to hear that
37 settlement application in full; and as we said, this argument about the fact that it's not
38 ready to go ahead is absolutely the defence that can be argued at that time.

39
40 THE COURT:

At that time as in?

41

1 MS. BONORA: June 30th.
2
3 THE COURT: June 30th, okay.
4
5 MS. BONORA: A few days from now.
6
7 THE COURT: Okay. All right.
8
9 MS. BONORA: Thank you.
10
11 THE COURT: Thank you.
12
13 MS. HUTCHISON: My Lord, may I make one --
14
15 THE COURT: Sure.
16
17 MS. HUTCHISON: -- brief comment?
18

19 **Further Submissions by Ms. Hutchison (Adjournment of Matters Directed at the**
20 **Sawridge First Nation Only)**

21
22 MS. HUTCHISON: I -- and it's as much as anything to make sure
23 that regardless of what we do, we all -- that we actually have all the materials that would
24 be before the Court on June 30th. My friend referred to when the Court hears all the
25 evidence about the membership process and what's happening, and that raises a bit of a
26 concern for me because as far as I'm aware, there is no evidence submitted by the
27 Sawridge Trustees in that regard for the June 30th hearing to support their application to
28 approve the settlement application. There were no affidavits filed by the Sawridge
29 Trustees since 2011, I believe. So that's a question and a concern I think we should all
30 clarify before we know what we're doing on the 30th.

31
32 The other point I would just make, My Lord, in terms of the Public Trustee isn't asking
33 the Court to embark on a crazy document production. We've actually proposed a staged
34 production in -- and My Lord has not had an opportunity to read reply submissions, but
35 we've proposed a staged production that would allow the issues the Court -- and the
36 evidence the Court will have to have access to to assess a settlement application. Give
37 the Court access to that evidence first, and if there is still outstanding production issues,
38 we can embark on the broader issues.

39
40 So the Public Trustee is very open to an appropriately staged process here. The concern,
41 however, My Lord, remains this Court has already decided that having full evidence about

1 the Sawridge membership process is relevant and material to dealing with at least one
2 certainty of this trust, the certainty of objects. It's also relevant to the interest of the
3 candidate children. The certainty of objects is relevant to the interests of all of the minor
4 beneficiaries including the ones that may be grandfathered or not.

5
6 So to ask the Court to proceed forward and deal with the settlement application without
7 that evidence, I would submit to the Court, is going to quite literally waste the Court's
8 time on the 30th when we obviously have a great deal -- a great many other issues that do
9 require the Court's time and the Court's attention and direction so that we can move
10 forward with the application.

11
12 So, My Lord, the Public Trustee would refer you back to the June 17th, 2015, letter. We
13 would suggest that the list on page 3 of that letter is an appropriate and manageable
14 agenda for the time we had allocated on June 30th with the addition of arguing the
15 prematurity of the settlement application, My Lord.

16
17 Subject to questions, My Lord --

18
19 THE COURT: All right.

20
21 MS. HUTCHISON: -- that -- those are my submissions.

22
23 THE COURT: Thanks. What about this point of there is no
24 evidence or fresh --

25
26 **Further Submissions by Ms. Bonora (Adjournment of Matters Directed at the Sawridge**
27 **First Nation Only)**

28
29 MS. BONORA: Well, My Lord, certainly we had expected that
30 our transcripts, which are examinations on affidavits, are evidence before the Court as are
31 the undertaking responses; and that is the evidence that will show the membership process
32 and criteria, and so that is the evidence that will be before you.

33
34 Not -- I've just -- Mr. Poretti and I were talking about whether it's been filed yet. We'll
35 obviously have it filed before June 30th, but we don't believe the evidence is that
36 extensive for you to review in terms of making sure that the process and criteria is
37 ascertainable and working.

38
39 THE COURT: Am I to understand then that, at this stage,
40 insofar as the briefs are concerned, you have not tied that evidence from the transcripts
41 and undertakings back into your submissions in the briefs?

1
2 MS. BONORA: We certainly have made representations about
3 the membership process and the membership criteria and the fact that that evidence has
4 been produced in our brief.
5
6 THE COURT: Okay, and are those submissions tied into
7 specific transcript -- excerpts from transcripts and undertakings?
8
9 MS. BONORA: Yes. I'm trying to remember our brief.
10
11 THE COURT: Mm-hm.
12
13 MS. BONORA: Certainly we've made reference to how the
14 membership process works, the fact that it's gone to the Fed -- three decisions have --
15
16 THE COURT: Mm-hm.
17
18 MS. BONORA: -- gone to the Federal Court of Appeal, the fact
19 that four members -- four minors have been made members, so I think that we have made
20 reference to the evidence. I don't know --
21
22 THE COURT: Okay.
23
24 MS. BONORA: -- about the specificity --
25
26 THE COURT: Okay.
27
28 MS. BONORA: -- of -- blah, blah, blah, anyway, of the actual
29 references to it, but I believe that evidence is there and not extensive; so we didn't file
30 another affidavit because, of course, the evidence is already there. There would be no
31 need to file another --
32
33 THE COURT: Mm-hm.
34
35 MS. BONORA: -- affidavit.
36
37 THE COURT: It is there in the sense of in transcripts and in
38 undertakings?
39
40 MS. BONORA: Yes, and the -- and --
41

1 THE COURT: The responses?

2
3 MS. BONORA: -- and we've made the submissions in our brief
4 about the fact that that information is available and shows that that membership process is
5 working. The way we interpreted your decision was you had to look at process and
6 criteria, so we provided the criteria. We've shown that the process works for the 20
7 people, I think, who've been --

8
9 THE COURT: Mm-hm.

10
11 MS. BONORA: -- admitted so far and that, because it's gone to
12 the Court of Appeal, it addresses all those issues of bias and all those things because the
13 Court of Appeal could have looked at that in terms of saying this process didn't work
14 under judicial review -- sorry, not the Court of Appeal, the Federal Court, and so we
15 believe that evidence is all there in terms of dealing with our settlement offer and the fact
16 that there is enough evidence before this Court to say that that membership process is
17 working.

18
19 THE COURT: Okay.

20
21 MS. BONORA: And it is -- you know, I don't think we should
22 lose sight of the fact that the grandfathering of these 23 children is not automatic. That
23 is, I think, a very significant offer. It could be that the Court would simply decide that
24 the membership definition changes from what it is now to members which excludes those
25 23. It's the very reason you appointed the Public Trustee because they could be excluded,
26 and so that's why our settlement offer is so significant to include those 23 people and
27 then provide a process in case anybody was missed, I think, is a very significant offer
28 which we have difficulty that the Public Trustee does not want to address it and that's
29 why we felt the need to bring it to the Court because of the significant dollars that are
30 being spent now and the significant dollars that will certainly be spent if we embark on
31 this document production and all the other issues.

32
33 THE COURT: Okay. Thanks.

34
35 **Further Submissions by Ms. Hutchison (Adjournment of Matters Directed at the**
36 **Sawridge First Nation Only)**

37
38 MS. HUTCHISON: My Lord, I apologize.

39
40 THE COURT: Mm-hm.

41

1 MS. HUTCHISON: I prom -- I told you I was done. I'm handing
2 you my friend's application, and I'm handing you my friend's brief. My friend's
3 application makes not a single reference to any of the evidence filed in this proceeding as
4 evidence that will be relied on. The two pages of my friend's June 12th, 2015, brief that
5 deals with the settlement application contains not one single evidentiary reference, My
6 Lord. It would come as a significant surprise to the Office of the Public Trustee if, on
7 June 30th, we were expected to deal with particular excerpts from transcripts, particular
8 portions of the undertakings. My Lord, we're not -- sorry. I thought you were handing
9 those back now.

10

11 THE COURT: No. Well, I am going to.

12

13 MS. HUTCHISON: That would be quite a surprise, My Lord, to --

14

15 THE COURT: Okay.

16

17 MS. HUTCHISON: -- say the least; and just to finish that point, My
18 Lord, if anything, my friend's submissions today suggest to me an even greater need to
19 adjourn the substance of the settlement application to another date. It tells me that the
20 Sawridge Trustees are now intending to put before the Court the limited evidence, but
21 there's still evidence, that's been obtained through the questioning process, through Paul
22 Bujold's answers to undertakings, and the only portions of those evidence that were file --
23 that was filed on June 12th or June 19th are found in the excerpts of the Public
24 Trustee's -- excerpts of evidence of the Public Trustee's brief and Roman Bombak's
25 affidavit, and that is certainly not a complete record.

26

27 Furthermore, My Lord, we are less than a week away from that hearing, and the Public
28 Trustee has no information regarding what the Sawridge Trustees would actually propose
29 to rely on in terms of specific evidence; so I -- one of my friends has used the term trial
30 by ambush which is not a term I like to use, but I would be using it on June 30th if that
31 was what we were facing in the course of this application, My Lord.

32

33 In terms of -- My Lord, I think I'm about to start chatting with you again about your own
34 decision on candidate children and the relevance of the evidence. I think I've covered
35 that. I'll limit my concerns to my friend's submissions suggest to me an extremely --

36

37 THE COURT: Mm-hm.

38

39 MS. HUTCHISON: -- great need to adjourn the substance of the
40 settlement application to a later date, My Lord, so that there can be full disclosure of the
41 materials that will actually be relied on by the applicant.

1
2 Thank you.

3
4 **Further Submissions by Ms. Bonora (Adjournment of Matters Directed at the Sawridge**
5 **First Nation Only)**

6
7 MS. BONORA: My Lord, the -- I think my friend is -- it's
8 interesting because she's told us we have such limited information, and it's true, the
9 information is not that great. Just -- the -- she examined Mr. Bujold. She's clearly aware
10 of the transcripts. She sought the undertakings. Those undertakings have been answered.
11 It's not an ambush in any way. That's the evidence that's the before the Court. She has
12 an obligation to file those things as the examining party, and so it never occurred to me
13 that those things could not be relied upon. Certainly if it was necessary to provide her
14 with a list of the things that relate to membership which I think would be obvious, we
15 could certainly do that and we could do it before the afternoon was out. It's not
16 something that will be at all a surprise because it's something she questioned on. It's
17 something that was provided to her in the undertakings, I'm going to say, months ago.

18
19 And so I don't think this is something that is an ambush. I don't believe that we should
20 adjourn, but let's say we -- you know, if you believe that there needs to be further notice,
21 we certainly don't want to be unfair; then we still have the issue of if we're going to
22 adjourn to give us time to provide her with our list of evidence that we're going to refer
23 to, it still comes down to you making a decision about the settlement offer going ahead as
24 a full application. So I think that's still --

25
26 THE COURT: Mm-hm.

27
28 MS. BONORA: -- a decision before you. I really think that the
29 evidence is well-known to my friend.

30
31 **Order (Adjournment of Matters Directed at the Sawridge First Nation Only)**

32
33 THE COURT: All right. Well, here is what I am going to do.
34 I mean, it started with Mr. Molstad and his application for an adjournment, so that
35 adjournment is granted. I am just going to adjourn it sine die. You can work out a date
36 between counsel if it is necessary to get back on the production application. Does that --

37
38 **Further Submissions by Mr. Molstad (Adjournment of Matters Directed at the Sawridge**
39 **First Nation Only)**

40
41 MR. MOLSTAD: Yeah, and --

1
2 THE COURT: -- make sense?
3
4 MR. MOLSTAD: -- and I just want to make sure that we're clear
5 that the adjournment relates to all matters to which have been directed at the Sawridge
6 First Nation?
7
8 THE COURT: That is it. I am just --
9
10 MR. MOLSTAD: Yeah.
11
12 THE COURT: -- talking about --
13
14 MR. MOLSTAD: Yeah.
15
16 THE COURT: -- as I understand --
17
18 MR. MOLSTAD: Yeah.
19
20 THE COURT: -- it, it is the so-called production application.
21
22 MR. MOLSTAD: Yeah, I -- you know, I believe that's what it
23 includes. There are --
24
25 THE COURT: Mm-hm.
26
27 MR. MOLSTAD: -- a number of other matters that these counsel
28 will be dealing with, and we will not be there on the 30th; so if something comes up and
29 says -- someone says, Sawridge First Nation has to take a position, we want to have that
30 matter put over to be able to do that.
31
32 THE COURT: So you are not able to come on the 30th just as
33 an observer?
34
35 MR. MOLSTAD: Well, I could send someone, My Lord, but the
36 point is that there's no need for Sawridge First Nation to be there because these issues do
37 not -- you know, they're issues between the trustees and the Public Trustee.
38
39 THE COURT: Okay.
40
41 MR. MOLSTAD: And they have to be dealt with and the other

1 parties.

2

3 **Further Order (Adjournment of Matters Directed at the Sawridge First Nation Only)**

4

5 THE COURT: All right. Well, your adjournment application
6 is granted.

7

8 MR. MOLSTAD: Thank you.

9

10 THE COURT: With respect -- now, while it is tempting to
11 adjourn everything because there is some efficiency from the Court's perspective in
12 dealing with everything at one time, Ms. Bonora has convinced me that that is not
13 appropriate; and so on June 30th, we will deal with the application for the approval of the
14 settlement. I do not see any particular prejudice to any other participant and particularly
15 the Public Trustee. The Public Trustee is still open to argue at that time that there is
16 deficiencies or reasons why the settlement application should not be approved at that time,
17 so the prematurity issue can still be alive. It is still a live issue on June 30th, but it may
18 well be that the trustees can convince me that the settlement proposal is an appropriate
19 resolution, and it may very well narrow the issues which, in turn, will save the trusts the
20 costs of ongoing litigation.

21

22 So we will deal with the approval of the proposed settlement on June 30th. The only
23 condition I am going to impose is that the trustees provide to everyone, including the
24 Court, by close of business on Friday, whatever Friday is, the 26th, a list of just
25 references to the evidence you are going to rely on, tie it back into the paragraphs in your
26 briefs, and I think that it is that simple; but you do not need to reproduce a whole bunch
27 of paper. Just get those transcripts filed, and make sure I have got copies of them so I
28 can read them on Monday. I am not going to have time to prepare for this till Monday in
29 any event.

30

31 If any of the responding parties wish to raise evidentiary -- or references to evidence, by
32 all means prepare a short memo on it and hand it up to me when we argue it just so I can
33 track if there is any other evidence that anybody wants to rely on.

34

35 I think that will do it; otherwise, that will be the first order of business will be to deal
36 with the approval of the proposed settlement, and then the other items, I take it, there is
37 no issue with dealing with the other issues that are outlined in page 3 of Ms. Hutchison's
38 letter of June 17th? There are four items there, and that would pick up this
39 communication issue, the costs issue, a litigation plan. Everybody okay with that?

40

41 MS. HUTCHISON: Yes.

1
2 THE COURT: All right.
3
4 MR. MOLSTAD: Just two matters, My Lord: I'd ask that Your
5 Lordship consider directing my friend to provide me with a proper notice of motion or a
6 proper application that addresses and is directed to the Sawridge First Nation so we know
7 what really she's seeking against us, and I'm not sure if you've dealt with that.
8
9 THE COURT: Well, as part of the adjournment order and you
10 are going to prepare the order -- we will document this by order of this adjournment, so
11 that adjournment order will include a direction and I make the direction that there be more
12 detail provided with respect to the specific relief which is sought around this production --
13
14 MR. MOLSTAD: And the --
15
16 THE COURT: -- requirement. Is that basically what you are --
17
18 MR. MOLSTAD: Yeah. The relief and the evidence that she
19 relies upon, yeah. If it's just the affidavit --
20
21 THE COURT: Yes.
22
23 MR. MOLSTAD: -- of Mr. Bombak, that's fine.
24
25 THE COURT: Mm-hm.
26
27 MR. MOLSTAD: I'll deal with that, but I just want to know what
28 it is she's seeking and the grounds upon which --
29
30 THE COURT: So --
31
32 MR. MOLSTAD: -- she seeks them.
33
34 THE COURT: -- particularize --
35
36 MR. MOLSTAD: Yeah.
37
38 THE COURT: -- that.
39
40 MR. MOLSTAD: Yeah.
41

1 THE COURT: All right. And the preparation of that revised
2 pleading, that revised motion can wait until after the June 30 -- or until after I have
3 pronounced, one way or another, on June 30th. Does that --

4

5 MR. MOLSTAD: Agreed.

6

7 THE COURT: -- make sense?

8

9 MR. MOLSTAD: Yeah. I agree with that.

10

11 THE COURT: Because it probably narrows the --

12

13 MR. MOLSTAD: Yeah, makes --

14

15 THE COURT: -- scope of --

16

17 MR. MOLSTAD: -- makes sense. Yeah.

18

19 **Submissions by Mr. Molstad (Costs)**

20

21 MR. MOLSTAD: And the last issue I did want to speak to is the
22 issue of costs for today, and my submissions are brief.

23

24 In paragraph 39 of your reasons of June 12th, 2012, you stated that the Public Trustee is a
25 neutral, quote:

26

27 Agent,

28

29 Unquote, or, quote:

30

31 Officer of the Court,

32

33 Unquote, and that the Public Trustee will hold that position only by appointment by the
34 Court. You ordered, at that time, as we know, that the Public Trustee's legal fees be paid
35 from the trust and that they be indemnified for costs awarded against them from the trust.

36 Our respectful submission is that agents of the Court should not be allowed to conduct
37 themselves in ways that are unreasonable, and this Court, with the greatest of respect,
38 would have never said to Sawridge First Nation having been served with this material
39 when they were on the Friday before the 15th that we will not consent to an adjournment
40 of this matter to allow you to prepare. We're here today, I'm here today because the
41 Public Trustee would not consent to our request for an adjournment. We ask that you

1 consider awarding costs on the basis that the Public Trustee pay for those costs without
2 indemnification because we submit that the children and the beneficiaries of this trust
3 should not pay costs; and should you decide to award costs, we ask that you fix an
4 amount in that regard.

5

6 THE COURT: Ms. Hutchison?

7

8 **Submissions by Ms. Hutchison (Costs)**

9

10 MS. HUTCHISON: My Lord, to be clear, the Public Trustee made
11 every effort it could within the scope of its mandate to protect the interests of the minors
12 to accommodate Mr. Molstad.

13

14 The Public Trustee is very much of the view that the production application and the
15 settlement application are interre -- linked and could not be dealt with separately. There
16 was no intention to put Mr. Molstad in an awkward position. The Public Trustee was
17 attempting to ensure the interests of the minors were protected.

18

19 And, with respect, My Lord, the Sawridge Trustees refused, one could say, to cooperate in
20 that regard and made it -- and left the Public Trustee in a position where it could not give
21 an unconditional consent to an adjournment. I would submit to the Court that's not
22 unreasonable. This is a rather complicated set of applications. They're interrelated. It's
23 difficult to separate them out individually, and furthermore, My Lord, would not suggest
24 that this is a situation where the Public Trustee's behaviour could in any way be
25 characterized as unreasonable.

26

27 I would ask that the Court, at minimum, deal with costs at the time that the production
28 application is actually dealt with and award no costs of this particular application today in
29 terms of if Mr. Molstad has submissions on costs on production.

30

31 And, My Lord, beyond that, I would suggest that if a cost award is granted, that's not in
32 the best interest of the minors. It shouldn't -- it -- the clear terms of the order are a total
33 indemnification of the Public Trustee. If costs are awarded against the Public Trustee, it
34 comes directly out of the Sawridge Trust. It's not in anyone's best interest to deal with it
35 that way, My Lord.

36

37 **Order (Costs)**

38

39 THE COURT: Well, what I am going to do is reserve on the
40 question of costs on this adjournment application on which Mr. Molstad's client has been
41 successful simply reserved for a trial judge, if there is ever a trial, of the issues around

1 this litigation. So I am putting it off beyond any production application. It is off until --
2 to be dealt with by a trial judge if there ever is a trial.

3
4 All right?

5
6 MR. MOLSTAD: Thank you.

7
8 MS. HUTCHISON: Thank you, My Lord.

9
10 MS. BONORA: Thank you, Sir.

11
12 THE COURT: Thanks, counsel. We will see some of you but
13 not Mr. Molstad on June 30th.

14
15 Okay. Go ahead. I will return all this material. We are adjourned.

16
17 (OTHER MATTERS SPOKEN TO)

18
19 THE COURT: Go ahead. I am done. It will just take me a
20 minute to get organized up here.

21
22 MR. MOLSTAD: Thanks again, My Lord.

23
24 THE COURT: Thank you.

25
26 MS. BONORA: Thank you. Yeah.

27
28 THE COURT: Thanks, counsel.

29
30 MR. KUEBER: My Lord.

31
32 MS. HUTCHISON: Thank you, My Lord.

33
34 THE COURT: Thanks.

35
36 THE COURT: Oh, can I just ask counsel -- is the recording
37 still on?

38
39 THE COURT CLERK: Yes, Sir. Shall I turn it off?

40
41 THE COURT: And that excludes Mr. Molstad, but can you

1 just look at your calendars to see whether you can be available on Thursday morning in
2 case there is a roll-over? I do not want to have to adjourn this for a long period of time
3 if there is just some things that can be --

4

5 MS. BONORA: That's a statutory holiday. Is that okay?

6

7 THE COURT: Yes. Well, yes, I mean, it is Thursday which
8 is --

9

10 MS. BONORA: July --

11

12 THE COURT: -- we are hearing this the 30th. The Thursday
13 would be the July 2nd in the morning.

14

15 MS. BONORA: Oh, I'm sorry.

16

17 MR. KUEBER: Yeah.

18

19 MS. BONORA: You're skipping --

20

21 THE COURT: Yes.

22

23 MS. BONORA: -- a day. Mm-hm.

24

25 MS. HUTCHISON: My Lord, I know I'm booked to be out of
26 town, but I --

27

28 THE COURT: Are you?

29

30 MS. HUTCHISON: -- can certainly -- I can try and see if I can
31 change that, but --

32

33 THE COURT: Well, I just -- if you would not mind? I just do
34 not want this -- if I am going to deal with this next week, I want to try and get it fully
35 dealt with; and I include in that possibly giving an oral judgment so that I am not
36 carrying this.

37

38 MS. HUTCHISON: I will --

39

40 THE COURT: All right.

41

1 MS. HUTCHISON: -- do what I can, My Lord.
2
3 THE COURT: Okay.
4
5 MR. KUEBER: I'm --
6
7 THE COURT: Okay.
8
9 MR. KUEBER: -- available, Sir.
10
11 THE COURT: Okay.
12
13 MR. KUEBER: Thanks.
14
15 MS. BONORA: I can make myself --
16
17 THE COURT: Okay.
18
19 MS. BONORA: -- available.
20
21 THE COURT: Good. Thanks.

22
23 _____
24 PROCEEDINGS CONCLUDED
25 _____
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1 **Certificate of Record**

2
3 I, Morag O’Sullivan, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen’s Bench held in Courtroom 313 at Edmonton, Alberta, on
5 the 24th of June, 2015, and that I, Morag O’Sullivan, was the court official in charge of
6 the sound-recording machine during the proceedings.

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1 **Certificate of Transcript**

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I, Corie Dombrosky, certify that

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

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

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Detailed Transcript Statistics	
Order No. 55561-15-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	35
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Title Page Lines:	50
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Total Lines:	1545
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Title Page Characters:	619
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Transcript Characters:	52632
Total Billable Characters:	54573
Multi-Take Adjustment: (-) <small>Duplicated Title Page Characters</small>	53954

June 22, 2016

File No.: 551860-1

SENT VIA E-MAIL: jhutchison@jhlaw.ca

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park AB T8H 2A3

Attention: Janet L. Hutchison

Dear Madam:

RE: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112
Offer of settlement on the Transfer issue
With Prejudice

We are writing to make a formal offer of settlement to the OPGT in respect of the issue of the transfer of assets from the 1982 trust to the 1985 trust. We believe that this issue is simple. This issue involves simply normalizing the transfer of assets from one trust to the other trust. It does not involve an accounting of the assets in either trust or an accounting of the assets that transferred. The accounting is not an issue that the trustees have raised in this application. The trustees understand that the beneficiaries are free to bring an application for an accounting in respect of the transfer of assets and an accounting of the assets in the 1985 trust. The trustees are stating on a with prejudice basis that an order of the court to approve the transfer of assets from one trust to the other trust will not be raised to argue that any subsequent accounting application brought by any beneficiary is *res judicata*. Of course, the transfer issue itself that is addressed in the Consent Order will be *res judicata*.

Thus, we offer to settle the transfer issue by entering into the attached consent order. We believe the order sets out exactly what we have stated above and believe it protects the ability of any beneficiary to bring an accounting application.

The offer to settle by entering into the consent order is open for acceptance until July 15, 2016. In the event that the offer is not accepted, then the offer will be made known to the court from the perspective of an answer to the request for documents in the OPGT Rule 5.13 application on the transfer issue. The offer will also be made known to the court in support of an application for costs in the event that the OPGT is not successful in its Rule 5.13 application given that the clarification in the attached consent order should assist the OPGT to determine that it need not proceed with its extensive Rule 5.13 application on the transfer issue.

We note that the Sawridge Trustees are the applicants in this application. To that end, it is up to the applicants to define the issue they wish to have addressed and the relief that they seek. No accounting relief is being sought, no relief is being sought to prevent a beneficiary from seeking an accounting. We have provided that clarification orally, in writing and now in the form of a consent order and formal with prejudice offer.

We are seeking to keep the costs in control. We make this offer in the hopes that the OPGT will respond positively to say that the transfer of assets from one trust to the other does not prejudice or in any way harm the minor beneficiaries provided their rights are protected to seek a future accounting.

The 1985 trust has been operating since 1985 with assets transferred to it from the 1982 trust. The problem for the trustees is really a dearth of information and documentation in respect of the trust to trust transfer. We simply wish to have the court agree that the transfer is approved and the 1985 trust is the entity with which to deal.

We do not see this as complex. We hope the OPGT can see that dealing with this issue poses no risk to the minor beneficiaries.

We believe this offer is in keeping with the direction of the Court to the parties to focus and to proceed expeditiously with the litigation.

This offer is open for acceptance until July 15, 2016.

Yours truly,
Dentons Canada LLP

Doris Bonora

DCEB/clg
Enclosure

- cc K. Platten, Q.C., Crista Osualdini McLennan Ross
(Catherine Twinn) (via email)
- cc Marco Poretti, Reynolds, Mirth, Richards & Farmer LLP (via email)
- cc E. Molstad, Q.C., Parlee McLaws LLP (via email)
- cc Paul Bujold (via email)
- cc Brian Heidecker (via email)

Clerk's Stamp:

COURT FILE NUMBER 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA
2000, c T-8, AS AMENDED

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

APPLICANTS

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

DOCUMENT

ORDER

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT

Doris C.E. Bonora
Dentons Canada LLP
2900 Manulife Place
10180 – 101 Street
Edmonton, Alberta T5J 3V5
Ph. (780) 423-7188 Fx. (780) 423-7276
File No.: 551860-1

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

ORDER

UPON HEARING representations from counsel for the Sawridge Trustees, Catherine Twinn as
a Trustee of the 1985 Sawridge Trust, and the Office of Public Guardian and Trustee of Alberta;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved nunc pro tunc. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

The Honourable Mr. Justice D.R.G. Thomas

APPROVED AS TO FORM AND CONTENT BY:

Dentons Canada LLP

Reynolds Mirth Richards & Farmer LLP

Doris Bonora
Counsel for Sawridge Trustees

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

Hutchison Law

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

Janet Hutchison
Counsel for The Office of the Public
Guardian and Trustee



July 6, 2016

EDWARD H. MOLSTAD, Q.C.
DIRECT DIAL.: 780 423 8506
DIRECT FAX: 780 423 2870
EMAIL: emolstad@parlee.com
OUR FILE #: 64203-77/11M

Hutchison Law
190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3

Via email only

Attention: Ms. Janet Hutchison

Dear Madam:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
QB Action No. 1103 14112
With Prejudice Offer of Settlement of Transfer Issue

We confirm that we received a copy of the with prejudice offers to settle made by the Sawridge Trustees to the Public Trustee and to Catherine Twinn in the letter from Dentons Canada LLP, dated June 22nd, 2016.

It is the position of the Sawridge First Nation that this settlement offer is reasonable and resolves any possible concerns with respect to the approval of the transfer of the assets from the 1982 Trust to the 1985 Trust.

As previously noted, the Sawridge First Nation will be claiming costs payable by the Public Trustee on the basis that these costs not be paid from the Sawridge Trust. In the event that the Sawridge Trustee's offer regarding the transfer of assets is not accepted by the Public Trustee, the Sawridge First Nation will be submitting to the Court as part of its response to the Public Trustee's Rule 5.13 application regarding the transfer of assets that the Court take the Public Trustee's response to the offer into consideration in relation to Sawridge First Nation's application for costs.

Yours truly,

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
EHM/tlk

Cc: Reynolds Mirth Richards & Farmer LLP – Attn: Mr. Marco Poretti
Cc: Dentons LLP – Attn: Ms Doris Bonora
Cc: Bryan & Company – Attn: Ms Nancy Cumming, Q.C.
Cc: McLennan Ross LLP – Attn: Ms Karen Platten, Q.C.
Cc: McLennan Ross LLP – Attn: Ms Crista Osualdini
Cc: Supreme Advocacy LLP - Mr. Eugene Meehan, Q.C.
(ALL VIA EMAIL ONLY)

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

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

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

APPLICANTS: ROLAND TWINN, CATHERINE TWINN, WALTER
FELIX TWIN, BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985
Sawridge Trust

APPLICANT in this OFFICE OF THE PUBLIC TRUSTEE OF
Application: ALBERTA

RESPONDENT in this THE SAWRIDGE FIRST NATION
Application:

QUESTIONING ON AFFIDAVIT
OF
PAUL BUJOLD

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

Edmonton, Alberta
July 27, 2016

----- A. C. E. Reporting Services Inc. -----
Certified Court Reporters

1 for the benefit of beneficiaries, and concerns have
2 been raised on these two matters: One, regarding
3 the definition of beneficiaries contained in the
4 1985 Trust; and, secondly, the transfer of assets
5 into the 1985 Trust.

6 And as I understand it, the
7 Sawridge trustees are seeking to expand the
8 definition of beneficiaries of the 1985 Trust to
9 include all members of the Sawridge First Nation?

10 A That's correct.

11 Q And -- and the purpose of that objective on the
12 part of the Sawridge trustees is to eliminate
13 discrimination?

14 A That's correct.

15 Q And, in fact, based upon the definition of the
16 beneficiaries of the 1985 Trust, persons who were
17 declared by the Court to be members pursuant to
18 formally Bill C-31, have been excluded as
19 beneficiaries of the 1985 Trust?

20 A That's correct because they're women who were
21 enfranchised --

22 Q Right.

23 A -- through marriage.

24 Q And in terms of the investigation that you've done
25 in reviewing the records and gathering the
26 documents that you've gathered, I understand that
27 you have satisfied yourself that you have seen all

1 of the documents and all of the information with
2 respect to the transfer of the assets from the 1982
3 Trust to the 1985 Trust, and that -- in other
4 words, you've exhausted your efforts in that
5 respect?

6 A That's correct.

7 Q And all of the documents that you've gathered
8 demonstrate that all of the assets of the 1982
9 Trust were transferred to the 1985 Trust, and
10 that's why you seek the Court's order approving
11 that transfer?

12 A That's correct.

13 Q In paragraph 9 of your affidavit, you make
14 reference to Ronald Ewaniuk, CA. Do you know when
15 Mr. Ewaniuk first became involved with the 1985
16 Trust and the 1986 Trust?

17 A I am not sure exactly of the date. I -- I could
18 research the documents that I've got to see if I
19 can find that.

20 Q Yeah. Was it -- you know, he was involved for
21 quite some time, though, wasn't he?

22 A Yes, he was. He was involved in different
23 capacities, so in the early days, he was involved
24 as a partner -- as a senior partner of Deloitte --

25 Q Okay.

26 A -- Touche.

27 Q Yeah.

1 testified, happened? That event took place?

2 A Yes, it did.

3 Q And what we know, at this time, was that the
4 purpose of the 1985 Trust, when it was structured,
5 was to protect the assets of that Trust from those
6 persons who might be forced upon the Sawridge First
7 Nation as members under what was then Bill C-31?

8 A That's correct.

9 Q And -- and having reviewed all of the records that
10 you've been able to gather, do you have any
11 information that the resolution, Exhibit H, was not
12 carried out?

13 A None.

14 Q Okay.

15 A None whatsoever.

16 Q Would you agree with me that based upon the purpose
17 of the transfer of the assets from the 1982 Trust
18 to the 1985 Trust, there would be no reason for the
19 Sawridge trustees, the Sawridge First Nation, or
20 chief and council to withhold the transfer of any
21 assets?

22 A Not that I could think of.

23 Q They were trying to protect these assets, so their
24 objective was to transfer the assets?

25 A We had a telephone conversation with Morris
26 Cullity, who was the -- the solicitor working with
27 them at the time on the transfer and on the

1 structure of the '85 Trust.

2 Q M-hm.

3 A His -- in -- in his view, the intent of the 1985
4 Trust was simply to protect the assets, pending the
5 completion of the constitutional challenge. Once
6 that was complete, the intent was to merge the two
7 Trusts back to -- using the 1986 Trust definition,
8 to go back to that and merge the two Trusts.

9 Q But -- but in terms of the 1985 Trust, in -- in --
10 in those circumstances, both the Sawridge First
11 Nation and the trustees would be motivated to
12 ensure that all assets were transferred?

13 A That's right. Absolutely.

14 Q The reason is to fulfill the purpose at that time?

15 A That's right. And to protect those assets.

16 Q Yeah.

17 A Yes.

18 Q If you look at -- at paragraphs 9 to 28 of this
19 affidavit -- and I don't want you to rush through
20 it. Just take a look at them because a lot of this
21 information was information that you obtained from
22 the Sawridge First Nation; is that correct?

23 A That's correct, yes.

24 Q And I think you've confirmed that Sawridge First
25 Nation was cooperative, and they were cooperative
26 in providing this information as well?

27 A They were, yes.

1 Q In paragraph 20 of the affidavit sworn
2 September 12th, 2011, it refers to Exhibit I, and
3 can I just take you to that exhibit?

4 A Okay.

5 Q This is a document entitled "Sawridge Band
6 Resolution" and has a number of signatures which
7 appear to be, obviously, signatures of persons in
8 addition to the chief and council of the Sawridge
9 First Nation. Would you agree with that?

10 A Yes, I would.

11 Q And this recites, in the first paragraph, that the
12 trustees of the 1982 Trust have authorized a
13 transfer of the Trust assets to the trustees of
14 what is, essentially, the 1985 Trust; is that
15 correct?

16 A That's correct.

17 Q And the second paragraph recites that these assets
18 have actually been transferred, and that's a
19 reference to the assets of the 1982 Trust having
20 been already transferred to the 1985 Trust; is that
21 correct?

22 A That's correct.

23 Q And it would appear that the Sawridge First Nation,
24 in the last paragraph of this document, is, for
25 whatever reason, approving and ratifying this
26 transfer?

27 A That's correct.

1 Q Okay. Paragraph 23 and 24 of your affidavit. You
2 indicate that the transfer was carried out under
3 the guidance of accountants and lawyers, and based
4 upon your review and a review of all of the
5 information that you gathered, would you agree that
6 it supports the proposition that all property in
7 the 1982 Trust was transferred to the 1985 Trust?

8 A Yes, I do.

9 Q I -- I want to confirm what the Sawridge trustees
10 are not seeking in relation to their efforts to
11 normalize the 1985 Trust and be in a position to
12 provide benefits to beneficiaries, and can you just
13 confirm that the Sawridge trustees do not seek any
14 declaration or remedy in relation to the assets
15 before 1985?

16 A That's correct.

17 Q And the Sawridge trustees do not seek any
18 declaration or remedy in relation to the assets
19 held in the 1982 Trust?

20 A That's correct.

21 Q And the Sawridge trustees do not seek any
22 declaration or remedy in relation to an accounting
23 of the assets in the 1982 Trust?

24 A That's correct.

25 Q And the Sawridge trustees do not seek any
26 declaration or remedy in relation to an accounting
27 of the assets in the 1985 Trust?

1 A That's correct.

2 Q And the Sawridge trustees do not seek any
3 declaration or remedy in relation to assets prior
4 to the 1982 Trust?

5 A That's correct.

6 Q And this order being sought by the Sawridge
7 trustees does not prevent a beneficiary from
8 seeking an accounting of the 1985 Trust?

9 A That's correct.

10 Q Do you have any information that there are any
11 other relevant documents that relate to the
12 transfer of assets from the '82 Trust to the 1985
13 Trust that have not been produced?

14 A I -- no. I think the search was exhaustive.

15 Q Yeah. In paragraph 28 of your affidavit, you state
16 that: (As read)

17 To unravel the assets of the 1985
18 Trust after 26 years would create
19 enormous costs and will likely
20 destroy the Trust.

21 Could you just give a brief explanation of what you
22 mean there?

23 A Well, if -- if the 1985 Trust were to fail, all the
24 assets -- because the 1982 Trust no longer exists,
25 all the -- all the assets would either have to be
26 sold and -- and they're -- the results then
27 distributed among the beneficiaries, but we'd first

1 have to identify the beneficiaries. Or the Court
2 could order a return of those assets to the 1982
3 Trust, and so it would essentially destroy the 1985
4 Trust.

5 Q And the cost of that happening, would it be to the
6 detriment of the beneficiaries?

7 A Oh, it would be enormous detriment to the
8 beneficiaries because of all of the costs for
9 assessment, for sale, for transfer would all be
10 taken out of the Trust, and it would, in essence,
11 destroy the -- not only the assets of the 1985
12 Trust, but the assets of the 1986 Trust, since the
13 two are intertwined.

14 Q Yeah. I have another document I want to put to
15 you. It's a -- an email from your counsel,
16 Ms. Bonora, to other counsel, which attaches a
17 draft of the clarification on the transfer issued
18 for review and comments and proposes that if this
19 clarification is acceptable, a consent order could
20 be drafted. You received a copy of this, did you?

21 A I did.

22 MR. MOLSTAD: I wonder if that could be
23 marked as an exhibit, please.

24 EXHIBIT 5:

25 Email from Ms. Bonora attaching a draft
26 of the clarification on the transfer
27 issued for review and comments

1 Q MR. MOLSTAD: And there's another document I
2 want to put to you. It's a letter from
3 Ms. Hutchison to counsel -- I'm sorry. It's from
4 Mr. Poretti to Ms. Hutchison and McLennan Ross
5 dated July 26, 2016, enclosing a proposed consent
6 order. You received a copy of this?

7 A I did.

8 MR. MOLSTAD: I'd like to mark this as an
9 exhibit, please.

10 EXHIBIT 6:
11 Letter from Mr. Poretti to Ms. Hutchison
12 and McLennan Ross dated July 26, 2016,
13 enclosing a proposed consent order

14 Q MR. MOLSTAD: Now, I want to turn now to
15 you -- the questioning on affidavit of yourself.
16 Do you have a copy of that transcript with you?

17 A I do.

18 Q This is a transcript of the questioning on your
19 affidavits that was conducted on the 27th and 28th
20 of May 2014, which we're advised will be relied
21 upon by the Public Trustee in relation to these
22 applications, and I have a few questions about your
23 evidence in this transcript.

24 If you go to page 9 of the
25 transcript -- and I think that we talked already
26 about who the trustees are. How many of the five
27 trustees are members of chief and council of the

1 Sawridge First Nation?

2 A One.

3 Q And who is that?

4 A Roland Twinn.

5 Q And Ms. Catherine Twinn is also a trustee of the
6 Sawridge Trust; is that correct?

7 A That's correct.

8 Q And in terms of Ms. Catherine Twinn's roles with
9 the First Nation, she was part of the Sawridge
10 First Nation membership committee for many years?

11 A That's right.

12 Q Ms. Catherine Twinn was also one of the legal
13 counsel who acted for the Sawridge First Nation in
14 the lawsuit where the Sawridge First Nation was
15 challenging the constitutionality of Bill C-31?

16 A That's correct.

17 Q And -- and do you know if Ms. Catherine Twinn also
18 participated in preparing the Sawridge First Nation
19 membership code?

20 A As far as I know, she did, yes.

21 Q Yeah. And Ms. Catherine Twinn is an elector of the
22 Sawridge First Nation?

23 A That's right.

24 Q And Ms. Catherine Twinn is also a beneficiary of
25 both the 1985 Trust and the 1986 Trust?

26 A Yes, so far as we're able to determine on the 1985
27 Trust.

1 Q Okay. And since these trusts were first
2 established, both the 1985 Trust and the 1986
3 Trust, the trustees have included members from the
4 same family and also members from chief and
5 council; correct?

6 A That's correct.

7 Q And do you know who the members of chief and
8 council are today?

9 A Yes.

10 Q And who are they?

11 A Chief Roland Twin, Councillor Tracey
12 Poi tras-Collins, and councillor -- who's the third
13 one?

14 Q Is it Darcy Twin?

15 A Yes, Darcy. Sorry. My mind was blanking.

16 Q Yeah. And when you say Councillor Tracey, it's
17 Councillor Tracey Poi tras-Collins, is it?

18 A Poi tras-Collins, yes.

19 Q Yeah. And in relation to your efforts to have
20 these trusts normalized, the Sawridge First Nation
21 provided you with much of their records, including
22 their code of conduct, their constitution, their
23 Governance Act, and other documentation, whenever
24 requested?

25 A That's correct.

26 Q And we've asked you about the documents, but do you
27 believe that after all of your efforts to gather

1 documents and to speak to people who have
2 involvement in -- historically and to make written
3 inquiries of those persons, that you have all of
4 the information that still exists in relation to
5 the transfer of the assets from the 1982 Trust to
6 the 1985 Trust?

7 A Yes, I think I do.

8 Q If I can -- I'll get you to go to page 45 of the
9 transcript. I'm just going to read to you part of
10 this transcript, beginning at line 19: (As read)

11 Q Do you have any information to
12 indicate that the assets that
13 individuals were holding between
14 the early 1970s and 1982, that
15 some of those assets were not
16 ultimately transferred into the
17 1982 Trust?

18 A From the records that we have
19 got, my understanding is that all
20 of the assets that were held by
21 individuals for the 1982 Trust
22 eventually ended up in the 1982
23 Trust, and those assets were then
24 transferred in full to the 1985
25 Trust.

26 That is your information today; correct?

27 A It is.

1 Q And at page 63 of the transcript of your
2 evidence -- and this is when you were being
3 questioned by Ms. Hutchison in relation to your
4 affidavits, page 63, lines 15 to 22: (As read)

5 Q So going back, Mr. Bujold, to
6 paragraph 7, 8, 9, and 10 of your
7 September 12th, 2011, affidavit,
8 what I am sort of focusing on
9 there is that if I understand
10 what you are saying, your belief
11 is that -- and I apologize. I am
12 actually looking at paragraph 22.
13 So you indicate that your belief
14 is that all of the assets from
15 the 1982 Trust were actually
16 transferred over to the 1985
17 Trust?

18 A Yes.

19 That is and continues to be your belief today?

20 A It is.

21 Q At page 103 and 104 -- actually, I take that back.
22 Let me just ask you: As I understand it, that in
23 relation to the 1985 Trust definition of
24 beneficiaries, if it is not changed, if it
25 continues to be in accordance with that trustee, it
26 will create certain problems for the trustees, as I
27 understand it; is that correct?

1 A That's correct.

2 Q And some of those problems include the fact that
3 it -- it discriminates against women who married
4 non-First Nation men and discriminates against
5 their children?

6 A Yes, it does.

7 Q And do you recall some of the other problems that
8 will be created by that?

9 A Well, it discriminates, also, against anyone who's
10 enfranchised, although that clause no longer exists
11 in the *Indian Act*.

12 Q Yeah.

13 A It -- it discriminates against anyone who's
14 illegitimate, and that's all I can think of at the
15 moment.

16 Q Okay. The -- if you go to page 127 of your
17 transcript of questioning by Ms. Hutchison, at line
18 6 to 27, if you just take a quick look at that, as
19 I understand it, that Sawridge First Nation
20 provided the Sawridge trustees with information
21 about the number of applications for membership and
22 this was passed on to the Public Trustee; correct?

23 A That's correct, yes.

24 Q And I'm referring to page 147, lines 4 to 13 of
25 your transcript, and just want to confirm that
26 Sawridge First Nation provided to the Sawridge
27 trustees their membership application form, a flow

1 chart for the membership application process,
2 Sawridge First Nation membership rules, and all of
3 this information was passed on by the Sawridge
4 trustees to the Public Trustee?

5 A That's correct.

6 Q At page 150 of the transcript, as I understand it,
7 the -- Sawridge First Nation provided the Sawridge
8 trustees with letters of acceptance and rejection
9 in relation to membership applications, and these
10 were provided by the Sawridge trustees to the
11 Public Trustee?

12 A That's correct.

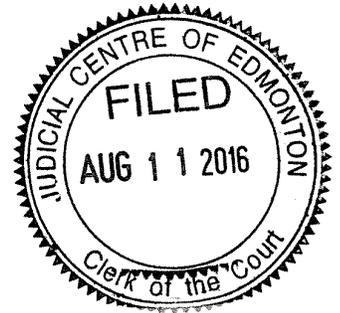
13 Q And if you go to page 180 of the transcript, you'll
14 see there there's an undertaking listed as
15 undertaking number 49, at the bottom of the page?

16 A Yes.

17 Q It says: (As read)

18 Inquire of Catherine Twinn her
19 recollection of what was discussed
20 at the April 15th, 1985, meeting
21 that the Sawridge Band resolution
22 presented at Exhibit I of
23 Mr. Bujold's September 12, 2011,
24 affidavit dealt with. Specifically,
25 does she recall if there was any
26 discussion or documentation
27 presented in relation to the

COURT FILE NUMBER 1103 14112
 COURT Court of Queen's Bench of Alberta
 JUDICIAL CENTRE Edmonton



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

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

APPLICANTS **ROLAND TWINN
 CATHERINE TWINN
 WALTER FELIX TWIN
 BERTHA L'HIRONDELLE, and
 CLARA MIDBO, as Trustees for the 1985
 Sawridge Trust**

DOCUMENT **APPLICATION for Advice and Direction in
 Respect of the transfer of assets**

ADDRESS FOR SERVICE AND CONTACT
 INFORMATION OF PARTY FILING THIS DOCUMENT: **DENTONS CANADA LLP
 2900, 10180 - 101 Street
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 Attention : Doris Bonora**

**REYNOLDS, MIRTH, RICHARDS & FARMER LLP
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Telephone: (780) 497-3325
 Fax: (780) 429-3044
 File No: 108511-001-MSP

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date	Thursday, August 24, 2016
Time	10:00 AM
Where	Law Courts Building 1 Sir Winston Churchill Square Edmonton, AB T5J 3Y2
Before Whom	Justice D.R.G. Thomas

Go to the end of this document to see what you can do and when you must do it.

1. Applicants

- (a) The Trustees of the 1985 Sawridge Trust

2. Issues to be determined or nature of claims

- (a) Approval of the transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
- (b) Providing Direction that without limiting the generality of the foregoing, the Trustees' application cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 trust.

3. Grounds for request and relief sought

- (a) Assets were transferred from the 1982 trust to the 1985 trust in 1985;
- (b) There are representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust;
- (c) The parties to this action have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have obtained;

- (d) The Trustees are not seeking an accounting of the assets transferred into the 1982 Trust;
- (e) The Trustees are not seeking an accounting of the assets transferred into the 1985 Trust;
- (f) The Trustees are not seeking an accounting of the assets transferred from the 1982 Trust into the 1985 Trust;
- (g) Little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust.

4. **Documents filed in this application**

- (a) Affidavits of Paul Bujold filed in this action;
- (b) Questioning on the affidavits of Paul Bujold filed in this action;
- (c) Undertakings of Paul Bujold filed in this action;
- (d) Form of Order in respect of this matter attached as Schedule "A" hereto.

5. **Applicable Statutes**

- (a) Trustee Act R.S.A. 2000, c.T-8, s.43, as amended

6. **Any irregularity complained of or objection relied on:**

7. **How the application is proposed to be heard or considered:**

In chambers before Justice D.R.G. Thomas, the case management justice assigned to this file.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicants what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

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, RSA 2000, c
 T-8, AS AMENDED

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

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

DOCUMENT **ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Doris C.E. Bonora Dentons Canada LLP 2900 Manulife Place 10180 – 101 Street Edmonton, AB T5J 3V5 Ph. (780) 423-7188 Fx. (780) 423-7276 File No.: 551860-1	Marco Poretti Reynolds Mirth Richards & Farmer LLP 3200, 10180 – 101 Street Edmonton, AB T5J 3W8 Ph. (780) 425-9510 Fx: (780) 429-3044 File No. 108511-MSP
--	--	---

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

ORDER

UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking

an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 trust.

The Honourable Mr. Justice D.R.G. Thomas



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

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

APPLICANTS

ROLAND TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO,
CATHERINE TWINN, as trustees for the 1985
Sawridge Trust

DOCUMENT

**BRIEF OF THE TRUSTEES FOR
APPROVAL OF THE TRANSFER OF
ASSETS FROM THE 1982 TRUST TO
THE 1985 TRUST**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

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Attention: Janet L. Hutchison

Counsel for the Office of the Office of the Public
Guardian and Trustee

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Edmonton AB T5N 3Y4

Attention: Karen A. Platten, Q.C. Counsel

Counsel for Catherine Twinn as a Trustee of the
1985 Sawridge Trust

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INTRODUCTION

1. This Brief is filed in support of an application concerning the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust") brought by the trustees of the 1985 Trust (the "Trustees"). The Trustees seek the approval of the Court of the transfer of assets which occurred in 1985, from the Sawridge Band Trust ("1982 Trust") into the 1985 Trust, *nunc pro tunc*.
2. This application is being made with consent. Attached at **Tab 1** is a Consent Order provided for approval of the Court. The within material is filed to provide the Court with the factual background to consider the proposed Consent Order.
3. This Consent order is not to be deemed to be an accounting of the assets transferred into the 1982 Trust or the 1985 Trust. The Trustees have agreed a beneficiary may seek an accounting in relation to the 1982 Trust or the 1985 Trust.
4. OPGT agreed to withdraw its Rule 5.13 Asset transfer application against Sawridge First Nation once the terms of the Order were agreed to on July 27, 2016 (Questioning of Paul Bujold July 27, 2016 page 7-8 compressed transcript **Tab 4**).

PART I – STATEMENT OF FACTS

5. The history of the 1982 Trust and the information available related to the transfer of assets into the 1985 Trust is the subject of affidavits sworn by Paul Bujold, Chief Executive Officer of the Sawridge Trusts, and on which affidavits he has been questioned. The factual background obtained from this evidence includes:
 - (a) In 1982, the Sawridge Band ("Band") decided to establish a formal trust in respect of property then held in trust by individuals on behalf of the present and future members of the Sawridge Band. On April 15, 1982, a declaration of trust establishing the 1982 Trust was executed. (Affidavit of Paul Bujold September 12, 2011 paragraph 9 and 10) On April 15, 1985, a Resolution of trustees was made whereby the trustees of the 1982 Trust resolved to transfer the assets of the 1982 Trust to the 1985 Trust. (Affidavit of Paul Bujold September 12, 2011 Paragraph 19, 20 and 21)

- (b) On April 16, 1985, the Trustees of the 1982 Trust and the Trustees of the 1985 Trust declared that the Trustees of the 1985 Trust would hold and continue to hold legal title to the assets which had been held in the 1982 Trust. (Affidavit of Paul Bujold September 12, 2011 paragraph 21)
6. Mr. Bujold attests that through his review of all of the documents in the possession of or acquired by the Trustees, and through his discussion with many individuals involved with the trusts, he believes that all of the assets held in the 1982 Trust were transferred to the 1985 Trust. He testified that it makes sense that all of the assets were transferred to the 1985 Trust because the trust was designed to protect the assets of the 1982 Trust for the members of SFN as they existed in 1985 before the passage of Bill C-31. It would not make sense that any assets would not be transferred to the 1985 Trust given the protectionist goal of the trust. (Affidavit of Paul Bujold September 12, 2011 paragraph 22; Questioning of Paul Bujold July 27, 2016 page 17-24 compressed transcript; Questioning of Paul Bujold May , 2014 pages 45-59)
 7. The transfers were carried out by the Trustees of the 1982 Trust under the guidance of lawyers and accountants. (Affidavit of Paul Bujold September 12, 2011 paragraph 22 -24; Questioning of Paul Bujold July 27, 2016 page 26 compressed transcript)
 8. The Trustees have been able to locate very little documentation in relation to the transfer of the assets from the 1982 Trust to the 1985 Trust. The fact that very little information is available is the main reason for the Trustee's application. (Affidavit of Paul Bujold September 12, 2011 paragraph 24; Questioning of Paul Bujold July 27, 2016 page 18-19 and page 27 compressed transcript; Questioning of Paul Bujold May 2014 page 68)
 9. Mr. Bujold has been cross-examined on the affidavits sworn and has provided undertakings in response to questions arising from the transfer of assets from the 1982 Trust to the 1985 Trust.
 10. At the Questioning on Affidavit of Paul Bujold held on May 27 and 28, 2014, counsel for the Public Trustee had the opportunity to examine Mr. Bujold on the basis for his belief that all of the assets of the 1982 Trust were transferred to the 1985 Trust. Questioning on this issue continued from page 33 to 74. This issue was also the subject of Undertakings 12 through 18, all of which were answered by Mr. Bujold. Ultimately however, the conclusion reached was that there is very little information and that the relevant parties who were involved such as the accountants and lawyers no longer had any records. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)
 11. From the questioning and undertakings, the following factual background has been identified:

(4)

- (a) The Trustees contacted individuals who were still alive who would have had knowledge of the financial dealings of the trusts in the relevant time period to attempt to obtain and review any relevant documentation relating to the transfer of assets that remained available. (Undertakings 12-19, 49 and 50 from Questioning of Paul Bujold May 27 and 28, 2014)
 - (b) All relevant documentation in the Trustees' possession or obtained through enquiries have been disclosed to all parties and have been reviewed by all counsel.
 - (c) All of the assets that were held in trust in the 1982 Trust in 1985 were transferred into the 1985 Trust. Thus it appears it was a trust to trust transfer.
 - (d) There are no documents that Mr. Bujold reviewed nor any one he spoke to that led him to believe that there is any asset of the 1982 Trust that was not transferred into the 1985 Trust. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)
12. The Trustees have reviewed the limited documentation available obtained through their search efforts and agreed to make requests for additional documentation. Based on what has become available through the searches and after review of the limited documents available, and based on interviews conducted with the individuals involved with the trusts in 1985, it is understood that assets from the 1982 Trust transferred directly to the 1985 Trust. Mr. Bujold was also questioned by Mr. Molstad on July 27, 2016 on this issue. (Questioning of Paul Bujold July 27, 2016 compressed transcript pages 22-27, 32-33, 35-37)

Paragraphs 1-12 above rely on the following:

- Affidavit of Paul Bujold September 12, 2011 paragraphs 9 -28, Exhibits A-E, G-J
- Transcripts of Paul Bujold May 27-28, 2014, pages 33-45, 56-58, 64-73, 180-183
- Undertakings of Paul Bujold 12, 13,14, 15, 16, 17, 18, 49, 50
- Transcripts of Paul Bujold July 27, 2016 pages 18 -29, 31-33, 35-37,
- Transcript of Paul Bujold July 27, 2016

13. The OPGT and Catherine Twinn asked for a clarification of the transfer issue to ensure that an accounting was not being requested and that an accounting could be requested in the future. The clarification provided on May 13, 2016 is attached hereto at **Tab 2**. (Clarification was entered as Exhibit 5 in Questioning of Paul Bujold July 27, 2016; Questioning of Paul Bujold July 27, 2016 page 28-29 compressed transcript)
14. Once the parties were ad idem that the transfer relief sought did not limit a beneficiary's right to an accounting, the OPGT and Catherine Twinn were able to agree to the form of Order attached.

PART II - ISSUES

15. Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust.
16. Confirmation that the approval will not have an impact on the ability of beneficiaries to seek an accounting from the 1985 Trustees, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

PART III - SUBMISSIONS

17. The Trustees have advised all parties that the approval of the transfer of assets from the 1982 Trust to the 1985 Trust is sought for certainty and to protect the assets of the 1985 Trust for the benefit of the beneficiaries. To unravel the assets of the 1985 Trust after 30 years would create undue costs and would have the potential impact of destroying the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with the reversal of the transfer of assets. (Affidavit of Paul Bujold September 11, 2011 paragraph 28 and Questioning of Paul Bujold July 27, 2016 page 27-28 compressed version)
18. While there are limitations in the documents available, the Trustees have advised all parties they have exhausted all reasonable options to obtain documentation regarding the transfer of assets from the 1982 Trust to the 1985 Trust and have provided the limited documents the Trustees have located to the parties. There is evidence that the 1985 Trust was created to preserve the assets of the 1982 Trust for the members of the Sawridge First Nation for the members that existed in 1985 before Bill C-31 was enacted. The 1985 Trust was not a beneficiary of the 1982 Trust and thus should not have been able to receive assets directly. There are many methods by which a trust can transfer assets to another trust through a series of transactions. Given the high level of advice that the Trustees received, it is believed that the transaction was carried out

properly. Based on the searches conducted, there is simply no record of the necessary transactions.

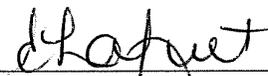
19. The Trustees, OPGT and Catherine Twinn have had appropriate opportunity to consider the documentation available and to seek any further documentation they may have found informative. Based on the clarifications provided by the Trustees, including the assurances that the relief sought in this application in no way seeks an accounting of the assets of the 1985 Trust or the 1982 Trust, the OPGT and Catherine Twinn have consented to this application and do not seek additional evidence or information about the transfer of assets that were in the 1982 Trust at the time of their transfer into the 1985 Trust or about how the transfers from the 1982 Trust to the 1985 Trust were documented.
20. In *Pilkington v. Inland Revenue Commissioners HL 8 Oct 1962 Tab 3*, the House of Lords approved as appropriate a transfer of part of one trust to another trust for the benefit of one beneficiary. On the basis of this case and what has become known as the Pilkington principle, a trust to trust transfer can be appropriate where it is for the benefit of the beneficiary. At page 17 of the *Pilkington* case the Court effectively says that if the transfer could have been done from one trust to another trust through a series of transactions then it cannot be held to be inappropriate where the same result is achieved directly. Admittedly, *Pilkington* dealt with a payment for the benefit of one beneficiary to a trust for the benefit of that beneficiary and in the *Sawridge* trusts, the transfer was of the whole trust fund of one trust to another trust. However, it is submitted that the same principle is applicable as the transfer from the 1982 Trust to the 1985 Trust was for the benefit of the same beneficiaries and preserved their interest in the trust assets. In addition, it is submitted that the *Sawridge* trust to trust transfer could have been achieved through a series of transactions and as *Pilkington* says, the transfer should not be held as inappropriate just because it was done directly instead of indirectly if this was the case with the transfer to the 1985 Trust. It is submitted that it is in the best interests of the beneficiaries of the 1985 Trust that the transfer of assets be approved, *nunc pro tunc*.
21. The Trustees, the Office of the Public Guardian and Trustee and Catherine Twinn consent to an Order of this Court approving the transfer of assets from the 1982 Trust to the 1985 Trust, *nunc pro tunc*. The proposed Consent Order makes it clear that the approval of transfer of assets shall not operate as an accounting of the assets of the 1982 Trust and that the Order approving the transfer may not be relied upon by the Trustees in a future application to prevent a beneficiary from seeking an accounting of the 1985 Trust, including an accounting to determine the assets that were transferred from the 1982 Trust.

PART IV – REMEDY SOUGHT

22. The Trustees respectfully submit the attached Consent Order for approval by the Court.

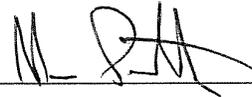
ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF AUGUST, 2016.

DENTONS CANADA LLP

PER:  _____

to: Doris Bonora
Solicitors for the Trustees

REYNOLDS MIRTH RICHARDS & FARMER LLP

PER:  _____

Marco S. Poretti
Solicitors for the Trustees

LIST OF AUTHORITIES AND ATTACHMENTS

	Page
TAB 1 Proposed Consent Order	2
TAB 2 Clarification of the transfer issue	5
TAB 3 <i>Pilkington v. Inland Revenue Commissioners HL 8 Oct 1962</i>	6
Tab 4 Questioning of Paul Bujold July 27, 2016 page 7-8 compressed transcript.....	2

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, RSA 2000, c
T-8, AS AMENDED

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

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

DOCUMENT **CONSENT ORDER**

ADDRESS FOR SERVICE
AND CONTACT
INFORMATION OF PARTY
FILING THIS DOCUMENT

Doris C.E. Bonora	Marco Poretti
Dentons Canada LLP	Reynolds Mirth Richards
2900 Manulife Place	& Farmer LLP
10180 – 101 Street	3200, 10180 – 101 Street
Edmonton, AB T5J 3V5	Edmonton, AB T5J 3W8
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Fx. (780) 423-7276	Fx: (780) 429-3044
File No.: 551860-1	File No. 108511-MSP

DATE ON WHICH ORDER WAS PRONOUNCED: _____, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER

UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not

seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

The Honourable Mr. Justice D.R.G. Thomas

~~CONSENTED TO BY:~~

~~Dentons Canada LLP~~

~~Doris Boudra
Counsel for Sawridge Trustees~~

Reynolds Mirth Richards & Farmer LLP

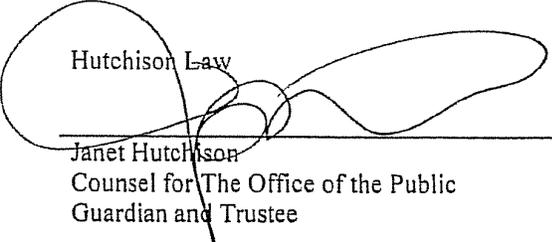


Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law



Janet Hutchison
Counsel for The Office of the Public
Guardian and Trustee

seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

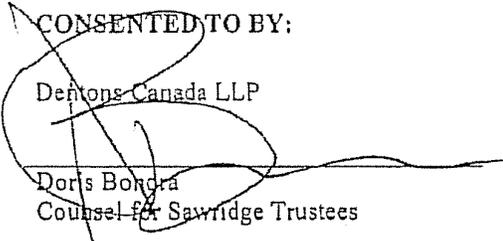
IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

The Honourable Mr. Justice D.R.G. Thomas

CONSENTED TO BY:

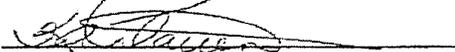
Dentons Canada LLP


Doris Bondra
Counsel for Sawridge Trustees

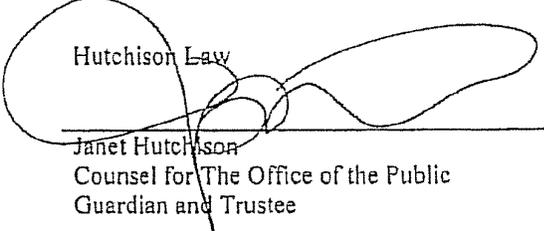
Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP


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

Hutchison Law

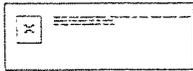

Janet Hutchison
Counsel for The Office of the Public
Guardian and Trustee

Doris M. McKenna

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Friday, May 13, 2016 4:57 PM
To: 'Janet Hutchison' (jhutchison@jhlhlaw.ca); Karen Platten; Crista Osualdini; Edward H. Molstad; Marco S. Poretti; Gabriel Joshee-Arnal
Cc: Brian Heidecker; 'Paul@sawridgetrusts.ca'
Subject: Clarification of the transfer issue
Attachments: 21595350_1.docx

We are attaching a draft of the clarification of the transfer issue for your review and comments. This is intended to try and resolve this issue. If the clarification is acceptable we could draft a consent order to deal with this issue. We understood that Catherine Twinn and the OPGT had concerns that the transfer issue involved an accounting and we have attempted to make this clear. We would be pleased to hear your comments so that we can perhaps move ahead to resolve this single matter.

Doris



Doris C.E. Bonora
Partner

D +1 760 423 7168
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Bio | Website

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2900 Manulife Place, 10160 - 101 Street Edmonton, AB T5J 3V5 Canada

大成 Salans FMC SNR Denton McKenna Long

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Clarification of the transfer issue

The Sawridge Trustees seek to have the Court approve the transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") nunc pro tunc.

The approval of the transfer by the Court shall not be deemed to be an accounting of the assets of the 1982 trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 trust that existed upon settlement of the trust in 1985. The sole issue before the Court is to approve the transfer of assets from the 1982 trust to the 1985 trust such that there shall not be a challenge to the transfer from one trust to the other which occurred in 1985.



***612 Pilkington and Another Appellants; v. Inland Revenue Commissioners and Others Respondents.**

 [Image 1 within document in PDF format.](#)

House of Lords
8 October 1962

[1962] 3 W.L.R. 1051

[1964] A.C. 612

Lord Reid , Viscount Radcliffe , Lord Jenkins , Lord Hodson and Lord Devlin .
1962 July 9, 10, 11; Oct. 8.

Analysis

[On Appeal from In Re Pilkington's Will Trusts.]

Trusts—Power of advancement—Exercise of power—Statutory power—Fund held on trust for beneficiary for life and after his death for such of his children or remoter issue as he should appoint—Settlement for the benefit of infant child of beneficiary—Advancement of moiety of infant's expectant share on trusts of new settlement Avoidance of death duties —Whether advancement for benefit of object of power—Whether rule against perpetuities infringed— *613 Whether valid exercise of power of advancement— Trustee Act, 1925 (15 Geo. 5, c. 19)

Perpetuity Rule—Power of advancement—Power used for resettlement—Application of perpetuity rule.

Power of Appointment—Power of advancement—Distinction—Perpetuity rule.

By his will dated December 14, 1934, a testator directed his trustees to hold the income of his residuary estate upon protective trusts in equal shares for all his nephews and nieces living at his death with a provision that their consent to any exercise of any applicable power of advancement should not cause a forfeiture of their interests; and after the death of a nephew or niece to hold the capital and income of such beneficiary's share for his or her children or remoter issue as he or she should appoint and in default of appointment for his or her children at 21. The will contained no provision replacing or excluding the power of advancement contained in section 32 of the Trustee Act, 1925 . ¹ The testator died on February 8, 1935. One of his nephews was married and had three infant children. The second child, a daughter, was born on December 29, 1956, and the trustees, for the purpose of avoiding death duties, desired to exercise the statutory power of advancement in her favour by applying up to one moiety of her expectant share in the testator's trust fund by adding it to a fund, which it was proposed should be subject to the trusts of a new settlement, under which the income of the fund was to be applied for her maintenance until she attained 21, and from then and until she attained 30 was to be paid to her, when the capital was to be held on trust for her absolutely. If she should die under that age the trust fund was to be held upon trust for her children who should attain the age of 21 years and, subject as aforesaid, upon trust for the nephew's other children.

On a summons to determine whether the trustees might lawfully so exercise the power of advancement:-

Held:

(1) that there was nothing in the language of section 32 of the Trustee Act, 1925, which in terms or by implication restricted the width of the manner or purpose of advancement. In particular, if the whole provision made for the object of the power was for his or her benefit, it was no objection to the exercise of the power that (as might happen here) other persons benefited incidentally as a result of the exercise, nor was it bad merely because moneys were to be tied up in a proposed settlement. Accordingly, there was no maintainable reason for introducing into the statutory power of *614 advancement a qualification that would exclude its exercise in the manner proposed by the trustees (post, pp. 636, 640). *Lowther v. Bentinck* (1874) L.R. 19 Eq. 166; *In re Joicey* [1915] 2 Ch. 115. C.A.; *In re Halsted's Will Trusts* [1937] 2 All E.R. 570; *In re Ropner's Settlement Trusts* [1956] 1 W.L.R. 902; [1956] 3 All E.R. 332; and *In re Collard's Will Trusts* [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 considered.

(2) But that the exercise of the statutory power of advancement which took the form of a settlement was a special power akin to a special power of appointment and, as such, must be exercised within the period permitted by the rule against remoteness, and its exercise must, for the purpose of the rule, be written into the instrument creating the power, and that since the new settlement was only effected lay the operation of a fiduciary power which itself "belonged" to the old settlement, the trusts of the settlement proposed by the trustees must be treated as if they had been made by the testator's will, ailed so treated they infringed the rule (post, pp. 641-642).

Decision of the Court of Appeal [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A. reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Upjohn and Pearson L.JJ. ²).

This was an appeal from an order of the Court of Appeal dated March 24, 1961, discharging (save so far as it related to costs) an order of the Chancery Division of the High Court of Justice (Danckwerts J.) dated May 14, 1959. The said orders were made in a cause or matter commenced by originating summons wherein the respondents, Guy Reginald Pilkington, Leonard Norman Winder, David Frost Pilkington and Clifford Pearson, trustees of the will of William Norman Pilkington, were the plaintiffs; and the appellants, Richard Godfrey Pilkington and Penelope Margaret Pilkington, were originally the only defendants, the respondents the Commissioners of Inland Revenue being added as defendants by order of the Court of Appeal dated July 18, 1960.

The question at issue in this appeal was whether the trustees could lawfully exercise the powers conferred on them by the will of William Norman Pilkington (hereinafter called "the testator") and section 32 of the Trustee Act, 1925, by making part of the expectant interest of the appellant Penelope Margaret Pilkington in the testator's residuary trust fund subject to the trusts, powers and provisions of a new settlement to be executed by the respondent, Guy Reginald Pilkington.

By his will dated December 14, 1934, the testator, William *615 Norman Pilkington, directed his trustees to invest his residuary estate and to hold the fund upon trust in equal shares for all his nephews and nieces, therein defined as "the beneficiaries," being children of his brothers Lionel Edward Pilkington, Charles Raymond Pilkington and Guy Reginald Pilkington, living at his death who should attain the age of 21 years or being female marry under that age. The share of each beneficiary was, so far as is here material, settled upon express protective trusts for the benefit of the beneficiary during his or her life, with a provision that his or her consent to any exercise of any applicable power of advancement should not cause a forfeiture of the interest. After the death of a beneficiary the capital and future income of the share of such beneficiary was to be held in trust for the children or remoter issue of such beneficiary as he should appoint with a trust in default of appointment for the beneficiary's children on attaining the age of 21 years or marriage. If the trusts

of the share of a beneficiary should fail then it was to accrue to the other shares in the trust fund. The will contained no provision replacing or excluding the power of advancement conferred upon trustees by section 32 of the Trustee Act, 1925. The testator died on February 8, 1935, and his will was duly proved by his executors.

The first appellant, Richard Godfrey Pilkington, a son of Guy Reginald Pilkington, was married with three children. His father, who was also a trustee of the will, was desirous of making a settlement in favour of the second appellant, Penelope Margaret Pilkington, the second child of Richard Godfrey Pilkington, who was born on December 29, 1956, and he proposed to his co-trustees that he should execute a settlement for the benefit of Penelope and that the trustees of the will should then exercise the power given by section 32 of the Trustee Act, 1925, by applying part of Penelope's expectant share in the testator's trust fund by adding it to the fund subject to the trusts of the proposed new settlement. Accordingly he paid £10 in cash to the trustees of the proposed settlement under which the trustees were directed to hold this sum, together with any further moneys (the intended total sum being £7,600) which were to be paid to them upon the following trusts: Until Penelope attained 21 years, or died under that age, the trustees were to have power at their discretion to apply the whole or any part of the income of the trust fund for the maintenance, education or benefit of Penelope as they thought fit and were to accumulate the residue of income as an addition to the capital of the trust fund, with power to apply all or part of the accumulations as if they were income of the current year; if she *616 should attain 21 years then until she attained 30 years, or died under that age, the trustees were to pay the income of the trust fund to her. The capital of the fund to be held upon trust for her upon attaining 30 years absolutely; if Penelope died under the age of 30 leaving children or a child living at her death the trustees were to hold the fund and the income thereof in trust for all or any her children or child who should attain the age of 21 years, if more than one in equal shares, and in such event the trusts applicable until Penelope attained 21 were to apply to the children and the income of their expectant shares of the fund. Subject to these provisions the trustees were to hold the fund in trust for all or any the children or child of Richard Godfrey Pilkington (other than Penelope) who being male attained 21 years or being female attained that age or married if more than one in equal shares. In the event of the failure of the trusts the fund was to be held upon the trusts of the will of the testator applicable to the share of Richard Godfrey Pilkington as though he had died without being married. The power of advancement contained in section 32 of the Trustee Act, 1925, was expressly made applicable.

The trustees of the will took out a summons to determine whether they could lawfully exercise the powers conferred upon them by section 32 of the Trustee Act, 1925, in relation to Penelope's expectant interest in the testator's trust fund by applying (with the consent of Richard Godfrey Pilkington) up to one moiety of the capital of such interest so as to make it subject to the new proposed settlement, or whether such an application of the capital would be improper and unauthorised because: (a) Penelope's interest under the proposed settlement would vest at a date later than the date on which she attained a vested interest in her expectant share under the will of the testator; or (b) the trusts of the new settlement, if contained in the will of the testator, would be void for perpetuity.

Danckwerts J. held that the power of advancement might be legitimately exercised by paying some part of the capital of Penelope's share (not exceeding one moiety) to the trustees of the proposed settlement and so as to make it subject to the trusts, powers and provisions of such settlement and, since the power of advancement took the property advanced out of the original settlement, the relevant period for the purposes of the rule against perpetuities was to be determined by reference to the proposed settlement and the power could accordingly be exercised in the manner proposed.

On July 18, 1960, the Court of Appeal, on the motion of the *617 respondent trustees, ordered that the Commissioners of Inland Revenue might be added as parties and further that (notwithstanding that the time for appealing had expired) the trustees or the commissioners might be at liberty to appeal from the order of Danckwerts J.

The Commissioners of Inland Revenue appealed. The grounds of their appeal were that the order was wrong in law:

(1) Because the proposed transaction was nothing less than a resettlement of the capital over which it extended upon trusts and with and subject to powers and discretions not contained in or contemplated by the testator's will and not authorised by the power of advancement contained in section 32 and because it was irrelevant that the trustees thought that it was for the benefit of Penelope that it should be so resettled.

(2) Because to resettle any part of the capital of the share of a beneficiary was not within the meaning of the phrase "to pay or apply any capital money" subject to a trust.

(3) Because upon the true construction of the section the power of advancement thereby conferred upon trustees to pay or apply any capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property or of any share therein did not extend to enable such trustees to deprive such person of the interest in property conferred upon him by the trust instrument or to declare new or other trusts affecting such capital or share or to do any act or thing in relation to the trust property which would operate to deprive such person of such interest or to subject such capital or share to such new or other trusts.

(4) Because the power of advancement might only be exercised to accelerate and, if necessary, enlarge the interest of the person sought to be advanced and not to postpone or reduce it.

(5) Because the effect of the proposed transaction would be to deprive Penelope of her existing contingent interest in the capital sought to be subjected to the trusts of the proposed new settlement and to subject such capital to trusts which differed from those declared by the will and to postpone and reduce Penelope's interest in such capital.

(6) Because In re Fox³ and In re Joicey⁴ are authority for the proposition that a power of advancement did not enable the trustees to alter the devaluation of the estate or to destroy the contingent interest of the person sought to be advanced.

*618

(7) Because the authorities upon which Danckwerts J. relied, properly understood, did not decide the contrary or, if they did, were wrongly decided.

(8) Because, if contrary to the contention of the Commissioners of Inland Revenue the said power of advancement extended to enable the trustees to subject the capital to new or other trusts, and thereby to postpone or reduce the interest of Penelope, the validity or otherwise of any such new or other trusts in relation to the rule against perpetuities fell to be tested by considering whether they would have been within the rule if they had been declared by the testator's will.

(9) Because the trusts in favour of Penelope and her children declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.

(10) Because the subjection of any part of the capital of the expectant share of Penelope to the trusts, powers and provisions of the proposed new settlement would be an unlawful delegation of the trusts, powers and provisions of the will.

(11) Because under the trusts of the proposed new settlement persons who were not objects of the power of advancement (and in particular Penelope's children) were beneficiaries, and the proposed transaction was accordingly a transaction in excess of the said power.

The Court of Appeal allowed the appeal.

Sir Milner Holland Q.C. and *Eric Griffith* for the appellants. The trustees of the testator's will take the view that it is for the benefit of Penelope that part of her contingent reversionary interest in the testator's residuary trust fund should be raised now and made subject to the trusts, powers and provisions of a new settlement to be executed by the respondent Guy Reginald Pilkington. This raises the questions (1) whether the trustees have power to do this under section 32 of the Trustee Act, 1925, if in their absolute discretion they consider that it is for the benefit of the infant Penelope. (2) The subsidiary question whether the terms of the proposed settlement would infringe the rule against remoteness of vesting.

(1) There is no express reference in the will to a power of advancement, and, accordingly, the trustees have the powers of advancement conferred on them by section 32 of the Trustee Act, 1925. It is not disputed that the trustees' proposed exercise of the power is bona fide. The proposed exercise of the *619 power can only be ineffective in law if in any circumstances it cannot be for Penelope's benefit. The only view to the contrary which would appear to have cogency is that held by the Court of Appeal, namely, that the proposed exercise is not within the purview of section 32 at all.

Attention is drawn to the very wide language of section 32. The words are "advancement or benefit." The words "or benefit" are not a mere trifling addition but cover any application of money for the benefit of the object of the power which may not be advancement as such. In *Roper-Curzon v. Roper-Curzon*⁵ it was held that even a bare power of advancement justified the payment of money into the trusts of a post-nuptial settlement of the person for whose benefit the power was exercised. As to "benefit": see *Lowther v. Bentinck*⁶ and *In re Kershaw's Trusts*.⁷ "Benefit" is not to be construed in this context ejusdem generis with "advancement" but is a word of very wide import: see *In re Halsted's Will Trusts*,⁸ where Farwell J. adopted the observations of Jessel M.R. in *Lowther v. Bentinck*⁹ and held that a power to benefit A included power to benefit other persons for whom A was under some obligation.

In the Court of Appeal¹⁰ it was pointed out that in *Roper-Curzon*¹¹ and *Halsted*¹² the power was exercised for the benefit of an adult beneficiary. It is to be observed (a) that in both cases the payments were in fact made to the trustees of a new settlement; (b) if it is not within a power of this kind to pay money to the trusts of an existing settlement it could not be a proper exercise of the power to pay it to an adult to apply it to the trusts of a new settlement, for that would amount to a fraud on the power.

In *In re Ropner's Settlement Trusts*¹³ Harman J. considered that it had been rightly conceded in argument that it was a proper exercise of the power of advancement there for the trustees of the original settlement to hand money to the

trustees of a new settlement provided that they were satisfied after a proper consideration of all the circumstances that such exercise was for the benefit of the objects of the power.

As to the judgment of Lord Evershed M.R., ¹⁴ it is conceded *620 that if the trustees are concerned only with the advancement in life of a beneficiary then any advancement must relate to the personal circumstances or personal needs of that beneficiary, but under section 32 one is considering not only the payment of money for advancement but also the application of capital moneys "subject to a trust, for the advancement or benefit,... of any person entitled to the capital of the trust property." These words cannot be confined here to the personal needs of Penelope. Further, it is not disputed that the trustees must consider the circumstances at the time they exercise the power, but the exercise of the power conferred by section 32 cannot be limited to those circumstances which the situation of the object of the power demand to be done.

As to the ambit of a power of advancement "for benefit and advancement": see *In re Brittlebank* ¹⁵ which shows that the effect of the insertion of the word "benefit" is to enlarge the power and give it a wider extension than "advancement" alone would give, and that in the absence of mala fides on the part of the trustees, once they have reached the conclusion that a given exercise of the power is for the benefit of the object of the power the court will not interfere with the exercise of it.

The fact that the Court of Appeal have held that the power of advancement contemplated in section 32 is one to be exercised in special circumstances, for example, setting up the object of the power in a profession, or making some provision on marriage, is inconsistent with the view that the avoidance of death duties justifies trustees in exercising this power, for that is not a special circumstance but an ever present situation; nevertheless, the court approved *In re Collard's Will Trusts* ¹⁶ where the sole purpose for exercising the power was to avoid death duties.

The Court of Appeal placed reliance on *In re Joicey*, ¹⁷ but the power in question there was an arbitrary power and not a power of advancement under which the trustees have to consider whether in the circumstances its proposed exercise is for the benefit of the beneficiary.

A limitation on the scope of this power cannot properly be derived from the cross-heading "Maintenance, Advancement and Protective Trusts" which precedes section 31 of the Trustee Act, 1925. It by no means follows that because an advancement *621 requires special circumstances therefore the object of the power can only receive a benefit under section 32 in special circumstances. Further, where trustees have exercised the power bona fide it is not within the province of the court to overrule them.

(2) If the rule against perpetuities as contended for by the Crown is applicable then the relevant date for the purposes of the rule is the death of the testator in 1938. It is submitted, however, that the exercise by the trustees of the power of advancement takes the sum in question out of the will entirely. Accordingly, it is irrelevant to consider whether interests created by Guy Reginald Pilkington's settlement vest within 21 years after lives in being under interests created by the will of the testator. For the purposes of the rule, therefore, the relevant interests are those contained in the proposed settlement. If this view be wrong it is surprising that it was not adverted to in *Roper-Curzon v. Roper-Curzon* ¹⁸ since it follows from the Crown's contention that what the court authorised there plainly offended the rule.

In *re Gosset's Settlement*, ¹⁹ *Lawrie v. Buncos* ²⁰ and *In re Fox* ²¹ show that once trustees decide to exercise a power of advancement the sum advanced is taken right out of the settlement for all purposes and thus any trust created in respect of such sum is not read back into the original instrument.

Upjohn L.J. ²² described the power here as a special power, but there is no such interest known to the law as a *special* power of *advancement*. The addition of the word "special" adds nothing to the concept of a power of advancement. Those authorities, therefore, such as *In re Fane*, ²³ which lay down that for the purposes of the rule against perpetuities all limitations made in pursuance of a special power shall be such only as would have been valid if inserted in the original will or settlement, are inapplicable.

[Reference was also made to Morris and Leach, *The Rule Against Perpetuities*, 1st. ed., p. 50 and to *In re Legh's Settlement Trusts*. ²⁴]

B. L. Bathurst Q.C. (Viscount Bledisloe) and *James Cunliffe* for the trustees. The argument on behalf of the appellants is *622 adopted. For the following reasons the trustees consider that their proposed exercise of the power of advancement conferred on them by section 32 of the Trustee Act, 1925, is a proper exercise thereof: (i) Penelope's advanced share could not thereafter be divested by the subsequent exercise of her father's special power of appointment over his share of the trust fund. (ii) If her father survived the advance for more than two years, estate duty would be reduced and after five years no estate duty would be payable in respect of it on his death. (iii) The income from the advanced share would be used wholly for Penelope's maintenance, or, accumulated. (iv) That income would be (a) free from surtax and (b) qualify for personal allowances for Penelope. (v) On attaining 21, Penelope would be absolutely entitled to the income. (vi) Penelope's children would be provided for if she died between the ages of 21 and 30. (vii) Penelope obtains the capital on attaining 30. (viii) Penelope would be protected from extravagance on attaining 21.

The Court of Appeal have held in allowing the Crown's appeal (1) that the proposed settlement is nothing more than a resettlement; (2) that an advancement must relate to some special circumstance arising.

As to (1), advancements by way of settlement have a long history: see *Roper-Curzon v. Roper-Curzon*. ²⁵ If an advancement by way of a settlement of this kind can be said in certain circumstances to be a benefit for an adult it would be very surprising if such a benefit were to be denied to an infant.

As to (2), whether there must exist a particular need, the language of section 32 could hardly be wider, and it has nowhere been suggested that there is anything improper in what the trustees propose to do. *In re Moxon's Will Trusts* ²⁶ is an example of the court refusing to interfere with a bona fide and reasonable exercise by trustees of a discretion vested in them.

As regards the perpetuity question, the short answer is that when a power of advancement is exercised the fund advanced is taken right out of the original settlement: see *per Danckwerts J*, ²⁷ To call this a special power is meaningless. The word "special" in relation to powers has always been linked with powers of appointment and it is only in relation to a limited or special power of appointment that the power must be read back for this purpose *623 into the original will

or settlement. Thus, in relation to a power of advancement once the fund is taken out there is no vested interest left under the original settlement.

Peter Foster Q.C. and E. B. Stamp for the Commissioners of Inland Revenue. Reliance is placed on the following propositions: (1) The statutory power contained in section 32 of the Trustee Act, 1925, can only be used to enlarge or accelerate the beneficiary's interest and not to postpone or reduce it. (2) The proposed exercise of the power in this case will offend the rule delegates non potest delegare. That doctrine applies to all powers and applies to section 32. (3) The proposed exercise of the power is void as being an excessive execution since non-objects are included. (4) The proposed exercise is nothing less than a resettlement and cannot come within section 32 however wide a meaning is given to the words "pay or apply." (5) The proposed exercise of the power will offend the rule against perpetuities in any event.

1. The position under the will is that Penelope has a vested interest at 21 or earlier marriage. Under the proposed settlement she is given a contingent interest until she attains 30. The effect of the exercise of the power is not to advance her interest but to postpone its vesting from 21 to 30. This power does not enable trustees to alter the devaluation of or destroy the contingent interest of the beneficiary advanced. There must be an out and out payment and there cannot be a settlement without the advancee so asks and it is then the advancee who is the settler. The power of advancement given by section 32 follows the old form of advancement used by convincers and is similar to that to be found in the precedent books for many years before 1925. Reliance is placed on the definition of advancement propounded by Cotton L.J. in *In re Aldridge*²⁸: "it is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

If a power of advancement were as wide as has been contended for by the appellants *In re Morris's Settlement Trusts*²⁹ would have been decided differently. "A power of advancement is a purely ancillary power, enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment *624 by a beneficiary selected by the appoint or of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest": *per Jenkins L.J.*³⁰

The purpose of exercising a power of advancement is to accelerate the vesting in interest of capital and not to postpone such vesting. The power of advancement contained in section 32 is a very limited power in that it is limited to the payment of an application of capital and capital moneys to a person interested in capital and to no one else. It is emphasised that although the language of section 32 may appear quite wide the nature of the power is such as to accelerate and not to vary, reduce or postpone the nature of the interest. Ex hypothesi it does not enable a resettlement which alters, varies and postpones the interest in question.

The House is invited to consider the cross-heading which precedes section 31 as an aid to the construction of section 32: *Qualter, Hall & Co. v. Board of Trade*.³¹ It is "Maintenance, Advancement and Protective Trust." There are only three sections under this heading. Section 32 is the second of them and therefore it must refer to advancement. Powers of advancement are used to advance capital to a particular person for a particular purpose, for example, the purchase of a commission. The word "benefit" extends the purposes for which the payment may be made, such as, for example, the payment of debts. "Apply" is limited to the expending of money on behalf of the beneficiary for his benefit in contradistinction to a payment to the beneficiary direct. "Benefit" is anything which accrues to the beneficiary as a result of the immediate spending of money by the trustees. "Apply" in the context of section 31 (1) and (2) and section

33 (1) (ii) clearly means "expend" and it is plain that an application of income under section 31 (1) cannot be by way of a resettlement for section 31 as a whole is concerned with maintenance during the beneficiary's minority.

The power of advancement conferred by section 32 admits of a payment but not of a settlement. The cases show that the power of advancement has never been exercised so as to enable *the trustees* to resettle the sum advanced; it is the person *625 advanced who effects the settlement: *In re Gosset's Settlement* ³²; *Roper-Curzon v. Roper-Curzon* ³³; *In re Halsted's Will Trusts*. ³⁴ Ex concessis this cannot be done by an infant.

The following authorities show very clearly what has hitherto been considered to be the true nature of a power of advancement: *In re Joicey* ³⁵ shows that an advancement is an acceleration of the beneficiary's interest. If the appellants' contention be correct then that case should have been decided differently, as also should *In re Mewburn's Settlement*. ³⁶ for there the power of advancement contained in the power of appointment would have been a delegation of the power and the exercise of the power of appointment would have been bad as an excessive execution. Similar observations apply to *In re May's Settlement*. ³⁷

The rule of construction is that the words of section 32 are to be assumed to bear their technical meaning as hitherto understood by convancers and are not to be given a wider meaning: see *Craies on Statute Law*, 5th ed., p. 158; *Mason v. Bolton's Library Ltd.*, *per Farwell L.J.* ³⁸

2. Delegates non potest delegare. The proposed exercise of the power offends this rule. In the resettlement there is a power of advancement. This amounts to a pure delegation. If the proposed settlement is made the power contained in the will by virtue of section 32 Will be exercised by another set of trustees, that is, those of the settlement and that plainly infringes the rule.

Every settlement confers powers of management, the proposed settlement, however, includes the wide power of investment allowed by the Trustee Investments Act, 1961, whilst the testator's will contains a much more restricted power of investment, the power of advancement is therefore being used to widen the powers of investment and that plainly offends the rule against delegation. It is pertinent to observe, moreover, that it would be strange to find in a power of advancement power to delegate powers of management to other persons. further, under this power of advancement it would be possible for Penelope to circumvent the prohibition against a Roman Catholic taking a benefit under the will and that would appear also to be a very strange result to flow from a power of advancement.

3. The proposed exercise of the power will bring in non-objects, *626 for under the will Penelope's children are only objects under the power of appointment and have no interest until that power is exercised in their favour, but under the proposed settlement her children take vested interests at 21 in the event of Penelope dying before the age of 30. The proposed exercise of the power of advancement is therefore void as being an excessive execution of the power.

4. However wide a meaning be given to the language of section 32 it cannot embrace a resettlement. A resettlement cannot come within the words "pay or apply." This argument depends on the width to be given to the word "apply." In *In re Peel* ³⁹ it was held that under a trust to apply an annuity for the maintenance, education, or benefit of an infant,

the trustees had no power to accumulate any part of the income for the benefit of the infant until he should attain 21. In other words, the trustees could not retain the income but must apply it, that is, expend it. The "application" in the present case is not an expending of the capital moneys in question but is a retention of it in the proposed settlement. [Reference was made to In re Vestey's Settlement.⁴⁰]

5. The proposed exercise of the power plainly offends the rule against perpetuities. The object of the power being an infant the trustees can only justify the making of a settlement provided it is within the powers conferred on them by section 32. That cannot be a general power but it is a special power and as such it must be read back into the testator's will: In re Churston Settled Estates.⁴¹

In conclusion, it is submitted that In re Ropner's Settlement Trusts⁴² was wrongly decided. [Reference was also made to Lowther v. Bentinck⁴³ ; In re Kershaw's Trusts.⁴⁴]

E. B. Stamp following. The House may derive some assistance by considering what is the result sought to be achieved by the trustees and the nature of the legal steps or process by which it is proposed to achieve it. The intended result is to force the property over which the power of advancement extends from the trusts of the testator's will and subject it to the trusts of a new settlement. There is no difficulty under *627 section 32 of the Trustee Act, 1925 in freeing the property by paying or applying it for the benefit of Penelope, but there is nothing in section 32 which enables trustees to subject property to the trusts of another settlement.

Leaving on one side section 32, it is submitted that (1) If trustees of a settlement transfer the money or interests which they hold thereunder to trustees of another settlement the effect of that transfer on the beneficial interests is nil. The only effect of such a transfer is simply to make the new trustees hold the property on the trusts of the old settlement. The transferors could only interfere with the beneficial interests if they were empowered so to do by the beneficiaries or if the old settlement contained a power to create new trusts. (2) To describe trustees as settling or resettling trust property is a misnomer. The only persons who can settle or resettle the trust property are the beneficiaries, the persons entitled to it. Trustees can therefore only settle or resettle by authority of the beneficiaries.

The question is, by what process in the present case is it proposed that the property over which the power of advancement extends is to be made subject to the trusts of the new settlement? If the trustees were the beneficial owners of the trust property they could transfer it directly to the trustees of the new settlement to hold it on the trusts of that settlement. The only other way whereby the trustees could achieve that object would be if the testator's will contained a power to create new or other trusts in respect of the property over which the power of advancement extends. This is in effect what the trustees wish to do but they have no power to do so.

It is necessary to ascertain whether the proposed transaction is effected by one or two steps. The power in so far as it enables trustees to terminate a settlement made in favour of a beneficiary can be done over the head of the beneficiary, but trustees have no power to *resettle* property over the head of the beneficiary.

The argument for the appellants inevitably depends on construing the power of advancement as a power of appointing new or other trusts. But nothing resembling such a power is to be found in section 32. Indeed, in the view of the

Variation of Trusts Act, 1958 , it would be most extraordinary if in 1962 it were to be found that the Trustee Act, 1925 , contained a power enabling trustees to appoint new or other trusts. [Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12th ed.. Vol. 2, p. 1320, side note "Maintenance."] Under the *628 power of advancement trustees can make an infant owner of trust property but they cannot set up new trusts in favour of a person absolutely apart from the infant beneficiary.

Sir Milner Holland Q.C. in reply. What the trustees propose to do was not challenged on the ground that it is not for Penelope's benefit but on the ground that some limitation must be placed on the ambit of section 32. But where is that limitation to be found, for what is proposed is plainly an application of capital moneys. In *In re Halsted's Will Trusts* ⁴⁵ Farwell J. expressly decided that half the trust fund could be raised and settled for the benefit of the plaintiff, his wife and children. If it be said that there is no trace in the reports of an application of this kind for the benefit of an infant it is to be remembered that the reason for such an application is of recent origin. *In re Ropner's Settlement Trusts* ⁴⁶ supports the appellants' contention. As to *In re Aldridge*, ⁴⁷ it is to be observed that the infants whom it was proposed to advance never had an interest in capital under the trusts of the will.

As regards perpetuity, the present question is not covered by authority. If this is a proper exercise of the power of advancement, the fund advanced is taken right out of the trusts and the trusts of the proposed settlement have not to be read back into the will. This is a power given by statute and not by the testator's will.

Their Lordships took time for consideration.

1962. October 8.

LORD REID.

My Lords, I have had the advantage of reading the speech about to be delivered by my noble and learned friend Viscount Radcliffe. I entirely agree with what he says about the application of the rule against perpetuities; but I am only reluctantly persuaded by his reasoning to agree that section 32 of the Trustee Act, 1925 , can be applied to the present case. I do not think that it is disputed that the main purpose of the appellants' scheme and its main benefit to the infant Penelope is avoidance of death duties and surtax. This is to be achieved by taking funds out of the testator's estate and resettling them on Penelope and any family she may have by means of a new trust with trust purposes different from those provided by the testator. *629 It may be that one is driven step by step to hold that the power conferred by section 32 to "pay or apply any capital money subject to a trust, for the advancement or benefit ... of any person entitled to the capital of the trust property or of any share thereof whether absolutely or contingently ..." must be interpreted as including power to resettle such money on an infant in such a way as will probably confer considerable financial benefit on her many years hence if she survives. But that certainly seems to me far removed from the apparent purpose of the section and considerably beyond anything which it has hitherto been held to cover.

Nevertheless I am compelled to recognise that there is no logical stopping place short of that result. You cannot say that financial benefit from avoidance of taxation is not a benefit within the meaning of the section. Nor can you say that the section only authorises payments for some particular or immediate purpose or that the benefit must be immediate and

certain and not future or problematical. and again you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit for that would rule out all payments where the beneficiary is under age.

I have more difficulty about the resettlement. My difficulty does not arise from the rule delegates non potest delegare for if the section authorises the creation of a new trust it must do so by writing into the testator's will authority to his trustees to do this: and new trust purposes almost inevitably mean that in certain events certain persons will take benefit who were not beneficiaries under the testator's will. But I think that the cases show that it is too late now to say that this power can never authorise trustees to convey funds to new trustees to hold for new trust purposes: to say that might endanger past transactions done on the faith of these authorities.

If that be so, then I must hold that, if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities. To draw a line between one class of case and another would be legislating and not proceeding on an interpretation of the existing statutory power.

I realise that this case opens a wide door and that many other trustees may seek to take advantage of it. But if it is thought that the power which Parliament has conferred is likely to be used *630 in ways of which Parliament does not approve then it is for Parliament to devise appropriate restrictions of the power.

I agree that this appeal must be allowed.

LORD HODSON.

My Lords, the opinion which I am about to read is that of my noble and learned friend Viscount Radcliffe who is unable to be present today.

VISCOUNT RADCLIFFE.

My Lords, this is a difficult case, and at first impression I would not have expected to find it so hard to return a certain answer to a question concerned with the time-honoured and much used power of advancement, long inserted in settlements of personality and now applied to all such settlements made since 1925 by virtue of section 32 of the Trustee Act of that year.

Fortunately, the facts themselves are of contrasting simplicity. Here we have one of the two appellants, Miss Penelope Pilkington, spinster and an infant still only of some 5½ years of age, who belongs evidently to a family of some substance and is entitled to a contingent reversionary interest in a trust fund set up by the will of her father's uncle, William Norman Pilkington. Her father, Richard Godfrey Pilkington, the other appellant, is entitled during his life to the income of a share of that trust fund (the share is said to be worth some £90,000) and after his death, subject to the possible exercise of certain powers to which I will refer in a moment, his share is to be held in trust for his children attaining 21 or, if female, marrying under that age and, if more than one, in equal shares. The father is, I believe, now about 43 years of

age and is married, and Miss Penelope has at present a small sister and a small brother, both presumptively entitled to a portion of his share when it falls into possession and, of course, other children may come into existence to add to the number of possible inheritors.

It is obvious, I think, that as things stand today and are likely to stand for some time to come, Miss Penelope is very far from having any certain or assured rights to any part of this trust fund. If she were to die under 21 unmarried she would take nothing, except in the contingency of her father having previously exercised his special power of appointment in her favour. On the other hand, since this power of appointment extends to all the children or issue of his marriage, an exercise of it by him at any time might exclude her from any interest in his share of the fund or alternatively might reduce her interest to any extent. *631 Powers of appointment apart, her presumptive one-third of his share is variable according to the number of her brothers and sisters, existing or born hereafter, who may ultimately become entitled to divide her father's share with her. There is a separate contingency that this share may never descend to his children at all, because under a special clause of the testator's will (clause 13 (J)) his trustees have power to revoke the trusts affecting the share and transfer it outright to the father for his own absolute use. This would cut out Miss Penelope altogether. Her title to any capital in the trust fund is therefore both contingent and diffusible. So far as concerns rights to derive any income from it, nothing can come to her so long as her father is alive (unless he forfeits his interest and so brings into operation a discretionary trust, under which she might receive some payments) and even after his death her right to income may be further deferred if he appoints a life interest, as he has power to do, to a surviving wife.

Now what the trustees of the testator's will, the second respondents, are proposing to do, if they lawfully can, is to take a sum of about £7,600 or investments of equivalent value out of Miss Penelope's expectant share (I do not think that it can make any difference whether they actually realise the sum or merely appropriate existing investments) and set it apart for her upon the trusts of a new settlement for her benefit which is to be brought into existence for the purpose by her great-uncle, the respondent Guy Reginald Pilkington. The first trustees of this proposed new settlement are intended to be the same persons as the will trustees, but again I do not think that anything turns on this, nor has anyone suggested that it does. What matters is that there are new trusts, not that there are old trustees.

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30, and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share: but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.

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The trustees are satisfied that if money were thus raised out of her expectant share and settled on these trusts its disposition would be for her benefit. They are able to analyse under various heads the ways in which her situation in life would be improved by having part of her prospective share withdrawn from the shadow of the contingencies or defeasances that might defeat it and secured as provision for herself and, it may be, her children. When one compares her situation under the proposed arrangement with her existing situation it is very natural to conclude that the give and take results to her advantage: but, apart from the actual variation of interests, the trustees have also to take into account the incidence of death duties, a very present matter of consideration for all who have interests in settled property. If she must wait to come into her share until it passes on her father's death, it will be reduced by the payment of duty on its capital value and, under our eccentric system of determining the rate on separate funds by aggregating the values of all properties passing on death in any form, that rate may well be a heavy one. On the other hand, if this settlement is made,

her fund will, it is thought, become free from duty on her father's death if he survives the making by five years. There are, too, more sophisticated calculations, derived from tax experts, which show that the net income resulting from the investments that are to form her fund will be considerably larger if it accrues to her trustees on her behalf than if it came to her father and he had to maintain her.

I am not sure how much independent weight I should give to the last consideration, but that does not matter, because the fact is that from beginning to end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope or, more accurately, since the trustees have not surrendered their discretion to the court but merely wish to know whether they have power to exercise it in the way outlined, that it is open to them honestly to entertain this view. What she herself thinks about it all is, of course, at present unascertainable, since she has other concerns with which to occupy herself, but it is at any rate permissible to expect that, when she brings her mind to bear on these matters in more mature years, she will regard the provision now being planned for her and her possible offspring as having been on the whole to her advantage and will be grateful for the forethought that has established her so early in life as a lady of independent means.

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Why, then, would it not be lawful for the trustees to exercise their statutory power of advancement in the manner proposed? Danckwerts J., who heard their originating summons in the High Court, seems to have felt no doubt that they had the necessary authority. The first respondents, the Commissioners of Inland Revenue, refused however to accept that his conclusion was correct and, with their consent, they were made parties to the proceedings for the purposes of an appeal. The Court of Appeal unanimously upheld their objection and reversed the order of Danckwerts J. I must notice later the reason for the Court of Appeal's decision: but it does not, I think, coincide with the general position adopted by the commissioners on the legal question, nor was any active attempt made to support it in argument before this House.

The commissioners' main propositions (there is a subsidiary point about the application of the rule against perpetuities which I will deal with later) centre round the construction which, they say, must be given to the words of section 32 of the Trustee Act, 1925. In fact, to me it seems that their several propositions are little more than different ways of illustrating the inherent limitation which they find in or extract from the words of the section. It is necessary, therefore, to begin by saying something about the form and nature of what is known as the power of advancement.

No one doubts that such a power was frequently conferred upon trustees under settlements of personality and that its general purpose was to enable them in a proper case to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later diffuseness or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement. This possibility was recognised and accepted as an incidental risk attendant upon the exercise of such a power, whose presence was felt on the whole to be advantageous in a system in which the possession of property interests was often deferred long beyond adult years.

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No one disputes either that, when section 32 was framed and inserted in the Trustee Act of 1925 as a general enabling provision applying to trusts coming into existence after that date, it was expressed in terms that corresponded closely with the previous common form recommended in books of convincing precedents and adopted in practice. I do not see

any particular importance in this circumstance apart from the fact that it makes it the more natural to refer to what had been said in earlier reported decisions that bear upon the meaning and range of a power of advancement.

The word "advancement" itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as "preferment or advancement" (*Lowther v. Bentinck* ⁴⁸, "business, profession, or employment or ... advancement or preferment in the world" (*Roper-Curzon v. Roper-Curzon* ⁴⁹ and "placing out or advancement in life" (*In re Breeds' Will* ⁵⁰). Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be advancement on marriage (*Lloyd v. Cocker* ⁵¹). Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as "or otherwise for his or her benefit" were often added to the word "advancement." It was always recognised that these added words were "large words" (see *Jessel M.R. in In re Breeds' Will* ⁵² and indeed in another case (*Lowther v. Bentinck* ⁵³ the same judge spoke of preferment and advancement as being "both large words" but of "benefit" as being the "largest of all." So, too, *Kay J. in In re Brittlebank*. ⁵⁴ Recent judges have spoken in the same terms - see *Farwell J. in In re Halsted's Will Trusts* ⁵⁵ and *Danckwerts J. in In re Moxon's Will Trusts*. ⁵⁶ This wide construction of the range of the power, which evidently did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit *635 of the beneficiary who was the object of the power, must have been carried into the statutory power created by section 32, since it adopts without qualification the accustomed wording "for the advancement or benefit in such manner as they may in their absolute discretion think fit."

So much for "advancement," which I now use for brevity to cover the combined phrase "advancement or benefit." It means any use of the money which will improve the material situation of the beneficiary. It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion," etc.

I think, with all respect to the commissioners, a good deal of their argument is infected with some of this confusion. To say, for instance, that there cannot be a valid exercise of a power of advancement that results in a deferment of the vesting of the beneficiary's absolute title (*Miss Penelope*, it will be remembered, is to take at 30 under the proposed settlement instead of at 21 under the will) is in my opinion to play upon words. The element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts: the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit. I have not forgotten, of course, the references to powers of advancement which are found in such cases as *In re Joicey*, ⁵⁷ *In re May's Settlement* ⁵⁸ and *In re Mewburn's Settlement*, ⁵⁹ to which our attention was called, or the answer supplied *636 by *Cotton L.J. in In re Aldridge* ⁶⁰ to his own question "What is advancement?"; but I think that it will be apparent from what I have already said that the description that he gives (it cannot be a definition) is confined entirely to the

aspect of anticipation or acceleration which renders the money available and not to any description or limitation of the purposes for which it can then be applied.

I have not been able to find in the words of section 32, to which I have now referred, anything which in terms or by implication restricts the width of the manner or purpose of advancement. It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in *Lowther v. Bentinck* ⁶¹; and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (*In re Kershaw's Trusts* ⁶²). The exercise will not be bad therefore on this ground.

Nor in my opinion will it be bad merely because the moneys are to be tied up in the proposed settlement. If it could be said that the payment or application permitted by section 32 cannot take the form of a settlement in any form but must somehow pass direct into or through the hands of the object of the power, I could appreciate the principle upon which the commissioners' objection was founded. But can that principle be asserted? Anyone can see, I think, that there can be circumstances in which, while it is very desirable that some money should be raised at once for the benefit of an owner of an expectant or contingent interest, it would be very undesirable that the money should not be secured to him under some arrangement that will prevent him having the absolute disposition of it. I find it very difficult to think that there is something at the back of section 32 which makes such an advancement impossible. Certainly neither **637 Danckwerts J.* nor the members of the Court of Appeal in this case took that view. Both Lord Evershed M.R. and Upjohn L.J. ⁶³ explicitly accept the possibility of a settlement being made in exercise of a power of advancement. Farwell J. authorised one in *In re Halsted's Will Trusts*, ⁶⁴ a case in which the trustees had left their discretion to the court. The trustees should raise the money and "have" it "settled," he said. So too, Harman J. in *In re Ropner's Settlement Trusts* ⁶⁵ authorised the settlement of an advance provided for an infant, saying that the child could not "consent or request the trustees to make the advance, but the transfer of a part of his contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit ..." All this must be wrong in principle if a power of advancement cannot cover an application of the moneys by way of settlement.

The truth is, I think, that the propriety of requiring a Settlement of moneys found for advancement was recognised as long ago as 1871 in *Roper-Curzon v. Roper-Curzon* ⁶⁶ and, so far as I know, it has not been impugned since. Lord Romilly M.R.'s decision passed into the textbooks and it must have formed the basis of a good deal of subsequent practice. True enough, as counsel for the commissioners has reminded us, the beneficiary in that case was an adult who was offering to execute the post-nuptial settlement required: but I find it impossible to read Lord Romilly's words as amounting to anything less than a decision that he would permit an advancement under the power only on the terms that the money was to be secured by settlement. That was what the case was about. If, then, it is a proper exercise of a power of advancement for trustees to stipulate that the money shall be settled, I cannot see any difference between having it settled that way and having it settled by themselves paying it to trustees of a settlement which is in the desired form.

It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary, that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But, if application and consent were necessary requisites of advancement, that would cut out the

possibility of making *638 any advancement for the benefit of a person under age, at any rate without the institution of court proceedings and formal representation of the infant: and it would mean, moreover, that the trustees of an adult could not in any Circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the commissioners did not contend before us that the power of advancement was inherently limited in this way: and I do not think that such a limitation would accord with the general understanding. Indeed its "paternal" nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant.

The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is "nothing less than a resettlement" and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.

In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement *639 conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, *cadit quaestio*.

I ought to note for the record (1) that the transaction envisaged does not actually involve the raising of money, since the trustees propose to appropriate a block of shares in the family's private limited company as the trust investment, and (2) there will not be any actual transfer, since the trustees of the proposed settlement and the will trustees are the same persons. As I have already said, I do not attach any importance to these factors nor, I think, do the commissioners. To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment. It cannot make any difference to follow the course taken in *In re Collard's Will Trusts*⁶⁷ and deal with the property direct. On the other point, so long as there are separate trusts, the property effectually passes out of the old settlement into the new one, and it is of no relevance that, at any rate for the time being, the persons administering the new trust are the same individuals.

I have not yet referred to the ground which was taken by the Court of Appeal as their reason for saying that the proposed settlement was not permissible. To put it shortly, they held that the statutory power of advancement could not be

exercised unless the benefit to be conferred has "personal to the person concerned, in the sense of being related to his or her own real or personal needs." ⁶⁸ Or, to use other words of the learned Master of the Rolls, ⁶⁹ the exercise of the power "must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the section, whose circumstances *640 call for that to be done which the trustees think fit to do." Upjohn L.J. ⁷⁰ expressed himself in virtually the same terms.

My Lords, I differ with reluctance from the views of judges so learned and experienced in matters of this sort: but I do not find it possible to import such restrictions into the words of the statutory power which itself does not contain them. First, the suggested qualification, that the considerations or circumstances must be "personal" to the beneficiary, seems to me uncontrollably vague as a guide to general administration. What distinguishes a personal need from any other need to which the trustees in their discretion think it right to attend in the beneficiary's interest? And, if the advantage of preserving the funds of a beneficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is. Death duty is a present risk that attaches to the settled property in which Miss Penelope has her expectant interest, and even accepting the validity of the supposed limitation, I would not have supposed that there was anything either impersonal or unduly remote in the advantage to be conferred upon her of some exemption from that risk. I do not think, therefore, that I can support the interpretation of the power of advancement that has commended itself to the Court of Appeal, and, with great respect, I think that the judgments really amount to little more than a decision that in the opinion of the members of that court this was not a case in which there was any occasion to exercise the power. That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.

To conclude, therefore, on this issue, I am of opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us. It would not be candid to omit to say that, though I think that that is what the law requires, I am uneasy at some of the possible applications of this liberty, when advancements are made for the purposes of settlement or on terms that there is to be a settlement. It is quite true, as the *641 commissioners have pointed out, that you might have really extravagant cases of resettlements being forced on beneficiaries in the name of advancement, even a few months before an absolute vesting in possession would have destroyed the power. I have tried to give due weight to such possibilities, but when all is said I do not think that they ought to compel us to introduce a limitation of which no one, with all respect, can produce a satisfactory definition. First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. and moreover, as regards this fear, I think that it must be remembered that we are speaking of a power intended to be in the hands of trustees chosen by a settler because of his confidence in their discretion and good sense and subject to the external check that no exercise can take place without the consent of a prior life-tenant; and that there does remain at all times a residual power in the court to restrain or correct any purported exercise than can be shown to be merely wanton or capricious and not to be attributable to a genuine discretion. I think, therefore, that, although extravagant possibilities exist, they may be more menacing in argument than in real life.

The other issue on which this case depends, that relating to the application of the rule against perpetuities, does not seem to me to present much difficulty. It is not in dispute that, if the limitations of the proposed settlement are to be treated as if they had been made by the testator's will and as coming into operation at the date of his death, there are trusts in it which would be void ab initio as violating the perpetuity rule. They postpone final vesting by too long a date. It is also a familiar rule of law in this field that, whereas appointments made under a general power of appointment conferred by will or deed are read as taking effect from the date of the exercise of the power, trusts declared by a special power of appointment, the distinguishing feature of which is that it can allocate property among a limited class of persons only,

are treated as coming into operation at the date of the instrument that creates the power. The question therefore resolves itself into asking whether the exercise of a power of advancement which takes the form of a settlement should be looked upon as more closely analogous to a general or to a special power of appointment.

On this issue I am in full agreement with the views of Upjohn *642 L.J. in the Court of Appeal.⁷¹ Indeed, much of the reasoning that has led me to my conclusion on the first issue that I have been considering leads me to think that for this purpose there is an effective analogy between powers of advancement and special powers of appointment. When one asks what person can be regarded as the settler of Miss Penelope's proposed settlement, I do not see how it is possible to say that she is herself or that the trustees are. She is the passive recipient of the benefit extracted for her from the original trusts; the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds of Miss Penelope's settlement; it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power which by statute is made append ant to those trusts. I do not think, therefore, that it is important to this issue that money raised under a power of advancement passes entirely out of the reach of the existing trusts and makes, as it were, a new start under fresh limitations, the kind of thing that happened under the old form of family resettlement when the tenant in tail in remainder barred the entail with the consent of the protector of the settlement. I think that the important point for the purpose of the rule against perpetuities is that the new settlement is only effected by the operation of a fiduciary power which itself "belongs" to the old settlement.

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the court. Again I agree with Upjohn L.J. that these objections go to the root of what is proposed and I do not think that it would be satisfactory that the court should try to frame a qualified answer to the question that they have propounded, which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Norm I think, is such a course desired either by the appellants or the trustees. They will, I hope, know where they stand for the future, and so will the commissioners, and that is enough.

LORD HODSON.

My Lords, my noble and learned friends who are also unable to be present today, Lord Jenkins and Lord *643 Devlin, are in full agreement with the opinion which I have just read and I am also in the same agreement.

Representation

Solicitors: Alsop, Stevens, Beck & Co. ; Solicitor of Inland Revenue .

Order of the Court of Appeal in part complained of discharged except as to costs. Declared that the application of the capital proposed by the respondents, the trustees of the will of William Norman Pilkington, deceased, would be improper and unauthorised because the trusts of the new settlement if contained in the said will would be void for perpetuity. Further ordered that the respondents the Commissioners of Inland Revenue do pay, or cause to be paid, to the appellants the costs incurred by them in respect of the said appeal to this House, such costs to be taxed as between solicitor and client. Further ordered that the costs incurred by the respondents [the trustees of the will] in respect of the said appeal to this House be paid out of the estate of the said testator William Norman Pilkington, deceased, such costs to be taxed as between solicitor and client. (J. A. G.)

Footnotes

- 1 Trustee Act, 1925, s. 32: "(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property ... Provided that - (a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property ..."
- 2 [1961] Ch. 466; [1961] 2 W.L.R. 776; [1961] 2 All E.R. 330, C.A.
- 3 [1904] 1 Ch. 480.
- 4 [1915] 2 Ch. 115, C.A.
- 5 (1871) L.R. 11 Eq. 452.
- 6 (1874) L.R. 19 Eq. 166.
- 7 (1868) L.R. 6 Eq. 322.
- 8 [1937] 2 All E.R. 570.
- 9 L.R. 19 Eq. 166.
- 10 [1961] Ch. 466, 486.
- 11 L.R. 11 Eq. 452.
- 12 [1937] 2 All E.R. 570.
- 13 [1956] 1 W.L.R. 902, 904, 905; [1956] 3 All E.R. 332.
- 14 [1961] Ch. 466, 480, 481, 484.
- 15 (1881) 30 W.R. 99.
- 16 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821.
- 17 [1915] 2 Ch. 115, C.A.
- 18 L.R. 11 Eq. 452.
- 19 (1854) 19 Beav. 529, 534, 535.
- 20 (1858) 4 K. & J. 142.
- 21 [1904] 1 Ch. 480.
- 22 [1961] Ch. 466, 488, 489.
- 23 [1913] 1 Ch. 404, 413; 29 T.L.R. 306, C.A.
- 24 [1938] Ch. 39; 53 T.L.R. 1036; [1937] 3 All E.R. 823, C.A.
- 25 L.R. 11 Eq. 452.
- 26 [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386.
- 27 [1959] Ch. 699, 705, 706.
- 28 (1886) 55 L.T. 554, 556, C.A.
- 29 [1951] 2 All E.R. 528, C.A.
- 30 [1951] 2 All E.R. 528, 532.
- 31 [1962] Ch. 273, 275, 287; [1961] 3 W.L.R. 825; [1961] 3 All E.R. 389, C.A.
- 32 19 Beav. 529, 535, 536.
- 33 11 Eq. 452.
- 34 [1937] 2 All E.R. 570.
- 35 [1915] 2 Ch. 115, 120, C.A.
- 36 [1934] Ch. 112.
- 37 [1926] Ch. 136.
- 38 [1913] 1 K.B. 83, 90, C.A.
- 39 [1936] Ch. 161.
- 40 [1951] Ch. 209; [1950] 2 All E.R. 891, C.A.
- 41 [1954] Ch. 334, 340, 341; [1954] 2 W.L.R. 386; [1954] 1 All E.R. 725.
- 42 [1956] 1 W.L.R. 902.
- 43 L.R. 19 Eq. 166.
- 44 L.R. 6 Eq. 322.
- 45 [1937] 2 All E.R. 570, 572.
- 46 [1956] 1 W.L.R. 902.
- 47 55 L.T. 554.
- 48 (1874) L.R. 19 Eq. 166.
- 49 (1871) L.R. 11 Eq. 452.
- 50 (1875) 1 Ch.D. 226.

- 51 (1860) 27 Beav. 645 .
52 1 Ch.D. 226 , 228.
53 L.R. 19 Eq. 166 , 169.
54 (1881) 30 W.R. 99 , 100.
55 [1937] 2 All E.R. 570 , 671.
56 [1958] 1 W.L.R. 165, 168; [1958] 1 All E.R. 386 .
57 [1915] 2 Ch. 115, C.A.
58 [1926] Ch. 136 .
59 [1934] Ch. 112 .
60 (1886) 55 L.T. 554, 556, C.A. : "It is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or a legacy, before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled."

61 L.R. 19 Eq. 166 .
62 (1868) L.R. 6 Eq. 322 .
63 [1961] Ch. 466 , 481, 486.
64 [1937] 2 All E.R. 570 , 572.
65 [1956] 1 W.L.R. 902 , 906.
66 L.R. 11 Eq. 452 .
67 [1961] Ch. 293; [1961] 2 W.L.R. 415; [1961] 1 All E.R. 821 .
68 [1961] Ch 466 , 481.
69 Ibid. 484.
70 [1961] Ch 466 , 487.
71 [1961] Ch. 466 . 488 et seq.

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[1964] A.C. 612

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Action No.: 1103 14112
E-File No.: EVQ16SAWRIDGEBAND3
Appeal No.: _____

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

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

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees
for the 1985 Sawridge Trust

Applicants

PROCEEDINGS

Edmonton, Alberta
August 24, 2016

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

2 _____

3 August 24, 2016 Morning Session

4

5 The Honourable Court of Queen's Bench of Alberta

6 Mr. Justice Thomas

7

8 C.K.A. Platten, Q.C. For Catherine Twinn

9 C. Osuladini For Catherine Twinn

10 L. Maj For the Minister of Aboriginal Affairs and

11 Northern Development

12 J.L. Hutchison For the Public Trustee of Alberta

13 D.C. Bonora For Sawridge Trustees

14 A. Loparco For Sawridge Trustees

15 N.L. Golding, Q.C. For Patrick Twinn, et al

16 E.H. Molstad, Q.C. For Sawridge First Nation

17 G. Joshee-Arnal For Sawridge First Nation

18 S.A. Wanke For Morris Stoney, et al

19 C. Wilde Court Clerk

20 _____

21

22 **Discussions**

23

24 THE COURT: Good morning.

25

26 Are you going to do the introductions?

27

28 MR. MOLSTAD: I have been assigned that task, Sir.

29

30 THE COURT: All right.

31

32 MR. MOLSTAD: We have, representing the Sawridge Trustees,

33 Ms. Bonora and Ms. Loparco.

34

35 We have representing the Public Trustee, Ms. Hutchison. Mr. Meehan is not with us
36 today.

37

38 We have representing Catherine Twinn, Ms. Platten, and Ms. Osualdini.

39

40 We have myself, Sir, and Mr. Joshee-Arnal representing the Sawridge First Nation.

41

1 We have representing Mr. Morris Stoney, et al, Ms. Wanke.
2
3 And we have representing Patrick Twinn, et al, Ms. Golding.
4
5 We also have in attendance from the Minister of Aboriginal Affairs and Northern
6 Development, Ms. Maj from the Department of Justice.
7
8 We -- as you can see from the agenda that was sent to you yesterday, the first item on the
9 agenda is the Rule 5.13 application --
10
11 THE COURT: Yes.
12
13 MR. MOLSTAD: -- on membership and costs. And I'd like to
14 guess that the matters after that are not going to take too long, but that is a guess in terms
15 of the other matters (INDISCERNIBLE).
16
17 THE COURT: Yeah, I saw that revised agenda this morning.
18 Thanks for sending it in. But I think what I'm going to do is I'm going to reorder it,
19 because it looks to me from the revised agenda, the only matter that may take some time
20 is actually your application.
21
22 MR. MOLSTAD: That may be the case.
23
24 THE COURT: So let's see if we can move some of the
25 counsel along here.
26
27 MR. MOLSTAD: Well, I'm -- we're all in your hands, Sir, so. . .
28
29 THE COURT: All right.
30
31 MR. MOLSTAD: What order are you proposing in.
32
33 THE COURT: Oh, I'm proposing just normal chambers
34 process; that is the consent order first, get it resolved and dealt with. That would be --
35
36 MR. MOLSTAD: Number 4?
37
38 THE COURT: Number 4, the consent order. And then we'll
39 deal with these adjournment requests and --
40
41 MR. MOLSTAD: All right. Before I sit down, before we start the

1 Rule 5.13 application, I've had some discussion with my friend and I have a few
2 preliminary comments before we start that.

3

4 THE COURT: All right.

5

6 MR. MOLSTAD: Okay? Thank you, Sir.

7

8 THE COURT: Certainly. And I think I will -- that's useful,
9 because I think I've reviewed that material and I can narrow it down fairly quickly.

10

11 MR. MOLSTAD: Thank you.

12

13 THE COURT CLERK: Sorry, Sir, what was your name?

14

15 THE COURT: Mr. Molstad, Q.C.

16

17 MR. MOLSTAD: Sorry.

18

19 **Submissions by Ms. Bonora**

20

21 MS. BONORA: Sir, you'll recall that in this application, there
22 were basically two issues. One was the beneficiary designation and the second was to
23 confirm that the transfer of assets from the 1982 Trust to the 1985 Trust were -- was
24 appropriate, and that we've put that issue behind us. And through the work of counsel,
25 we've been able to reach agreement on the issue of the transfer of assets.

26

27 I believe, Sir, you received a brief from us and a copy of the consent order.

28

29 THE COURT: I did. And thank you very much for the brief,
30 because it makes it pretty clear --

31

32 MS. BONORA: Yeah. So --

33

34 THE COURT: -- well, what the basis for it is, and I'm
35 certainly satisfied that the consent order is appropriate and properly based in law.

36

37 MS. BONORA: Sir, I will not take any more time then. If
38 you've read the brief, I really have nothing else to add to the submissions that we've
39 made. And so, therefore, I think my friends would like to make a few comments, and I'll
40 just respond to those if there's anything else, unless you have any questions for me.

1

1 THE COURT: All right. I wonder if, counsel, if you wouldn't
2 mind just mentioning your name before you speak just so the clerk can keep track of
3 who's speaking?

4
5 MS. BONORA: Doris Bonora of Dentons just spoke. Thank
6 you, Sir.

7
8 THE COURT: Thanks, Ms. Bonora.

9
10 **Submissions by Ms. Hutchison**

11
12 MS. HUTCHISON: Good morning, My Lord. Janet Hutchison for
13 the Public Trustee of Alberta.

14
15 Very brief comments, My Lord, simply to give the Court some idea of why the OPTT,
16 and I believe Ms. Platten will speak to trustee Twinn, why we weren't able to arrive at a
17 joint brief, as well as a consent order. And it was simply a matter, My Lord, of some of
18 the wording around the facts and the evidence and what evidence was actually available,
19 as well as the final paragraph of the brief. Counsel just really weren't able to quite agree
20 how to characterize some of the issues around accounting.

21
22 The -- the Public Trustee would just like it noted on record that its position on the
23 consent order is that when it -- there is this reference to accounting in the preamble in
24 paragraph 2, that includes an individual accounting, as well as a passing of accounts.
25 And, of course, My Lord, for future reference, the passing of accounts for the five trusts
26 would occur logically within this proceeding, after beneficiary identification is dealt with.

27
28 But that's all we have to say, My Lord.

29
30 THE COURT: All right. Thank you. Ms. Platten?

31
32 **Submissions by Ms. Platten**

33
34 MS. PLATTEN: Sir, I think those are also our submissions, and
35 so we don't really anything further to say.

36
37 THE COURT CLERK: Sorry, your name, for the record?

38
39 MS. PLATTEN: Sorry, Karen Platten for Catherine Twinn.

40
41 **Submissions by Ms. Golding**

1
2 MS. GOLDING: Sir, Nancy Golding from Borden Ladner
3 Gervais in Calgary, and I am new to these -- this matter, acting on behalf of several of the
4 individual beneficiaries.

5
6 I just wanted to comment that my client wasn't involved in this order, and so we don't
7 intend to make any comment on it. However, we do want it noted that our understanding
8 is the order is without prejudice to the rights of our client to request an accounting as it
9 relates to the 1982 and 1985 Trusts, and for any relief that might come from that.

10
11 Thank you, Sir.

12
13 THE COURT: Thank you. Ms. Bonora, any --

14
15 MS. BONORA: Just one --

16
17 THE COURT: Look, I --

18
19 MS. BONORA: -- comment, Sir.

20
21 MS. MAJ: Sorry, sorry.

22
23 MS. BONORA: Oh, my -- my apologies.

24
25 THE COURT: You -- you can say something, but if --

26
27 MS. MAJ: That's all right. It's hard -- it's hard to see me
28 in the back.

29
30 THE COURT: Quite frankly, you are not a party at --

31
32 **Submissions by Ms. Maj**

33
34 MS. MAJ: I was simply going to actually echo
35 Ms. Platten's comments, My Lord.

36
37 THE COURT: Yeah. Well, okay. Well, just echo it and let's
38 get on with it.

39
40 Ms. Bonora?

41

1 Submissions by Ms. Bonora

2

3 MS. BONORA: Just one comment. Ms. Hutchison said that the
4 consent order was based on the accounting naturally occurring in this proceeding, and that
5 was not discussed until yesterday morning. So I don't think it is the basis for the consent
6 order, and that is a very live issue in terms of how the accounting will proceed. So I --
7 we just need to -- I'm not sure that you will be hearing that accounting. That is an issue
8 that you'll hear about later in terms of how that's going to happen, so. . .

9

10 THE COURT: All right. Mr. Molstad, you don't have
11 anything to say?

12

13 MR. MOLSTAD: I don't have anything to say. My name is
14 Mr. Molstad.

15

16 Order (Consent Order)

17

18 THE COURT: All right. The consent order being sent to me
19 with the brief, as I -- just so it's clear on the record, I did review that brief and it was
20 very helpful to me in terms of providing a legal basis for the consent order. Plus, the
21 Summary of Facts helped put me in the picture again.

22

23 So the consent order is granted, and there it is.

24

25 MS. BONORA: Thank you, Sir.

26

27 THE COURT: Madam Clerk, if you wouldn't mind handing
28 that to Ms. Bonora.

29

30 Submissions by Ms. Bonora (Distribution Proposal Adjournment)

31

32 MS. BONORA: Sir, perhaps I'll speak to the adjournment in
33 respect of the distribution proposal next.

34

35 THE COURT: All right. Sure.

36

37 MS. BONORA: Sir, the -- you'll recall in your December 17th,
38 2015, decision, you asked the Trustees to present a distribution proposal and to have it
39 approved by the Court, and so we, in fact, submitted the distribution proposal to the
40 Court. We then filed a brief in respect of approving that distribution proposal, and briefs
41 have been filed by the Office of the Public Guardian and Trustee, and by Catherine

1 Twinn.

2
3 Subsequent to the filing of those briefs, we received applications by Morris Stoney and
4 his brothers and sisters, and from Patrick Twinn, and his family Shelby Twinn and Debra
5 Sarafinchin.

6
7 In respect of the standing of those parties and whether they are beneficiaries, we believe
8 that until those applications are heard, that, as beneficiaries, they probably have a right to
9 speak. If they, in fact, are beneficiaries and are going to be treated as parties, that they
10 have a right to speak to distribution, and so we think it appropriate to postpone that issue.
11 It's ready to go once we've determined the standing of the various other parties and -- and
12 it would be our submission that especially with respect to the clients Ms. Golding
13 represents.

14
15 So those are my submissions in respect of the adjournment, and I think all counsel are on
16 board with that adjournment request.

17

18 THE COURT: So both the distribution plan, I'll call it, plus
19 the issue of -- the outstanding issue of who the beneficiaries are?

20

21 MS. BONORA: Yes. So the beneficiary definition is also
22 postponed. Counsel have advised that they believe it would be perhaps a two-day
23 application to deal with that particular issue, and so we still have to determine exactly
24 how we're going to come to bring that issue before the Court. We're still in discussions
25 among counsel on that issue.

26

27 THE COURT: Well, thank you for that, but I'll give you my
28 thinking on that issue. I'm inclined to send that issue to trial, and it won't be me hearing
29 it. It will be some other judge. I'm finding that the estimates of counsel in this matter
30 aren't too accurate, and given the nature of this litigation, I'm thinking -- my thinking is,
31 I'm not making an order, but I'm thinking this is not going to be determined on the basis
32 of affidavit evidence. It's going to go to a trial and get this thing resolved once and for
33 all. So --

34

35 MS. BONORA: Thank you, Sir.

36

37 THE COURT: -- just so you know my thinking on it.

38

39 MS. BONORA: And it --

40

41 THE COURT: And that you might want to start preparing a

1 contingency plan around that approach.

2

3 MS. BONORA: M-hm. That's very helpful to all counsel,
4 because there was some discussion about whether you would, in fact, hear that
5 application, and there was a discussion about whether we needed to make an application
6 about whether you would hear that application. So if, in fact, you are saying perhaps you
7 won't and that it should move to a trial, that gives us some direction in our next
8 discussions about scheduling and moving towards that.

9

10 THE COURT: Okay.

11

12 MS. BONORA: So thank you for those comments.

13

14 THE COURT: Yeah. No, I -- the reason I'm saying it is I
15 really came on to this before we had all sorts of rules around case management in --
16 generally, and specifically in commercial matters. I mean, case managers are meant to
17 deal with process issues, and not substantive disputes. I mean, we deal with a lot of
18 disputes over the appropriate process, but this one is going off in the direction of a more
19 general dispute. So that's why I'm thinking about it, and I -- and clearly if it went to a
20 trial, I would not be the case manager in this case.

21

22 MS. BONORA: Yes, Sir.

23

24 THE COURT: All right?

25

26 MS. BONORA: So perhaps if you could leave the issue of the
27 actual process and whether it would be a trial or whether counsel may be able to agree
28 that it could proceed by affidavit evidence, and whether we could maybe discuss that
29 before you made a decision about that and we could make some -- even if we just did it
30 by way of written submissions to you, that would be helpful to all of us, I think, to have
31 us consider that and consult with our clients.

32

33 THE COURT: That would be satisfactory to me.

34

35 MS. BONORA: Thank you. Mr. Molstad just asked me if you
36 were talking about trials of other issues on the agenda, but I think you're just talking
37 about --

38

39 THE COURT: No, I'm --

40

41 MS. BONORA: -- the definition of beneficiary, which was the

1 original issue in our action.

2
3 **Order (Distribution Proposal Adjournment)**

4
5 THE COURT: That's -- well, I think it -- my goal here has
6 been to try and get this litigation focussed, or refocussed in some cases, and it does seem
7 that the issues are narrowing, which is sort of the function of a case manager. We're
8 down to the -- well, the distribution plan, I'll call it, appears to be generally acceptable,
9 subject to some latecomers having a look at it. Whether they'll have anything to say is
10 yet to be decided, but my thinking is that the distribution plan looks like it's -- I mean,
11 I've read it. It seems quite reasonable. It looks like that issue is going to get swept off
12 the table. The -- so the one outstanding issue is the -- the scope of the beneficiary group.

13
14 MS. BONORA: Thank you, Sir.

15
16 THE COURT: So your request for an adjournment on the
17 distribution proposal application and -- is adjourned *sine die*.

18
19 **Submissions by Ms. Bonora (Standing)**

20
21 MS. BONORA: Thank you, Sir.

22
23 Perhaps, Sir, we could deal with number 3 on the list, because I don't believe Ms. Wanke
24 has any other matters that she would be attending to. I don't know that for sure, but
25 the -- so the application with respect to Mr. Stoney is an application for standing, an
26 application to be determined as a beneficiary. We're asking that matter to be adjourned.
27 We just got served with it. Obviously, there needs to be some discussion around exactly
28 what's going to happen with that, and questioning. And I don't think there's any
29 opposition to that request to adjourn, but I will leave it for Ms. Wanke to speak, and
30 Mr. Molstad would like to address it, as well.

31
32 THE COURT: All right. Well, Ms. Wanke, you're the
33 applicant -- representing the applicant, so if you'd like to speak first?

34
35 **Submissions by Ms. Wanke (Standing)**

36
37 MS. WANKE: I am, My Lord. We have no issue with
38 Ms. Bonora's request to adjourn the matter. She had proposed that counsel have a
39 conference and come to you with a proposal in terms of timelines and how the matter will
40 be heard, and we think that's reasonable. And we think counsel can certainly do that by
41 consent.

1
2 We have some concerns that matters will be decided in this proceeding before the issue of
3 our application is determined if our application doesn't move forward in a timely manner,
4 and we're wondering if it would be appropriate to suggest that our application would be
5 determined first, before any more matters of -- that effect Mr. Stoney and his brothers and
6 sisters are heard and determined, or, in the alternative, at the very least if we could be
7 added to the service list while their application is pending so we receive notice of what's
8 going on in this proceeding.

9
10 Sir, I'd --

11
12 THE COURT: Okay.

13
14 MS. WANKE: I'd also like to speak briefly to Mr. Molstad
15 speaking. I understand that Mr. Molstad wants to speak today. I appreciate that there's
16 likely hardly anything of substance that's going to be said or determined on the
17 adjournment application, since nothing of -- no merit decision is being made, but as a
18 matter of precedent we think it's important to note that the Sawridge First Nation was, in
19 your decision in 2015, expressly noted not to be a party to these proceedings, and rights
20 and benefit flow and obligations flow from being a party. Since they're not a party or a
21 respondent to our application, our position is they would first need to seek standing to
22 make any submissions. And, again, nothing of merit or substance is being determined
23 today, but for precedent, I think it's important that prior to Sawridge First Nation having a
24 say on anything to do with our application, they first satisfy the Court they have standing
25 to speak.

26
27 THE COURT: Mr. Molstad, as an active participant?

28
29 **Submissions by Mr. Molstad (Standing)**

30
31 MR. MOLSTAD: Well, we haven't been named as a respondent.
32 However, my friend's application sets out as one of the grounds that Mr. Stoney and his
33 siblings are members of the Sawridge First Nation. So it is a matter that directly affects
34 the Sawridge First Nation.

35
36 We can tell you that we will be making an application to intervene in this matter and
37 participate because of this allegation. And also you may or may not be aware that this
38 issue has been litigated before a number of courts previously, including the Federal of
39 Court of Appeal, the Federal Court and the Canadian Human Rights Commission.

40
41 THE COURT: Thank you.

1
2 MS. WANKE: But the issue that's been litigated is a different
3 issue.
4
5 THE COURT: Well --
6
7 MS. WANKE: The issue of being a beneficiary of the Trust --
8
9 THE COURT: Okay. Well, look --
10
11 MS. WANKE: -- versus being a present day member.
12
13 THE COURT: -- I'm not going to get into it.
14
15 MS. WANKE: And it -- it simply -- you're right. It simply
16 isn't a matter for --
17
18 THE COURT: Well, let me --
19
20 MS. WANKE: -- to be determined.
21
22 **Order (Standing)**
23
24 THE COURT: Let me -- I'll give you some direction right
25 now.
26
27 You can make your application in writing, with a written brief, serve it on all of the
28 participants who are here today. They can respond, or not, and you can include in that the
29 Sawridge First Nation application for intervenor status. This matter will be dealt with in
30 writing. It will not be the subject of court appearance. You can stand in line for a
31 decision, because it may take some time to get dealt with, but that's the way it will
32 proceed. Okay?
33
34 MR. MOLSTAD: In terms of timing, Sir. We would just ask for
35 a reasonable period of time to prepare and file.
36
37 THE COURT: Well, certainly. Well, let's just pick dates. So
38 pick end dates.
39
40 MR. MOLSTAD: Pardon me?
41

1 THE COURT: The -- the applicant Stoney will have a -- well,
2 they've got an application, or -- all I've got is a Notice of Motion or --
3
4 MR. MOLSTAD: Right.
5
6 THE COURT: So, but the -- no affidavit ever made it to me,
7 my desk. So all materials, including a written brief in respect of this application to be
8 joined as a party by Maurice Stoney shall be completed, filed and served by September
9 30th, 2016, and the respondents, including a proposed intervenor, the Sawridge First
10 Nation, by October 31st.
11
12 MR. MOLSTAD: But we'll be making an application to
13 intervene. Should -- is that October 31st for us?
14
15 THE COURT: Well, you can put it in right -- yeah, just be --
16 you're a without-prejudice respondent, all right? Sawridge First Nation, you're to be
17 served with this application.
18
19 MR. MOLSTAD: Okay.
20
21 THE COURT: So double up on the response to the application,
22 and put in your intervenor response.
23
24 MR. MOLSTAD: So --
25
26 THE COURT: Or position.
27
28 MR. MOLSTAD: -- I just want to make sure I understand, Sir.
29 When do we file our application to intervene? September 30th --
30
31 THE COURT: You can do it --
32
33 MR. MOLSTAD: -- or October --
34
35 THE COURT: Well, do it by September 30th.
36
37 MR. MOLSTAD: All right. Thank you.
38
39 THE COURT: Okay?
40
41 MR. MOLSTAD: Yeah.

1
2 THE COURT: And then we'll give you until mid-November,
3 November 15th, for the Maurice Stoney applicant to respond in writing to those,
4 and in particular the intervention application.
5

6 MS. WANKE: My Lord, my only concern with the proposed
7 schedule is that Ms. Bonora had requested to question on the affidavit last week, and we
8 provided her -- admittedly, it was right before this application -- we provided her with
9 three dates before today, and those weren't acceptable. So if questioning is to take place,
10 I wonder if we could have a commitment? I know that Mr. Stoney will make himself
11 available. Can we have a commitment from Ms. Bonora that any questioning that will
12 take place will take place before September 10th?
13

14 THE COURT: Well, why don't you work that out with
15 counsel?
16

17 MS. WANKE: Well, my fear is that it will happen after.
18

19 THE COURT: Well, I'm not going to get into it. Work it out
20 with counsel. We're not going to stand this litigation still while, you know, the
21 latecomers get their act together. You can deal with her.
22

23 MS. WANKE: Thank you, My Lord.
24

25 THE COURT: I'm not going to intervene in it.
26

27 Now, we've got another matter, another similar latecomer.
28

29 **Submissions by Ms. Golding (Scheduling)**
30

31 MS. GOLDING: That is correct, Sir. And, Sir, I had actually
32 prepared an order that I had provided to counsel and have comments on, and it is
33 (INDISCERNIBLE) in accordance with those comments.
34

35 Sir, my application and my order in terms of the scheduling just indicated that our
36 application would be adjourned to allow counsel to schedule a hearing of the matter.
37 And, in fact, Ms. Bonora and I may be able to come to an agreement in terms of the
38 standing part of that, although perhaps not the costs part. And then we had put into this
39 order that until the hearing date, and without prejudice to the actual decision that gets
40 made, that we would be considered to be parties and would have standing to make
41 submission, and that any documents that are to be served on our clients could be served

1 on our office, Sir. And as I've indicated, counsel have all approved the order.
2

3 THE COURT CLERK: Sorry, can you state your name for the record?
4

5 MS. GOLDING: Sorry, I apologize. Nancy Golding.
6

7 THE COURT: I take it when you say all counsel, it includes
8 the Sawridge First Nation and Mr. Molstad?
9

10 MS. GOLDING: I did talk with Mr. Molstad about it --
11

12 MR. MOLSTAD: We're not --
13

14 MS. GOLDING: But he'd indicated --
15

16 MR. MOLSTAD: -- a party to this.
17

18 MS. GOLDING: -- he's not a party to this.
19

20 THE COURT: Yeah, I know you're not party, but have you
21 seen this?
22

23 MR. MOLSTAD: Well, I haven't seen it, no. Sorry.
24

25 MS. GOLDING: I -- I tried to show it to him, but he didn't want
26 to look at it.
27

28 MR. MOLSTAD: It appears that this is simply an adjournment
29 and deems them to be parties until it's decided, and that seems reasonable, Sir.
30

31 THE COURT: I'm just wondering about -- again, I keep
32 clogging this litigation up with additional parties who really don't -- I mean, on the face
33 of it I'm not seeing what Mr. Patrick Twinn and -- who is already a beneficiary. . .
34

35 MS. GOLDING: That's correct, Sir.
36

37 **Order (Standing)**
38

39 THE COURT: I'm just concerned about clogging this litigation
40 up with unnecessary parties. I'm not saying Mr. Twinn and his relations are unnecessary
41 parties, but the more lawyers and the more people that get added into this litigation

1 simply make it more difficult to bring to a conclusion, and I'm not sure at this stage that
2 there aren't enough people involved in this to raise all the issues that should be raised.

3
4 I'm not prepared to grant this order. I'm prepared to -- you -- I'm not prepared to grant
5 it, and I'm just going to -- Patrick Twinn and company, I'm going to -- you can proceed
6 in the same way as Mr. Stoney.

7
8 MS. GOLDING: Thank you, Sir.

9
10 THE COURT: In terms of we'll deal with their application in
11 writing. All right? Same timelines?

12
13 MS. GOLDING: That -- that's fine, Sir. Thank you, Sir.

14
15 THE COURT: In include Sawridge First Nation in terms of the
16 receipt of the materials, and you can decide whether or not you want the band -- pardon
17 me, the Sawridge First Nation can decide whether they want to take a position on
18 intervention.

19
20 MS. GOLDING: Thank you, Sir.

21
22 THE COURT: All right? So otherwise that is -- you're
23 adjourned *sine die*. Your matter's adjourned *sine die* as of --

24
25 MS. GOLDING: Thank you, Sir.

26
27 THE COURT: Madam Clerk, I'm just going to pass that
28 proposed consent order back.

29
30 Okay. Madam Clerk, I've moved along fairly quickly. Would you like to -- are you okay
31 with -- everything's adjourned? You've got notes?

32
33 All right. We're -- you're the only application outstanding.

34
35 **Submissions by Mr. Molstad (Application)**

36
37 MR. MOLSTAD: Just I have a couple of preliminary comments
38 before my friend makes her submissions in relation to this matter, and we're really in
39 your hands in terms of the procedure, but the comments are very brief.

40
41 When we referred in our brief to the decision of *Francis Kutee (phonetic)* as a decision of

1 the Supreme Court of British Columbia, we did not indicate that it was reversed by -- on
2 the merits by the BC Court of Appeal, and this was an unintentional oversight on our
3 part. We do say, Sir, that the comment of the trial judge is consistent with the law in
4 Alberta, and will make submissions in that regard when we make our submissions.

5
6 We also spoke to our friend and there was an unintentional error in their brief, which is
7 the written submissions of the Public Trustee of Alberta in response to Sawridge First
8 Nation's costs submissions at page 6.

9
10 THE COURT: Sorry, which one of the briefs?

11
12 MR. MOLSTAD: It's the written submissions of the Public
13 Trustee of Alberta in response to the Sawridge First Nations costs submissions.

14
15 THE COURT: Okay. The August 19th -- filed August 19th?

16
17 MR. MOLSTAD: August 19th, that's correct.

18
19 THE COURT: Okay.

20
21 MR. MOLSTAD: And in paragraph 20, my friend has written that
22 at the September 2nd and 3rd hearing, Thomas, J ordered the SFN would prepare and
23 serve an Affidavit of Records. That's a typographical error.

24
25 THE COURT: Sorry, I'm still getting the paragraph.

26
27 MR. MOLSTAD: Sorry.

28
29 THE COURT: Twenty?

30
31 MR. MOLSTAD: Paragraph 20.

32
33 THE COURT: On page 6?

34
35 MR. MOLSTAD: Page 6. It says that the Sawridge First Nation,
36 SFN, would prepare and serve an Affidavit of Records according to the rules. That was
37 the Sawridge Trustee, not the Sawridge First Nation.

38
39 THE COURT: Okay.

40
41 MR. MOLSTAD: And that was also an unintentional error on the

1 part of my friend.

2
3 MS. GOLDING:

Thank you, Mr. Molstad.

4
5 THE COURT:

6 certainly appreciate the written briefs. I tend to still move on paper, as opposed to
7 electronic, but if you -- you obviously have these briefs in electronic form. I'm not
8 talking the appended authorities, but could you please email the body of your briefs? And
9 I've got two briefs from the Public Trustee and one brief from you. Mr. Molstad, if you
10 wouldn't mind just emailing them to my assistant, Denise Sutton. I think all of you have
11 her email address.

12
13 MR. MOLSTAD:

Is that without the attachments. Sir?

14
15 THE COURT:

If you've got the -- if you --

16
17 MR. MOLSTAD:

We -- we can send it all.

18
19 THE COURT:

20 just -- I don't want to run the costs up for you. If they are -- if they're already scanned
21 in and ready to go, that would be helpful.

22
23 All right. I'll just tell you I -- so I have the three briefs. I did note --

24
25 MS. HUTCHISON:

26 My Lord, just so that the Court has it in front
27 of -- in front of your -- of My Lord, Sawridge First Nation filed a brief first March 15th.

28 THE COURT:

Right.

29
30 MS. HUTCHISON:

31 And then -- and so there are actually four
32 briefs.

33 THE COURT:

And I don't have that brief. I don't know --

34
35 MS. HUTCHISON:

36 My Lord, I can certainly hand up my copy
37 for --

38 THE COURT:

39 Well, it might -- it may have come down here,
40 but it didn't --

41 Great. Well, thanks. That was the other question I had. So that's the March 15th one.

1
2 MR. MOLSTAD: The body of that brief is attached to our brief
3 of August 16th --

4
5 THE COURT: Yeah. No, I was --

6
7 MR. MOLSTAD: -- as Appendix 1.

8
9 THE COURT: Yeah, I saw that, but I didn't -- it was more the
10 attachments to it that was all about.

11
12 MS. HUTCHISON: Whenever you're ready, My Lord.

13
14 THE COURT: Okay.

15
16 **Submissions by Ms. Hutchison (Application)**

17
18 MS. HUTCHISON: My Lord, I just thought I'd start out with some
19 very brief comments on the 513 assets, or settlement application as we referred to, as
20 both. And that is, of course, the application that was withdrawn, and we simply wanted
21 to confirm that before the Court. Our comments are really directed more at some of the
22 submissions the Sawridge First Nation has on costs. And we'll speak to that more fully,
23 but just in the context of that application, as we've set out for the Court in our briefs, it's
24 important for the Court to realize that the OPGT had started some efforts to try to have
25 cooperative discussions in this matter as early as February. The reality was,
26 unfortunately, on this topic, things did not bear fruit until late in the day. There was a
27 clarification offered by the Trustees on May 14th. Counsel, both for the Public Trustee of
28 Alberta and for Trustee Twinn, I think were quite diligently talking to Ms. Bonora about
29 how to modify that clarification, and ultimately we came to an agreement on the terms of
30 it on July 27th. It's unfortunate that that was also the morning that Paul Bujold was
31 being questioned, My Lord, but Sawridge First Nation was made aware of that withdrawal
32 as the questioning began.

33
34 And so, you know, certainly, My Lord, one might -- one might hope that everything had
35 been resolved at an earlier date, but this was a very important part of this proceeding. It's
36 final relief, it's a critical issue, and we would submit that the Public Trustee of Alberta
37 was simply exercising due diligence, and the timing of the withdrawal should not be held
38 against the Public Trustee in relation to costs.

39
40 In terms of whether the Rule 5.13 assets application was necessary, of course it was filed
41 at the time that there was a broader scope of relevance at play. Once the scope of

1 relevance was narrowed by the consent order, the assets application was withdrawn. And
2 as we will comment later on our -- our submissions on costs, My Lord, the Public Trustee
3 of Alberta would take the position there's no basis to grant costs in relation to the assets
4 application.

5
6 We understand that the Trustees are not seeking costs of that application. It is solely an
7 application by the Sawridge First Nation. Is that correct, Ms. Bonora?

8
9 MS. BONORA: That's correct, Sir. Yes.

10
11 THE COURT: Thank you.

12
13 MS. HUTCHISON: So on to the beneficiary application, My Lord,
14 or the membership 513 application, whichever way the Court wishes to refer to it.

15
16 As indicated in our August 5th brief at paragraph 4, the Public Trustee of Alberta has
17 brought that application to insure the parties have appropriately applied Sawridge 3 to
18 confirm the Court is satisfied that all the evidence it needs to identify potential minor
19 beneficiaries is before the Court, and also to confirm that the Court is satisfied with the
20 form in which the information is being put before the Court. At this point, we have lists.
21 We don't have an affidavit. There is obviously a bit of a question about whether any of
22 that information could be questioned on, or examined on, and who would -- who would
23 be questioned.

24
25 As the Court is aware, and I'm referring the Court here to our August 5th brief at
26 paragraph 7, the Public Trustee of Alberta was appointed, in part, to assist the Court in
27 identifying the beneficiary class of affected minors. As of Sawridge 3, that does include
28 identifying potential but not yet identified minors who are children of Sawridge First
29 Nation members, or membership candidates.

30
31 When the Court explained what was meant by membership candidates, and I'm referring
32 to Sawridge 3, paragraph 37 and paragraph 56 -- and Sawridge 3, My Lord, is available, I
33 think, in almost every brief that's been filed, so I hope the Court can reference it easily --
34 that there were three categories of minors to be represented by the Public Trustee, minors
35 who are childrens of -- children of members, children of adults with unresolved
36 application, children of adults with rejected applications, so long as there is an intention to
37 challenge the rejection.

38
39 The OPGT has brought this matter forward to the Court because it is obviously the
40 Court's ultimate decision to decide whether or not there's adequate evidence to deal with
41 that beneficiary identification, and there were aspects of both Sawridge First Nation's

1 information which, while very helpful, left some lack of clarity and aspects of Sawridge 3
2 that the OPGT both wanted to ensure was interpreted correctly by the Public Trustee of
3 Alberta and the Sawridge First Nation, but also to ensure that there was not anything
4 requested that the Court did not want requested.

5
6 All of that was done, My Lord, in good faith and very much with the -- with the Public
7 Trustee's intention to carry out the mandate that it's been given. And I realize my friend
8 Mr. Molstad has a different characterization of that. I would firmly say to the Court that
9 the Public Trustee of Alberta has brought this application forward in good faith and with
10 the full intention to meet its mandate appropriately.

11
12 My Lord, then going on, and I'll refer you to our brief at paragraph 26 of the August 5th
13 brief, and Sawridge 3 paragraph 48 to 55. Again --

14
15 THE COURT: Yeah, just I actually want to get -- this is the
16 part that's outstanding.

17
18 MS. HUTCHISON: Yes. Yes.

19
20 THE COURT: So just give me those -- you want to -- I'm
21 starting at paragraph 24 of your brief, sort of what I had my eye on, because it sets out
22 the three categories that I guess you're seeking some direction on.

23
24 MS. HUTCHISON: The start of that discussion is at paragraph 24
25 of our August 5th --

26
27 THE COURT: Yeah.

28
29 MS. HUTCHISON: -- brief, My Lord. It then does go on through
30 to paragraph --

31
32 THE COURT: Well, until we shift to costs.

33
34 MS. HUTCHISON: Until paragraph 30, actually.

35
36 THE COURT: Thirty?

37
38 MS. HUTCHISON: Of that brief. But --

39
40 THE COURT: Yes.

41

1 MS. HUTCHISON: -- the focus of the discussion would be
2 paragraph 24 through to 28 of that paragraph.

3
4 THE COURT: Well, it sounded very useful. Now, that -- I
5 must say when I read it, it didn't read it in relation to that March 5th -- the March 15
6 submission, Sawridge First Nation. But in terms of getting more definition around these
7 categories, or potential categories, the Sawridge First Nation has now in its brief starting
8 at paragraph 39, provided some perspective on at least what Sawridge First Nation
9 believes these terms mean, such as unresolved application.

10
11 Can you focus your -- did you -- have you -- I'm sure you've read them. What's your
12 position in respect to the definition as provided by Sawridge First Nation in their brief --
13 in their brief?

14
15 MS. HUTCHISON: My Lord, and with the greatest of respect, I
16 read quite a bit of Sawridge First Nation's submission around paragraph 39 as simply
17 quoting Sawridge 3 to some degree. I'm not completely certain, My Lord, that it's given
18 us complete insight into how Sawridge First Nation determined what qualified as a
19 pending application. And that said, My Lord, part of our written submissions have been
20 quite clear that if the Court is satisfied that the information now before you does meet all
21 of the questions that you set out in Sawridge 3, and the criteria set out in paragraph 48 to
22 55 of Sawridge 3, the Public Trustee of Alberta accepts that.

23
24 My Lord, the one other -- the one other element of this that I don't believe -- I don't
25 believe there is reference to, Sawridge 3 provides a mandate to only deal with rejected
26 applications, if there is an intention. The Court's word referred to an intention to
27 challenge.

28
29 THE COURT: Okay. Let work through this --

30
31 MS. HUTCHISON: Oh.

32
33 THE COURT: -- in a logical --

34
35 MS. HUTCHISON: Certainly, My Lord.

36
37 THE COURT: -- fashion, if you don't mind. I'm looking at
38 paragraph 24 subparagraph 1 of -- on page 8 of your brief, and you've developed those
39 categories based on Sawridge number 3.

40
41 The first one, minors who are children of the members of the Sawridge First Nation. And

1 then you say, paragraph 25 of your brief in relation to category 1:

2
3 Upon confirmation that the Court does not require anything more
4 formal than the April 5, 2016 list, such as an affidavit, and does
5 not require it to be prepared by Sawridge First Nation, the Public
6 Trustee confirms the Court now has a list of minors who are
7 children of band members up to April 5, 2015, as prepared by the
8 Sawridge trustees.
9

10 MS. HUTCHISON: And, My Lord, that's another typo. That should
11 be April 5, 2016.

12
13 THE COURT: Okay.

14
15 MS. HUTCHISON: The reference was correct at the start of the
16 paragraph, and then --

17
18 THE COURT: Yeah, okay.

19
20 MS. HUTCHISON: -- not carried through. My apologies.

21
22 THE COURT: No problem. Well, I have looked at that
23 material, and I am satisfied with it, so that that category's off the table. Okay?

24
25 MS. HUTCHISON: Thank you, My Lord. That's very useful
26 direction.

27
28 THE COURT: All right.

29
30 MS. HUTCHISON: Thank you. So then, My Lord --

31
32 THE COURT: Now, let's go on to unresolved applications.
33 That's the one that -- that's the term that's dealt with by Mr. Molstad in the Sawridge
34 First Nation brief at paragraph 39. So I'd just ask you to have a look at that.

35
36 MS. HUTCHISON: And so, My Lord, the -- the statement that
37 Sawridge First Nation makes is that:

38
39 This confirms that in order to be considered an unresolved
40 application, an applicant must have at least submitted a completed
41 application for membership.

1
2 And, My Lord, as we've indicated in our brief, that is, of course, one of the other terms
3 that I think all the parties would benefit from clarification for. And it may be, My Lord,
4 that you've already answered that question in Sawridge 3. And having told you it's in
5 every brief, I now have to find a copy of it. I just --

6
7 There we go. Yeah.

8
9 So, My Lord, paragraph 51 --

10
11 THE COURT: Yeah. Which tab of which brief are you --

12
13 MS. HUTCHISON: Tab -- tab 7 of the Sawridge August 16th brief.

14
15 THE COURT: Okay. And page?

16
17 MS. HUTCHISON: It's page 12 of Sawridge 3, which is tab 7, at
18 tab 7 of that brief.

19
20 THE COURT: Yeah.

21
22 MS. HUTCHISON: And paragraph 52.

23
24 THE COURT: Got it.

25
26 MS. HUTCHISON: There is a comment, there's an obiter comment,
27 My Lord, about incomplete applications or other potential SFN candidates. And so it may
28 be, My Lord, that the intention is that if Sawridge First Nation has deemed an application
29 complete, that is where the Court -- it's a complete application, deemed complete by the
30 Sawridge First Nation, but not yet -- it has not yet proceeded to the point of a decision.

31
32 THE COURT: M-hm.

33
34 MS. HUTCHISON: That may be all the Court intended to capture
35 by unresolved applications. It was simply the interplay of the various different terms that,
36 frankly, My Lord, was causing the Public Trustee of Alberta to feel it was necessary to be
37 certain that it had captured the full scope of the potential minor beneficiaries.

38
39 THE COURT: Okay. So at least on the category 2 then on the
40 unresolved applications, you simply seek my direction of amplification or clarification of
41 whatever I said in Sawridge number 3 on that subject.

1
2 MS. HUTCHISON: Correct, My Lord. If we understand
3 Mr. Molstad's January 19th letter correctly, and we, of course, don't have a full -- full
4 information about how the lists were developed or who was consulted, but if we
5 understand them correctly, the pending applications would be applications where Sawridge
6 First Nation deems the application complete in that it has the information Sawridge First
7 Nation decides it needs for the -- for the application, but there's been no actual
8 membership decision. If I understand Sawridge First Nation correctly, that's what they're
9 saying about pending applications.

10
11 Of course the Court's aware of this question of what is a complete application or not. We
12 simply wanted to be certain that that was not included in unresolved applications. If
13 there's an individual who is waiting for decisions about what else they have to provide, if
14 there's an individual waiting for decisions about whether what they provided is adequate,
15 are they within -- and they have minor children obviously, My Lord, are they within the
16 contemplation of the Public Trustee of Alberta, or is the crystallizing moment when the
17 Sawridge First Nation says your application is now considered complete? Because there is
18 this potential time period where something's been submitted and the person is waiting for
19 a determination on whether they are going forward or not in the membership process.

20
21 THE COURT: I haven't had time to go back and look at the
22 membership rules of the Sawridge First Nation, but is there a deeming provision in that
23 set of rules about if an application's not dealt with within a certain period of time, it's
24 deemed to be rejected or --

25
26 MS. HUTCHISON: I don't believe so, My Lord. I didn't bring
27 those.

28
29 MR. MOLSTAD: May I help a bit?

30
31 THE COURT: Yes.

32
33 MS. HUTCHISON: Absolutely.

34
35 THE COURT: Certainly.

36
37 **Submissions by Mr. Molstad (Application)**

38
39 MR. MOLSTAD: Ms. -- there is not, Sir, but when we sent the
40 list of the applications to Your Lordship and to my friend, it included one of the names
41 where the application -- the applicant did not include hi address or contact information, so

1 clearly it was incomplete. An inquiry of our in-house counsel, he advises me that that list
2 is every application they've received.

3

4 THE COURT: All right. Thanks.

5

6 MR. MOLSTAD: But notwithstanding that --

7

8 THE COURT: But there's no -- but there's no drop dead date.

9

10 MR. MOLSTAD: Yeah. No, no. And --

11

12 THE COURT: It's not -- not like planning legislation.

13

14 MR. MOLSTAD: And our submissions were based on your
15 decision where you said it should be completed. Sawridge went beyond that.

16

17 THE COURT: Okay.

18

19 **Submissions by Ms. Hutchison (Application)**

20

21 MS. HUTCHISON: And, My Lord, that's very useful clarification, I
22 think, for -- for everyone today.

23

24 THE COURT: Okay. That's great. Thank you.

25

26 So now I think probably we've discussed unresolved enough. What about the third
27 category of rejected?

28

29 MS. HUTCHISON: I think the only -- or the central issue on -- on
30 rejected, My Lord, as long as there is no distinction between rejected and unsuccessful,
31 and the reason that we highlight the different terminology, My Lord, it ties in again to
32 this gray area we were talking about where the potential is somebody submits what they
33 consider to be an application, but then it's not treated as an application for a period of
34 time. Is that unsuccessful, or does there have to be an actual written determination by
35 Sawridge First Nation that there's been a denial of membership status?

36

37 I realize it's a fine point, My Lord, but the Public Trustee of Alberta wanted to --

38

39 THE COURT: Okay.

40

41 MS. HUTCHISON: -- ensure it was on point on that.

1
2 The other element of the rejection category, My Lord, ties into the Court's reference --
3 and I apologize, I just have to find the paragraph I'm looking for in Sawridge 3.

4
5 I apologize, My Lord, for taking this long.

6
7 Paragraph 53 of Sawridge 3, which is at tab 7 of the Sawridge First Nation August 16th
8 submissions.

9
10 THE COURT: I have that.

11
12 MS. HUTCHISON: Page 13:

13
14 The Public Trustee is entitled to inquire whether the rejected
15 candidate intends to appeal the membership rejection, or challenge
16 the rejection through judicial review.

17
18 Mr. Molstad's January 19th letter is very clear. He advised that there are no pending
19 appeals or judicial reviews, but the letter doesn't go on to provide a list of everyone that's
20 been rejected. And that may be perfectly appropriate, My Lord. The Court may want
21 that inquiry to end there. It's -- it really turns on this question of does the Public Trustee
22 have an obligation to reach out and find out the intention of every adult applicant who's
23 been rejected who has minor children, or is it only relevant to look at whether or not
24 there's an appeal on the books? And if it's the second one, My Lord, I believe
25 Mr. Molstad has provided us with the information we need. If there is an element of
26 assessing intention, there is a question of whether the Court wants the Public Trustee to
27 go farther than that and contact rejected individuals.

28
29 As the Court is aware, obviously there can be arguments around limitations and the appeal
30 periods. We don't know if that's part of our scope at this time. And that's the sum of
31 our comments on category number 3.

32
33 THE COURT: Okay.

34
35 MS. HUTCHISON: As we've referred to it in our sub -- in our
36 paragraph 24, My Lord.

37
38 And, My Lord, that really -- that really sums up the clarification element of this matter on
39 the question of the form in which the information has been provided to the Court. The
40 Public Trustee of Alberta is essentially just asking is the Court satisfied with a list
41 attached to a letter from counsel, or do we need something more formal that can be

1 questioned upon?
2

3 And in terms of why that would be necessary, My Lord, it's really a question of whether
4 the Public Trustee has any obligation to try at some point to coalesce all the general
5 information that we have on applicants, and now the named specific information and try
6 to understand that and pull it together. It may prove more difficult to do if there's no
7 ability to question. It may not be impossible, but it may be quite, quite challenging. If
8 the Court has no desire to have that occur, it may be that these lists, in their current form,
9 are all that the Court requires for beneficiary identification.
10

11 THE COURT:

Well, I think the way we'll have to deal with
12 that is I don't have the time or the resources to start plowing through all of this material
13 to see whether or not certain criteria are met. What I can do for you is give you
14 clarification on the scope of these categories, and then -- but I would then remit it back to
15 the Public Trustee to, you know, look at the material you've got, and you're either
16 satisfied or you're not. If you're not, if there is some additional information you think
17 you need to meet the clarified definitions, then I guess the first place to go is Mr. Molstad
18 and Sawridge First Nation, see if you can resolve it on a voluntary out-of-court basis. If
19 there's still some issue outstanding, then you can come back. Okay? But I'm -- I don't
20 want anybody to be under the misapprehension that I'm going to plow through all this
21 material and decide whether or not the definitions or the clarified categories are satisfied.
22 It's going to go back to the parties to -- or participants to resolve. Okay?
23

24 MS. HUTCHISON:

That's very helpful, My Lord. Thank you.
25

26 I think the final comment on -- sorry, just a few very brief comments to respond to a few
27 items my friend has raised.
28

29 Mr. Molstad has raised a concern about lack of specificity or that the Public Trustee has
30 not told Sawridge First Nation exactly what is wanted. The Public Trustee is more than
31 willing to have Sawridge First Nation provide something in a list format to deal with their
32 confidentiality concerns. Frankly, the generality of the application was intended, to some
33 degree, to deal with the confidentiality concerns that were -- that were laid out for us in
34 September which we were not aware of at the time that we filed the amended application
35 my friend has referred to in his materials. It's not the intention of the Public Trustee of
36 Alberta to interfere with the Sawridge First Nation's concerns on that if -- frankly,
37 Sawridge 3 made it clear that that was not appropriate, and the Public Trustee is
38 respecting that.
39

40 In terms of some of the comments about whether -- or the submissions about whether the
41 Public Trustee of Alberta has essentially gone on a fishing expedition, My Lord, and

1 we're certainly extremely sorry if it's come across in that way to anybody, but that's not
2 the case, My Lord. *Kadoura*, although not a 5.13 application, is relevant.

3
4 We know in this proceeding, My Lord, that Sawridge First Nation is the repository and
5 the best source of evidence on all membership matters. They've become involved in the
6 matter by voluntarily helping the Trustees with that information. They really are the
7 source, as it were, for membership information that's required for beneficiary
8 identification, and that is the only motivation for the Office of the Public Trustee's
9 request. It's not at all intended to be a fishing expedition, My Lord.

10
11 Those are my submissions on the substance of the application, My Lord.

12
13 Now, as the Court will be aware, there is a costs application by Sawridge First Nation. I
14 can address that now or I can turn over to Mr. Molstad on substance, and then respond --
15 and then let him deal with his costs application, and I can respond. Completely in the
16 Court's hands.

17
18 THE COURT: Well, I think let's go that way. It's Sawridge --
19 a Sawridge application.

20
21 MS. HUTCHISON: Thank you, My Lord.

22
23 THE COURT: Thank you very much. But maybe in -- you
24 know, before you go right into the costs thing, my mind is now focussed on the categories
25 of beneficiaries.

26
27 **Submissions by Mr. Molstad (Application)**

28
29 MR. MOLSTAD: Yeah, I was --

30
31 THE COURT: If you wouldn't mind.

32
33 MR. MOLSTAD: I was going to deal with the -- leave this here.
34 I'll give it back.

35
36 THE COURT: Could we jack it up a little higher for him.

37
38 MR. MOLSTAD: That would be helpful, too, Sir.

39
40 THE COURT: We could just pile --

41

1 MR. MOLSTAD:

My name is Mr. Molstad, Madam Clerk.

2

3 We -- I believe you have everything in front of you in terms of what intend to refer to,
4 but the four briefs for -- and I would like to deal with some of the facts in terms of what
5 brings us here today. And I want to go back a bit, because some of this is interrelated in
6 terms of the substance of the application, as well as what we deal with in terms of costs.

7

8 Back on June 15th, 2015, I received on my desk a large box of written material and, in
9 fairness, we were advised later that it was served Friday afternoon, July 12th, 2015.

10

11 This box of material included a motion returnable June 30th, 2015, and we have that
12 attached as tab 2 of our written submissions, August 16th.

13

14 The motion did not name Sawridge First Nation as a respondent. However, as you read
15 that motion, you can see that it sought an order against the Sawridge First Nation. And
16 the relief that it was seeking against the Sawridge First Nation included an order requiring
17 Sawridge First Nation to file an Affidavit of Records, an order requiring the Nation to
18 produce numerous records, including records related to issues referenced in an unfiled
19 affidavit of Catherine Twinn, records related to another Court of Queen's Bench action,
20 documents produced in Federal Court action T6686, which was a Constitutional challenge
21 that Sawridge First Nation advanced with respect to Bill C-31 that went through two trials
22 in the Federal Court, and appeals, and documents produced in Federal Court action
23 T265589, another Federal Court action. And -- and we would encourage you to reread
24 this motion at tab 2 of our authorities, because it is our submission, Sir, that this
25 application was devoid of merit, and procedurally and substantively incorrect. It, in our
26 submission, is demonstrative of an application of a party who has a blank cheque and who
27 takes the position that there will be never any consequences for them in relation to costs.

28

29 The application, tab 2, was filed after the questioning of Mr. Bujold on May 27th and
30 28th, 2014, and after the Sawridge Trustees provided answers to undertakings December
31 1, of 2014. And I would point out that the questioning of Mr. Bujold, as a representative
32 of the Sawridge Trust, and his Answers to Undertakings provided what we would submit
33 was a significant amount of information, not all of the information, but a significant
34 amount regarding both the transfer of the assets to the 1985 Trust, and the identification
35 of the Trust beneficiaries. It's important to keep in mind that that information was
36 provided to the Public Trustee in 2014.

37

38 We would refer you also, Sir, to tab 6 of the Sawridge First Nation written submissions,
39 and this is the brief that was filed in August of 2015 by the Sawridge First Nation. And
40 in paragraph 7 of that brief, on page 2, it sets out that since the matter was commenced,
41 the trial -- that the Trustees of the Sawridge Trust, and with assistance from Sawridge

1 First Nation, had provided the Public Trustee with extensive disclosure. And I encourage
2 you to read all of paragraph 7, over to page 3, in terms of just what that disclosure was.
3 We submit that it was extensive and it was provided in 2014, or earlier.

4
5 Now, we know that the Public Trustee has not questioned Mr. Bujold in relation to his
6 undertakings that were provided on December 1, of 2014.

7
8 In the Public Trustee's response in relation to costs, or it's the -- excuse me, it's the
9 written missions of the Public Trustee in response to Sawridge First Nation's costs
10 submissions.

11
12 In paragraph 14 -- are you with me there, Sir?

13
14 THE COURT: Yeah, I'm just getting there. Thanks.

15
16 MR. MOLSTAD: Yeah. In paragraph 14, they state that on June
17 17th, 2015, Sawridge First Nation requested an adjournment of all matters scheduled for
18 June 30th, 2015. That is not correct. That is not true, Sir. On June 17th, 2015, we wrote
19 to this Court advising that we were requesting an adjournment of all matters that purport
20 to name Sawridge First Nation as respondent. And our letter that was sent to the Court is
21 found at tab 3 of the Sawridge First Nation written submissions.

22
23 THE COURT: And I'm taking it now you're just -- you're
24 always talking about your most recent brief that is filed --

25
26 MR. MOLSTAD: That's right.

27
28 THE COURT: -- August 16th?

29
30 MR. MOLSTAD: Yes, it is.

31
32 THE COURT: Thanks.

33
34 MR. MOLSTAD: It's the most recent August 16th, '16 brief, and
35 tab 3.

36
37 THE COURT: Okay. I've got the June 17 --

38
39 MR. MOLSTAD: Yeah. And that June --

40
41 THE COURT: -- 2015 letter?

1
2 MR. MOLSTAD: -- 17 letter, if you read the second paragraph,
3 and this was sent to the Court and to other counsel:
4

5 We have requested an adjournment of all matters that purport to
6 name Sawridge First Nation as a respondent. All of the parties,
7 with the exception of the Public Trustee, Ms. Kennedy has advised
8 that she will not be appearing at this application, have agreed to
9 consent to the adjournment of all matters that purport to name
10 Sawridge First Nation as a respondent.
11

12 We also refer you to your order which is found at tab 4, and we won't read that to you,
13 but in paragraph 1 of that order at tab 4, you make it very clear, Sir, that that's exactly
14 what we were asking for, an adjournment of all matters that were directed at the Sawridge
15 First Nation. And, of course, the transcript of that date is part of the Public Trustee's
16 submissions at tab 4. And at page 5 and 6 of that transcript, that confirms the very same
17 thing.
18

19 Now, on June 24th, of 2015, we appeared before you, and our application for an
20 adjournment was granted and the Public Trustee was ordered to provide the Sawridge
21 First Nation with full particulars of the relief claim as against the Sawridge First Nation,
22 and the grounds. We argued that the Public Trustee's refusal to consent to the
23 adjournment was patently unreasonable and that they should pay for the costs of that
24 adjournment, without indemnification from the Sawridge Trust. And you reserved your
25 decision until the final disposition of the matter.
26

27 Now, on July 17th, 2015, Sawridge First Nation was served with this amended
28 application. It's found at tab 5 of the Sawridge First Nation most recent written
29 submissions. And, again, this motion sought an order requiring Sawridge First Nation to
30 file an Affidavit of Records or, in the alternative, to produce numerous records. H-mm.
31

32 Paragraph 15 of our written submissions, if I could just take you to that briefly.
33

34 THE COURT: Sorry, what paragraph number?
35

36 MR. MOLSTAD: Paragraph 15 of our written submissions.
37

38 THE COURT: Okay.
39

40 MR. MOLSTAD: Filed August 16th. We summarize there some
41 of the records that the Public Trustee sought an order in relation to. And I won't read

1 that to you, Sir, but I encourage you to read it so that you can see the scope of what was
2 being sought again in this application, including records from other actions and from
3 unfiled affidavits.

4
5 Now, on August 14th, of 2015, the Sawridge First Nation filed written submissions in
6 response to the Public Trustee's amended application. And that is found at tab 6 of our
7 written submissions. And it's made clear in this response that the Sawridge First Nation
8 would seek costs from the Public Trustee, without indemnification from the Sawridge
9 Trust.

10
11 The hearing then proceeded on September 2nd and 3rd, 2015, and of course your Reasons
12 for Judgment are found at tab 7 of our written submissions filed most recently.

13
14 This Court in its reasons denied the application, found that the Sawridge First Nation was
15 not a party and stated that any application for production of specific documents would
16 have to be made pursuant to Rule 5.13. And you also directed that the Public Trustee
17 was to refocus in relation to its participation. And if you go to tab 7 of our written brief,
18 in particular paragraph 35, what you said was:

19
20 The same is true for this Court attempting to regulate the
21 operations of First Nations, which are bands within the meaning of
22 the *Indian Act*. The Federal Court is a better forum, and now that
23 the Federal Court has commented on SFN membership process in
24 *Stoney vs. Sawridge First Nation* , there is no need, nor is it
25 appropriate for this Court to address this subject. If there are
26 outstanding disputes on whether or not a particular person should
27 be admitted or excluded from band membership, then that should
28 be reviewed in the Federal Court, and not in this 1985 Sawridge
29 Trust modification and distribution process.

30
31 It follows that it will be useful to refocus the purpose of the Public
32 Trustee's participation in this matter. That will determine what is
33 and what is not relevant. The Public Trustee's role is not to
34 conduct an open-ended inquiry into the membership of the
35 Sawridge Band and historic disputes that relate to that subject.
36 Similarly, the Public Trustee's function is not to conduct a general
37 inquiry into potential conflicts of interest between the SFN, its
38 administration, and the 1985 Sawridge Trustees. The overlap
39 between some of these parties is established and obvious.

40
41 Instead, the future role of the Public Trustee shall be limited to

1 four tasks. One, representing the interest of minor beneficiaries
2 and potential minor beneficiaries so that they receive fair
3 treatment, either direct or incorrect, in the distribution of the assets
4 of the 1985 Trust, two, examining on behalf of the minor
5 beneficiaries, the manner in which the property was placed, settled
6 in the Trust, and, three, identifying potential but not yet identified
7 minors, where children of SFN members are membership
8 candidates. These are potentially minor beneficiaries of the 1985
9 Trust. And, four, supervising the distribution process itself.

10
11 With respect to the future production, what you said in paragraph 45 and 46, again in tab
12 7:

13
14 There have been questions raised as to what assets were settled in
15 the 1985 Trust. At this point, it is not necessary for me to
16 examine those potential issues. Rather, the first task is for the
17 Public Trustee to complete its document requests from the SFN,
18 which may relate to that issue. The Public Trustee shall, by
19 January 29th, 2016, prepare and serve a Rule 5.13(1) application
20 on the Sawridge Band that identifies specific types of documents
21 which it believes are relevant and material to the issue of the
22 assets settle in the 1985 Trust.

23
24 We submit, Sir, that based upon the affidavits of Mr. Bujold, the questioning of
25 Mr. Bujold, the Answers to Undertakings, that the Public Trustee either knew or ought to
26 have known that it had all of the records in the possession of the Sawridge First Nation
27 and the Sawridge Trustees, related to the transfer of assets, that is the settlement of the
28 assets for the 1985 Trust.

29
30 This Court made it very clear that the Public Trustee was representing minors who fell
31 into any one of three categories. And this is found in paragraph 56 of your decision, at tab
32 7. Category 2 was minors who are children of members of Sawridge First Nation,
33 category 4 was children of adults who have unresolved applications to join Sawridge First
34 Nation, and category 6, children of adults who have applied for membership in Sawridge
35 First Nation but have had that application rejected and are challenging that rejection by
36 appeal or judicial review.

37
38 And I emphasize those words, because you used them, Sir, appeal or judicial review.

39
40 The -- you then stated, Sir, and you directed that if the information was not already
41 disclosed:

1
2 Sawridge First Nation shall provide to the Public Trustee by the
3 29th of January, one, the names of individual who have (a) made
4 applications to join the Sawridge First Nation which are pending,
5 category 3, and (b) had applications to join the Sawridge First
6 Nation rejected and are subject to challenge, category 5 and 6, and
7 (2) the contact information for those individuals, where available.
8 This information was provided to the Public Trustee and the Court
9 without any information redacted. It was, of course, included on
10 January 18th, 2016, and a copy of the letter is attached as
11 Appendix D to the Public Trustee written brief.
12

13 You also stated in paragraph 61 of your decision, again found at tab 7:
14

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

30 Category 2 is the minors who are children of members of Sawridge First Nation.
31

32 With respect to the issue of costs at that application, you reserved your decision until you
33 were able to evaluate the Rule 5.13 applications. And in paragraph 71 of your decision,
34 again at tab 7, you stated that as the Court of Appeal observed in Sawridge number 2 at
35 paragraph 29:
36

37 The Public Trustee's activities are subject to scrutiny by this
38 Court. In light of the four task scheme set out above, I will not
39 respond to the SFN's cost argument at this point, but instead
40 reserve on that request until I evaluate the Rule 5.13 applications
41 which may arise from completion of tasks one to three.

1
2 You did make it clear, as it's stated, that the Public Trustee's activities are subject to your
3 scrutiny.
4

5 Now, on January 29th, 2016, we were served with two documents that were entitled the
6 Application by the Office of the Public Trustee of Alberta for Production Under Rule 5.3,
7 and one related to the assets settled in the 1985 trust, and the other related to the
8 beneficiaries.
9

10 I think it's important to note in terms of resolution of this issue, that on March 10th,
11 2016, before we were required to file our written submissions, as you'd indicated that we
12 would file them March 15, we sent a letter to the Public Trustee, and based upon the
13 position that we set out in that letter, we asked whether they would withdraw the 5.13
14 applications in order to avoid having to file written submissions. And that letter is found
15 at tab C-4 of the Sawridge First Nation's brief filed March 15th, of 2016. And I would
16 encourage you, Sir, to read that letter.
17

18 The Public Trustee responded on March 14th, 2016.
19

20 THE COURT:

Sorry, just give that to me again. I just want to

21 mark it.
22

23 MR. MOLSTAD:

Yeah. It's found at tab C-4 of our March 15th,

24 2016, brief.
25

26 THE COURT:

Okay. I'm just trying to find the C. A, B --

27 MR. MOLSTAD:

I just hope it's -- I've got the right -- at the

28 back of the --
29
30

31 THE COURT:

Yeah. No, I -- I've got --

32 MR. MOLSTAD:

It's a letter from Parlee McClaws dated March

33 10th, 2016.
34
35

36 THE COURT:

Yeah, I'm just trying -- I'm having trouble

37 finding -- ah, there's C. Okay. C-4?
38

39 MR. MOLSTAD:

Right.

40 THE COURT:

All right. I've got it.
41

1
2 MR. MOLSTAD: In any event, I encourage you to read it.
3
4 The Public Trustee responded on March 15th, 2016, and I encourage you to read this
5 letter, too. It's found at tab 8 of the Sawridge First Nation written submissions.
6
7 THE COURT: The more recent one, correct?
8
9 MR. MOLSTAD: The most recent one.
10
11 THE COURT: Okay.
12
13 MR. MOLSTAD: That's correct, Sir. And I won't take you
14 through them now, but basically the Public Trustee advised that if -- if Sawridge First
15 Nation provided an updated list of the Nation's children and a written response to advise
16 whether any of the individuals noted in Schedule 3 of our January 18th, 2016 letter, with
17 pending membership applications have minor children, then that would satisfy the Public
18 Trustee in relation to the beneficiary application.
19
20 So following that -- I mean, we filed a brief, but following that on April 5th, 2016, the
21 Sawridge Trustees provided the Public Trustee with an updated list of the Sawridge First
22 Nation minors. And that's found at tab F of the written brief of the Public Trustee.
23
24 THE COURT: M-hm.
25
26 MR. MOLSTAD: And with respect to the Public Trustee's other
27 request, we were very confused, because -- and we responded on March 16th, pointing out
28 that the Schedule 3 of our January 18, 2016, letter, which is at tab D of the written brief
29 of the Public Trustee --
30
31 THE COURT: Sorry, there must be a -- is there a second book
32 of attachments to that March 15 brief? Mine -- you said tab F. Mine runs out at tab C.
33
34 MR. MOLSTAD: Sorry, tab D of the brief of the Public Trustee?
35
36 THE COURT: Oh, I'm sorry, you're talking about their brief.
37
38 MR. MOLSTAD: Yeah.
39
40 THE COURT: All right. Got it.
41

1 MR. MOLSTAD: And it's tab D of the brief enclosed, but this is
2 our letter of January 18th.

3

4 THE COURT: Yeah. Got that. Thanks. I'm just --

5

6 MR. MOLSTAD: Now, it -- you know, we were confused by the
7 inquiry because this contains a list of the adult parents, that is Schedule 3 is a list of the
8 adult parents who have made application for their children for membership, and the
9 contact information and the number of children applying. It was not something that we
10 were directed to provide, but we did in order that they had full and sufficient information.

11

12 We asked, in our letter, for an application from the Public Trustee based on this, because
13 we didn't understand their request, and --

14

15 THE COURT: This is your -- you're talking about your April
16 one now.

17

18 MR. MOLSTAD: Yeah.

19

20 THE COURT: Yeah.

21

22 MR. MOLSTAD: Yeah. So -- and we never did get a response to
23 that. But as you have in front of you, when we filed our written submissions on March
24 15th, of 2016, that was based upon your directive that we do so. And we assumed that
25 the Public Trustee ought to have filed written submissions by January 29th, because it
26 seemed to us that if we're filing written submissions as a respondent, we should have
27 something to respond to. However, as you know, the Public Trustee had not done that. It
28 filed simply a Notice of Application setting out the grounds.

29

30 And in April, of 2016, we told the Public Trustee that we took the position that they
31 hadn't complied with your order of December, 2015, as they did not file any written
32 submissions, but what we did say is let's get this on. We made, as I stated earlier, a
33 reasonable assumption that if we have to file written submissions as a respondent, that we
34 have to file it in response to something.

35

36 We any -- in any event, we told the Public Trustee as long as we could agree to a
37 schedule and the Public Trustee would provide particulars of the evidence to be relied
38 upon, with copies, we would be prepared to proceed on the basis that they would make
39 written submissions, we would make a reply. And that procedure was agreed to. It's set
40 out in Exhibit 2 to the questioning that we conducted of Mr. Bujold, and it sets out that
41 they file written submissions, we file a reply, and later on we agreed, because we were

1 dealing with costs, that they could then file a reply in relation to our submission on costs.
2 But it did provide that the Public Trustee would be required to give us particulars of the
3 evidence to be relied upon in both applications by July 7, 2016, as well as copies of the
4 evidence. And on July 7th, the Public Trustee served us with notice of the records it
5 intended to rely upon in relation to its application. And that's found at tab 9 of Sawridge
6 First Nation's written brief.

7
8 And I want to take you to that, because this is July 7th in terms of timing, and these are
9 two applications that relate to both the assets and the beneficiaries that are still fairly
10 broad in terms of what they were seeking. But the evidence on page 2 of their letter,
11 which is the fourth page in, lists the evidence that they will be relying upon in relation to
12 both the membership application and the assets application. And there's transcripts,
13 affidavits, supplementary -- supplemental affidavits, undertakings, and a fairly lengthy list
14 on both, but one of them is the same in both. It's six in one and five in the other. It
15 says:

16
17 Catherine Twinn's affidavit dated September 23rd, 2015, filed in
18 this action on September 30th, 2015, our references will be limited
19 mainly to paragraph 29, period. 29(h) will be referenced in
20 relation to any costs applications made by the respondents.

21
22 The word mainly didn't give us comfort, because the position is that this is evidence
23 before the Court, and if we take issue with it, we have to address it.

24
25 We arranged for questioning of Mr. Bujold, and this occurred on July 27th. When we
26 attended at the questioning of Mr. Bujold, the Public Trustee advised us that they would
27 no longer be proceeding with the settlement application. And as you know, as you've
28 signed the consent order, and we've got a copy of it at tab 10 of our brief, the preamble
29 of this consent order is, in our submission, relevant and indicative of the information that
30 the Public Trustee was in possession of, because what it says is that:

31
32 The Sawridge Trustees have exhausted all reasonable options to
33 obtain a complete documentary record regarding the transfer of the
34 assets from the '82 Trust to the '85 Trust, that the parties have
35 been given access to all document regarding the transfer of the
36 assets, and the Trustees are not seeking an accounting in relation
37 to the transfer of these assets, and noting that the assets from the
38 '82 Trust were transferred to -- into the 1985 Trust.

39
40 And they talk about the little information available.

1 I think that my friend, Ms. Bonora, made mention of this in her brief. The purpose of the
 2 transfer in '82, '85, in terms of transfer from trust, was to avoid any claim that others
 3 might make in relation to these assets after the enactment of Bill C-31. So Sawridge First
 4 Nation would be highly motivated to ensure that those that were acting as trustees made
 5 the transfer of all assets from the '82 Trust to the '85 Trust. That was the reason. The
 6 reason clearly was one where it was in everyone's best interests to make sure the transfer
 7 took place.

8
 9 I would point out that the resolution of this matter, in accordance with this order, is
 10 similar to the resolution that was proposed by the Sawridge Trustees to the Public Trustee
 11 on May 13th, 2016. And a copy of that is Exhibit 5 to the questioning of Mr. Bujold.

12
 13 When Mr. Bujold was questioned on July 27th --

14
 15 THE COURT: I take it that's in the file.

16
 17 MR. MOLSTAD: It's been filed.

18
 19 THE COURT: Okay. Right.

20
 21 MR. MOLSTAD: Yes. The questioning and the exhibits --

22
 23 THE COURT: Well, just so --

24
 25 MR. MOLSTAD: -- to the questioning.

26
 27 THE COURT: Just so you know, of course, I mean, the
 28 systems internally have totally broken down. So it never made it to my desk, but. . .

29
 30 MR. MOLSTAD: Yeah, yeah. Well, if you have trouble finding
 31 it, Sir, we can send you --

32
 33 THE COURT: Yeah. No, I just --

34
 35 MR. MOLSTAD: -- another copy.

36
 37 THE COURT: -- want to get it on the record so. . .

38
 39 MR. MOLSTAD: Yeah.

40
 41 THE COURT: I'll find it eventually.

1
2 MR. MOLSTAD:

Yeah.

3
4 THE COURT:

Thanks.

5
6 MR. MOLSTAD:

In any event, Mr. Bujold confirmed that, first of all, the Public Trustee has not questioned him in relation to his undertakings. Secondly, that Sawridge Sawridge First Nation have fully cooperated with the Sawridge Trustee Request for Information regarding the beneficiaries and potential beneficiaries of the Trust, that paragraph 9 to 28 of his affidavit sworn in September, of 2011, contained a lot of information related to the settlement of the assets. And this information was obtained from the Sawridge First Nation, and that the Sawridge First Nation was cooperative in providing this information, that the Sawridge First Nation provided the Sawridge Trustees with a number of records related to membership, including a membership application form, a flow chart for the membership application process, the membership rules, letters of acceptance or rejection for membership, and all of these were forwarded to the Public Trustee.

18
19 So that's sort of an overview of some of the facts.

20
21 The application that my friend has in relation to the beneficiaries is the only one that's before you now and, first of all, we adopt our submissions of March 15th, 2016, in response to this and, in particular, in relation to the law as it's recited, dealing with a 5.13 application. And, frankly, it would appear that the Public Trustee does not take issue with the general principles cited in that they -- in our brief. And I refer you to paragraph 20 of the Public Trustee's written brief. And based upon that admission, we respectfully don't know why we're here.

28
29 We say, Sir, that the Public Trustee has not clearly specified any records it seeks production of, and as I read its written brief, it does not indicate it's seeking further production. They would appear to be asking for directions, and we submit that we're here to deal with the 5.13 application, and our submission is that it should be dismissed.

33
34 Now, touching briefly, and you've taken the Public Trustee through this, the Public Trustee's submissions about words used, unresolved and pending, with the greatest of respect, are devoid of merit. And if you look at tab 7 and read paragraph 52 of your decision, what you say in the last sentence:

38
39 Therefore, I will only allow investigation and representation by the
40 Public Trustee of children of persons who have, at a minimum,
41 completed a Sawridge Band Membership Application.

1
2 And as we've stated earlier in our letter of January 18, 2016, found at tab B of the written
3 brief of the Public Trustee, we provided a list which I'm advised was all the persons who
4 had submitted an application, period. And there were 26 names, addresses and
5 telephones, but there was one name without an address or a telephone number, because
6 none had been provided by the applicant. So it was obvious from just looking at the list
7 that there was one that clearly was incomplete.

8
9 With respect to the terms rejected and unsuccessful, we also submit, with the greatest of
10 respect, the Public Trustee's submissions are devoid of merit. And, again, if you look at
11 your decision at tab 7 in paragraph 56 and 57, and I won't read them all, but in the first
12 sentence, you say:

13
14 In summary, what is pertinent at this point is to identify the
15 potential recipients of a distribution of the 1985 Sawridge Trust,
16 which include the following categories.

17
18 And then you list the categories. Those two categories at the bottom:

19
20 5. Adults who applied for membership in the SFN, but have had
21 that application rejected and are challenging that rejection by
22 appeal or judicial review, and children of persons in category 5
23 above.

24
25 The words appeal and judicial review are used.

26
27 Our letter of January 18th, 2016, again -- and I just want to take you to that briefly, tab D
28 of the written brief of the Public Trustee.

29
30 THE COURT: Okay. Got it.

31
32 MR. MOLSTAD: It's tab D of the written brief.

33
34 THE COURT: I've got --

35
36 MR. MOLSTAD: On the first page at the bottom, what we say is:

37
38 In relation to individuals who have had application to join
39 Sawridge First Nation rejected, Sawridge First Nation advises that
40 the last application for membership in Sawridge First Nation that
41 was denied occurred on December 9th, 2013, and there was no

1 appeal in relation to that decision. Sawridge First Nation
2 Membership Rules provide that when a membership application
3 has been denied, an appeal of such decision to the electors of the
4 band must be initiated by delivering notice in writing to the band
5 counsel at the office of the band within 15 days after
6 communication to him or her of the decision of band counsel.
7 Sawridge First Nation advises that there are no appeals with
8 respect to denial of membership outstanding at this time. Sawridge
9 First Nation also advises that there are no outstanding applications
10 for judicial review of denial of any application for membership
11 decided by the electors of the Sawridge First Nation at this time.
12

13 So paragraph 27 of the Public Trustee's brief, it again raises membership issues. They
14 also tender the affidavit of Ms. Catherine Twinn, and the Public Trustee relies upon that
15 in this motion. They raise both conflict of interest and membership issues in terms of the
16 evidence and their brief.
17

18 THE COURT: Sorry, which one of their briefs are you
19 referring to?
20

21 MR. MOLSTAD: The -- the affidavit of Catherine Twinn --
22

23 THE COURT: Yeah. Good.
24

25 MR. MOLSTAD: -- that the Public Trustee relies upon in this
26 motion, which is found at tab 9 of the Sawridge First Nation. Or, actually --
27

28 THE COURT: Oh, of your -- of your brief. Okay.
29

30 MR. MOLSTAD: No, it's not. I --
31

32 THE COURT: No?
33

34 MR. MOLSTAD: It's tab C of the -- of the Public Trustee's
35 brief. The written brief of the Public Trustee.
36

37 THE COURT: Okay.
38

39 MR. MOLSTAD: Tab C.
40

41 THE COURT: Yeah. The --
42

1
2 MR. MOLSTAD:

And --

3
4 THE COURT:

That's the August 5th one.

5
6 MR. MOLSTAD:

Yeah, the affidavit of Ms. Catherine Twinn is the affidavit that they served us with notice on July 7th, 2016, that they would be relying on this evidence, and mainly on certain parts of it, but we say that this evidence raises both conflict of interest and membership issues. And rather than take you through the affidavit, we'll give you the paragraph numbers in the affidavit that address conflict of interest; paragraphs 29, 33, 34 and 35. And the paragraphs in the affidavit that raise membership issues are 29(a), 29(b), 29(c), 29(g), (for George), 29(i) and (j).

13
14 And what we say, Sir, is that this Court in its decision made some very specific directions. And again back to tab 7 of your -- which is your decision, we refer you to paragraph 35. We read this earlier. The last sentence:

17
18 If there are outstanding disputes on whether or not a particular
19 person should be admitted or excluded from band membership,
20 then that should be reviewed in a federal court and not in this
21 1985 Sawridge Trust modification and distribution process.

22
23 Paragraph 36, second line there:

24
25 The Public Trustee's role is not to conduct an open-ended inquiry
26 into the membership of the Sawridge Band, and historic disputes
27 that relate to the subject. Similarly, the Public Trustee's function
28 is not to conduct a general inquiry into potential conflicts of
29 interest between SFN, this administration and the 1985 Sawridge
30 Trustees.

31
32 Paragraph 54:

33
34 The Court's function is not to duplicate or review the manner in
35 which the Sawridge band receives and evaluates applications for
36 band membership. I mean by this that if the Public Trustee's
37 inquiries determine that there are one or more outstanding
38 applications for band membership by a parent of a minor child,
39 then that is not a basis for the Public Trustee to intervene in or
40 conduct a collateral attack on the manner in which the application
41 is evaluated, or the result of that process.

1
2 Paragraph 69 of your same decision, the second sentence:
3

4 I have already stated that the Public Trustee has no right to engage
5 and shall not engage in collateral attacks on membership processes
6 of the Sawridge First Nation.
7

8 And, lastly, paragraph 70 from your decision, the bottom half on page 15:
9

10 While in Sawridge 1, or Sawridge number 1, I had directed that
11 the Public Trustee may inquire into SFN membership processes at
12 paragraph 54 of that judgment, the need for that investigation is
13 now declared to be over, because of the decision in *Stoney v.*
14 *Sawridge First Nation*. I repeat that inquiries into the history and
15 processes of the SFN membership are no longer necessary or
16 relevant.
17

18 We submit, Sir, that based upon the Court's decision and it's very specific directions to
19 the Public Trustee, the fact that the Public Trustee is making reference to and alleging
20 deficiencies in the Sawridge First Nation membership process and also introducing
21 evidence which alleges deficiencies in the membership process and alleges conflict of
22 interest is inappropriate and we submit should be taken into consideration in relation to
23 costs.
24

25 My friend refers in their written brief to the *RBC v. Canada* decision, and particularly to
26 paragraph 17. Our submission is very brief. This case deals with record production of a
27 party, and an Affidavit of Records. And the Court said that with respect to parties and
28 disclosure, if there are fish, the respondents do not have to go fishing for them. And
29 that's a correct statement of law, but it has no application with respect to an application
30 pursuant to 5.13 as against a non-party.
31

32 We submit, Sir, that in relation to the beneficiary application, the Public Trustee has all of
33 the information that it requires in order to identify the minors that it represents, and we
34 also submit that the Public Trustee has failed to identify any further records or
35 information it requires and, as a result, the beneficiary application should be dismissed.
36

37 I would now turn to my submission on costs.
38

39 THE COURT: Now, when you use the term beneficiary
40 application, you're talking about the section 5.13.
41

1 MR. MOLSTAD:

Right.

2

3 THE COURT:

Correct.

4

5 MR. MOLSTAD:

I do have submissions I would intend to make
6 on costs. Perhaps this might be a good time to take a break, Sir?

7

8 THE COURT:

All right. Well, we'll break.

9

10 MR. MOLSTAD:

I'm in your hands. If you want to --

11

12 THE COURT:

Yeah. No, it's okay. If you want to -- how
13 long do you think you might be in your submission on this one? There's just some things
14 I have to do over the noon hour. I'm -- I can't get back here until 2 o'clock, so. . .

15

16 MR. MOLSTAD:

Well, I'm prepared to carry on, then.

17

18 THE COURT:

Okay. Let's go for another --

19

20 MR. MOLSTAD:

Yeah. Okay. Sure. Yeah.

21

22 THE COURT:

-- ten minutes or so and. . .

23

24 MR. MOLSTAD:

The -- at tab 11 of our written brief you will
25 find your order, and in paragraph 2 and 3 of that order on the second page --

26

27 THE COURT:

You're talking about the original order way

28 back.

29

30 MR. MOLSTAD:

Yeah.

31

32 THE COURT:

Okay.

33

34 MR. MOLSTAD:

Your order way back. That's correct, Sir. It's
35 at tab 11 of our written submissions. In paragraph 2, you state that:

36

37 The Public Trustee shall receive full in advance indemnification
38 for its costs for participation in the within proceedings, to be paid
39 by the Sawridge Trust.

40

41 And also, you say:

1
2 The Public Trustee will be exempted from my responsibility to
3 pay the costs of the other parties in the within proceeding.
4

5 We submit, Sir, that it is clear that the exemption from responsibility to pay costs is very
6 specifically the costs of the other parties in the within proceedings, and as you know, our
7 position has always been, and continues to be, that the Sawridge First Nation is not a
8 party in the within proceedings. So our submission is that the costs exemption does not
9 apply to the Sawridge First Nation.
10

11 I would point out that when the Public Trustee made their application originally, and I
12 only have one copy of this, but somewhere buried in the court file, to be appointed as a
13 litigation representative. They specifically asked for the terms and conditions of their
14 appointment to include ordering that the Public Trustee shall be exempted from liability
15 for costs to any other party in this proceeding. That was what they asked for, and we
16 submit that's what they got.
17

18 We also submit, Sir, that if the cost exemption does not apply to the Sawridge First
19 Nation, this Court has the jurisdiction to exercise its discretion in relation to awarding
20 costs. We submit that this Court must always be in a position to encourage the
21 reasonable and efficient conduct of litigation.
22

23 At tab 13 page 7, the Court of Appeal affirmed that the advanced costs order would be
24 subject to your oversight and further directions.
25

26 We did refer you to a decision from the Ontario Court of Justice found at tab 5, and it's
27 the *Children's Aid Society* decision. The issue in this case was whether the Ontario office
28 of the children's lawyer, which is referred to, abbreviated the OCL, would be liable for
29 costs in relation to a -- to a necessary multi-day trial. The rule applied to the OCL is
30 described in paragraph 34, and we draw this to your attention because I think my friend in
31 their submissions says that in this case, there was no exemption. We submit that there
32 was a form of an exemption in this case. In paragraph 34, the Court states:
33

34 The relevant provision of Rule 24 are reproduced here.
35

36 And number 24 is:
37

38 There is a presumption that a successful party is entitled to the
39 costs of a motion enforcement case, or appeal.
40

41 And then sub 2:
42

1
2 The presumption does not apply in a child protection case, or to a
3 party that is a government agency.
4

5 So there is a, although not as extreme, there is a form of an exemption in this case, and
6 Mr. Justice Schnall of the Ontario courts at page -- at, sorry, paragraph 53 and 54 of the
7 same decision, made some what we submit are very relevant comments to this case.
8 Paragraph 53:
9

10 A sense of immunity from costs may blind or desensitize a party
11 or non-party litigant to the fact that other litigants are incurring
12 costs and expenses to be involved in the court process. Immunity
13 from costs could result in a lack of accountability to the court
14 process. No participant in litigation should have carte blanche to
15 pursue litigation that has no focus and no evidentiary basis,
16 without running the risk of being held accountable for wasting
17 time and money and an order to pay compensatory costs to
18 indemnify the other litigants.
19

20 In this case, costs were awarded against the OCL on a full recovery basis.
21

22 We also submit, Sir, that the foundational rule provisions of our Rules found at tab 16 of
23 our written submissions, specifically prohibit, in mandatory language, a party from filing
24 an application or taking proceedings that do not further the purpose and intention of the
25 Rules.
26

27 You, Sir, we submit have the discretion to award costs to the Sawridge First Nation as
28 against the Public Trustee, without indemnification from the Trust.
29

30 Rule 5.13(2) provides that if the applicant is successful, the person requesting the record
31 must pay the person producing the record an amount determined by the Court. So in
32 other words, if my friend is successful with her application and the Sawridge First Nation
33 is compelled to produce a record, they have to pay them.
34

35 We submit, Sir, that in this case, should you decide that they should not be successful, it
36 seems to me to be inequitable not to order that they pay costs. They've proceeded with
37 an application under 5.13 that has a clear obligation on their part to pay costs, if they
38 succeed. If they don't succeed, we submit it is only fair that they be responsible to pay
39 costs. If, of course, you decide that the exemption applies to them, as we stated earlier,
40 we submit that you still have the discretion to award costs on the basis that they not be
41 paid by the Sawridge Trust.

1
2 The conduct that we submit should be considered as unreasonable and unnecessary
3 includes the following.

4
5 1. The refusal to consent to Sawridge First Nation's application for an adjournment,
6 requiring us to appear and apply for the adjournments. With the greatest of respect, Sir,
7 no lawyer would take that position without talking to his client and telling his client that
8 we might be subjected to a costs award because we're going to oppose this adjournment,
9 or not consent to it, and it's pretty obvious to us that the adjournment's going to be
10 granted. We submit, Sir, that lawyers have a responsibility to reduce the time required to
11 be spent in court by justices, not increase it.

12
13 2. The Public Trustee, in our submission, failed to exhaust obtaining production in
14 accordance with the Rules, before taking this exceptional step of seeking records from a
15 non-party, the Sawridge First Nation. They could have questioned Mr. Bujold on
16 undertakings or just requested the documents. Mr. Bujold testified that Sawridge First
17 Nation had been cooperating completely with any request for the records.

18
19 3. They proceeded with an application for relief, contrary to the Rules, when they either
20 knew or should have known that they were only entitled to make an application against a
21 non-party pursuant to Rule 5.13. You, Sir, agreed with this position and denied the
22 application in December, of 2015.

23
24 4. With respect to the beneficiary application before you now, we submit that it's
25 contrary to Rule 5.13, and the jurisprudence which supports that Rule, and is devoid of
26 merit.

27
28 5. With respect to the settlement application, the Public Trustee's decision to withdraw
29 this application is not based on the production of any documents from us. The Public
30 Trustee has not received any new documents and, as a result, this could have been
31 withdrawn before it was filed in January, of 2016.

32
33 6. The Public Trustee's conduct regarding disclosure of evidence intended to be relied
34 upon was, in our submission, unreasonable and caused unnecessary effort to find out what
35 is required under Rule 6.3. We submit, Sir, that it is a fundamental principle of our
36 system of justice that when you make an application, you're required to file and serve on
37 the respondents the evidence and the material that you intend to rely upon.

38
39 This is codified in Rule 6.13. Trial by ambush is not stepped, and as a non-party,
40 Sawridge First Nation was served with two Notices of Application on January 19th, 2016.
41 Those applications, one of which has been withdrawn, the other of which is before you,

1 that stated under the material or evidence to be relied upon, all relevant materials filed to
2 date in Court of Queen's Bench action 110314112, including all transcripts, affidavits,
3 excerpts of evidence and Answers to Undertakings, and such further and other materials
4 as counsel may advise and this Honourable Court may allow. What a ridiculous
5 proposition, that we, as a non-party, should be required to go to the courthouse and
6 review everything filed, or in this case go to the web site and looking at everything that's
7 been put on that web site, which is really no different than going to the courthouse, except
8 that we perhaps don't have to pay the photocopying costs that the courthouse might
9 charge us.

10
11 We finally received particulars of the evidence to be relied upon on July 7th, of 2016.
12 And even that, we submit, was equivocal in relation to the affidavit of Ms. Catherine
13 Twinn.

14
15 In summary, Sir, Sawridge First Nation's involvement in this proceeding came as a result
16 of the Public Trustee applying for orders, including requiring Sawridge First Nation to
17 prepare an Affidavit of Records and produce documents. We've been required to attend at
18 a number of hearings in person, and essentially respond to these three applications.

19
20 Now, notwithstanding the Public Trustee's extensive requests for records at the outset, it's
21 now decided on its own that it no longer requires any records from Sawridge First Nation.
22 We submit, Sir, that this demonstrates that these applications were both devoid of merit
23 and unnecessary litigation.

24
25 I think it's trite to say, Sir, that the Rules clearly provide that a successful party is entitled
26 to costs, and that you have a broad discretion in relation to those costs. We refer you to
27 Rule 10.33 which sets out a number of factors, and also paragraph 66 of our written brief
28 which highlights some of those factors.

29
30 And with respect to enhanced costs, we refer you to the decision of Madam Justice
31 Moreau found at tab 19 where she awarded enhanced costs in relation to a late application
32 for an adjournment of trial.

33
34 In paragraph 63 and 64 of the Public Trustee's submission on costs, and I want to take
35 you to that, Sir, because my friend has suggested that we've mischaracterized the case.

36
37 THE COURT:

So this is in the response brief?

38
39 MR. MOLSTAD:

Yes, this is in their brief, written submissions of
40 the Public Trustee in response to Sawridge First Nation's motion on costs.

1 THE COURT:

Got it.

2

3 MR. MOLSTAD:

In paragraph 63 and 64, the Public Trustee states that SFN has mischaracterized the decision of *Manning vs. Epp*, which is found at tab 17. And then they quote parts of one paragraph that, with the great respect, we submit is a mischaracterization of this decision, and we encourage you read paragraph 64. We'll read to you the full content of what this Court said. And it's found at tab 17 of our written brief, and paragraph 18 of Mr. (Sic) Justice Lax, stated at follows:

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The broad language of section 131 does not limit the award of costs to the parties to a proceeding. The cases involving nonparties mainly addresses the question of whether costs can be awarded against them: see, *Gulf Canada Resources*). There does not appear to be a case where costs have been awarded in favor of a non-party, although this was implicitly recognized and in *Friction Division, et al.*

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28

The City of Waterloo sought the right to appear on the motion and to bring its own motion in response to the position taken by the plaintiffs in a Statement of Claim and factum that they delivered in response to the motion to strike the pleading. They asserted that the Epp defendants could not raise the issue of privilege, as any privilege could only be claimed by Waterloo. Having taken this position, it is fair to say that the plaintiff invited Waterloo's motion in order to avoid the risk of being later said to have waived privilege. When Waterloo appeared, the plaintiffs disputed its right to do so.

29

30

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36

The plaintiffs take no position on Waterloo's entitlement to costs, and in their written submission, address only the issue of quantum. The motion was necessary to protect Waterloo's claim for privilege, and ensured that the privilege issue, which was important, was before the Court. It was successful in obtaining an order to expunge the pleading. It is appropriate to award Waterloo its costs, but on a partial indemnity scale.

37

So a no-party was awarded costs in that decision.

38

39

40

41

In *Kent vs. the Law Society of Alberta*, Mr. Justice Sanderman at tab 20, and in tab 20 of our brief at paragraphs 18 and 19.

1 THE COURT: I've got it, yeah.

2
3 MR. MOLSTAD: I won't read you those two paragraphs. I
4 encourage you to read them both, Sir. I'd just read you the last sentence in paragraph 19:

5
6 Unfortunately, in this matter he lacked restraint, another important
7 attribute of a successful litigator. Successful litigators know when
8 there is no case to advance and do not tilt at windmills for tactical
9 reasons when it causes pain to innocent parties.

10
11 In the decision of --

12
13 THE COURT: Of course that was aimed at Arthur Kent, a
14 non-lawyer, right?

15
16 MR. MOLSTAD: Right. I understand that Mr. Kent has had
17 much litigation before this Court.

18
19 THE COURT: Yeah, he actually got successful later on, so. . .

20
21 MR. MOLSTAD: What's that?

22
23 THE COURT: He actually succeed in his defamation.

24
25 MR. MOLSTAD: Oh, did he? Okay.

26
27 The -- in the *Hill v. Hill* decision, the Alberta Court of Appeal, and that's found at tab 21
28 of our written brief, Sir, this decision noted in paragraph 12 that payment by a third party
29 is not a bar to recovery of costs. And I am instructed today, Sir, to tell you on behalf of
30 the Sawridge First Nation that there shall be no double recovery by the Sawridge First
31 Nation. Any award of costs against the Public Trustee on the basis that there be no
32 indemnification from the Sawridge Trust, will either be paid to that Sawridge Trust, or
33 reduce any fee that comes from that Trust.

34
35 In conclusion, Sir, in relation to the issue of costs, we submit that taking into
36 consideration the conduct of the Public Trustee, enhanced costs should be awarded against
37 the Public Trustee on the basis that these costs not be paid by the Sawridge Trust. We
38 submit that the costs be either a multiple of column 5, or a lump sum, and that they
39 should be in relation to; 1, the application for adjournment that was not consented to; 2,
40 the application before this Court on September 2nd and 3rd, including preparing
41 submissions, which application was dismissed; and, 3, this application, including the

1 cross-examination of Mr. Bujold, and the written submissions that were required to be
2 made. And those, Sir, are our submissions in relation to costs.

3

4 THE COURT: Thank you, Mr. Molstad. I don't have any
5 questions. I think we're just going to keep on going, unless --

6

7 MS. HUTCHISON: Sure. That's absolutely --

8

9 THE COURT: There's nothing to deal with after this matter is
10 dealt with, so. . .

11

12 MR. MOLSTAD: Sorry.

13

14 **Submissions by Ms. Hutchison (Application)**

15

16 MS. HUTCHISON: It's much later than it looks.

17

18 My Lord, I'll try to respond to Mr. Molstad's comments, which I think some deal with
19 the substantive, some deal with the costs and so there may be a bit of a mix in my
20 comments, but I will just begin, My Lord, with our primary responses on the costs
21 application.

22

23 As the Court will be aware from reviewing our brief of August 19th, 2016, the Office of
24 the Public Trustee is, of course, of the position that it is not liable to pay costs to the
25 Sawridge First Nation in this matter on an enhanced basis, or otherwise.

26

27 First and foremost, My Lord, it's very clear that the costs terms set by Sawridge 1 and
28 Sawridge 2 apply to the Sawridge First Nation.

29

30 I don't have my brief from 2012 with me today, My Lord, but I reviewed it before we did
31 our August 19th brief, and I'm fairly sure my friend mischaracterized our submissions. I
32 believe that they referred to a request for costs for all -- from all -- exemption for costs
33 from all participants. And, in fact, that's referenced in the text of the Sawridge 1
34 judgment.

35

36 And most importantly, My Lord, whatever the order that was signed by this Court says,
37 the costs exemption went up to the Court of Appeal. That was party of what was
38 appealed to the Court of Appeal. And if the Court turns to our brief of August 5th, we
39 have Sawridge 2, as we've termed it, the Court of Appeal's decision, at tab 3 of our
40 authorities. And the question under appeal before the Court of Appeal, in its view was
41 did the chambers judge err in granting exemption from the costs of other participants?

1 And I'm looking at paragraph 30, My Lord.

2

3 THE COURT: Okay.

4

5 MS. HUTCHISON: Regardless of what anyone said or meant or
6 didn't say or didn't mean at this level, My Lord, the Court of Appeal was dealing with an
7 exemption for costs against all participants. And when one reads paragraph 30, and I
8 certainly encourage the Court to do so, it is completely in line with the rationale being
9 offered by the Court there that an independent litigation representative may be dissuaded
10 from accepting an appointment if subject to liability for a costs award, while the -- and it
11 goes on. And so we also note the exemption for costs, while unusual, is not unknown.

12

13 There's nothing, My Lord --

14

15 While the possibility of award of costs against a party can be a
16 deterrent to misconduct, we are satisfied the Court has ample other
17 means to control the conduct of parties and counsel before it.

18

19 That's reference to a costs award against the OPGT, not a costs award against -- limiting
20 it to other parties.

21

22 So our submission, My Lord, the costs exemption that was granted to the OPGT was very
23 much to deal with all participants. And, indeed, if we look at -- and I'm just going to
24 take you, My Lord, to -- jumping ahead in our submissions. At paragraph 24 and 25 of
25 our written brief dated August 19th, My Lord.

26

27 THE COURT: Sorry, just say that again. Sorry.

28

29 MS. HUTCHISON: Paragraph 24 --

30

31 THE COURT: Of which brief?

32

33 MS. HUTCHISON: -- 25, and actually 26, My Lord. It's -- it's our
34 August 19th brief.

35

36 THE COURT: Okay. Got that.

37

38 MS. HUTCHISON: Essentially, what we're putting before the
39 Court, My Lord, is the fact that the very narrow interpretation that Sawridge First Nation
40 is claiming simply can't be supported when the Court looks at the full context of the
41 indemnity and the exemption. The Court, both in Sawridge 1 and Sawridge 2, explicitly

1 set out the position that was put before it by the OPG, Office of the Public Trustee, My
2 Lord, and I've got two subparagraphs there in paragraph 25 that give you quotes from
3 those two decisions. Sawridge 1 is from paragraph 14, and then the quote from Sawridge
4 2 is at paragraph 30?

5
6 The Public Trustee is firm in stating that it will only represent
7 some or all of the potentially affected minors if the costs of its
8 representation are paid from the 1985 Trust, and it must be
9 shielded from liability for any costs arising from this proceeding.
10 And the OPGT's --

11
12 This is from Sawridge 2, the Court of Appeal:

13
14 The OPGT's willingness to act was conditional on, *inter alia*, the
15 Public Trustee is exempted from liability of the costs of other
16 litigation participants in this proceeding, by an order of the Court.
17

18
19 And as this Court likely remembers, My Lord, by Sawridge 1, Sawridge First Nation was
20 already very actively involved in this matter. They came to the table, with the greatest of
21 respect to my friend, by their own volition. They were not actually obligated to come to
22 the table in Sawridge 1 and make submissions about the OPGT's first application. They
23 did so. Everyone had in contemplation the fact that there were other litigation participants
24 in play, and that is the context in which the costs exemption order was granted, My Lord.
25 In terms -- and I would certainly ask the Court to review our submissions then in
26 paragraph 26 through to 31.
27

28 It is the position of the Office of the Public Trustee that when Sawridge First Nation and,
29 indeed, the Trustees, failed to seek leave to appeal from Sawridge 2, the exemption for
30 costs became immutable. It cannot be overturned, My Lord, and that is -- that is our
31 consistent position.
32

33 It's also been consistent, as you're aware, My Lord, that the Public Trustee has made that
34 a term and a condition of its representation of the minors in this matter.
35

36 In terms of the importance of both the indemnity and the exemption, which I would
37 suggest, My Lord, in some ways Mr. Molstad's application deals with those two items
38 together, and so we'll largely deal with them together. It has to be considered as well that
39 in Sawridge 1 and Sawridge 2, it was recognized that the protection or -- both the
40 exemption and the indemnity were there to ensure that the Public Trustee of Alberta could
41 provide independent representation. And, My Lord, if you look at paragraph 29 of our

1 submission, August 19th, that will take you to paragraph 40 and 42 of Sawridge 1, and
2 paragraph 27, 28 and 30 of Sawridge 2, that refer to the fact that this order for an
3 exemption for costs and indemnity of costs were integrally linked to ensuring that there
4 would be independent representation of the minors.

5
6 Our position, My Lord, is that that exemption and indemnity cannot be interfered with
7 without taking away that independence, or at least undermining the very goals that were
8 being served by those orders in -- when they were initially made, My Lord.

9
10 My Lord, I'm at paragraph 12 of our written submissions of August 19th, and that's
11 dealing with the costs of the adjournment applications. Obviously, My Lord, the Public
12 Trustee is making some submissions in response to the merits of Mr. Molstad's
13 application. It's not a concession that the merits should even be reached. With respect,
14 My Lord, the costs application should be dismissed simply on the basis of Sawridge 1 and
15 Sawridge 2's orders on exemption of costs and indemnity, but we -- we will address a
16 few points so that the Court has our position on this.

17
18 As we explain from paragraphs 12 through to paragraphs 18 of those submissions, My
19 Lord, the OPGT's inability, and we would characterize it as that, not a refusal, but an
20 inability to consent to Sawridge First Nation's request for an adjournment of the
21 production application, and Mr. Molstad is correct about my paragraph 14. It should -- to
22 have been completely clear, should have said SFN requested an adjournments of all
23 matters scheduled regarding SFN. And that was in no way intended to mislead this Court
24 or misstate the facts, My Lord. It was just a lack of clarity.

25
26 In any event, when that request was received, there was much more on the table, as this
27 Court may remember, to be dealt with at the appearance than just the -- the matter of the
28 production application. There was a litigation plan. Most importantly, there was the Offer
29 of Settlement from the Trustees.

30
31 The Public Trustee came to the parties, and then ultimately the Court, to indicate that
32 from its point of view, it was premature to deal with a settlement application until
33 production had been dealt with, and that the Public Trustee viewed staging of those
34 applications as integral to the best interests of the minors in this matter. That was
35 expressed fully to the Sawridge First Nation, not that there was a lack of regard for their
36 request or a lack of desire to accommodate it. The OPGT simply could not, because the
37 Trustees refused to adjourn their settlement application.

38
39 Interestingly, as matters progressed in June, of 2015, and I note, My Lord, in those
40 paragraphs the Public Trustee did try to propose a compromise solution, there was no
41 attempt to be punitive with Sawridge First Nation or ignore their request. Ultimately, by

1 the time we got to the June 30th, 2015 case management meeting, and I'm now, My Lord,
2 at about paragraph 20 of our submissions --

3
4 THE COURT: M-hm?

5
6 MS. HUTCHISON: -- the Trustees actually withdrew their
7 settlement application. And so -- and, sorry, that was in September. So the barrier to the
8 Public Trustee's ability to consent to the first adjournment was gone. By the time we
9 were at the September 2nd, 2015, hearing, we'd actually largely achieved the compromise
10 solution the Public Trustee had initially suggested.

11
12 It's not a basis for costs to be awarded, My Lord. The Public Trustee acted in good faith.
13 It has a mandate to represent and protect the interests of the minor beneficiaries. Its
14 position on Sawridge First Nation's request for an adjournment was based entirely on that,
15 and there was ultimately no prejudice to Sawridge First Nation, My Lord. They had three
16 months notice to prepare for the production application, ultimately.

17
18 In terms of my friend's submissions on the application for production, a few comments,
19 and they will be few, My Lord, because I don't wish to reargue those matters, obviously.
20 We would suggest that many of my friend's submissions are asking this Court to view
21 pre-Sawridge 3 events through a Sawridge 3 lens, and that simply cannot be done, My
22 Lord. Sawridge 1 set a broad mandate. We've taken the Court through that in our
23 written submissions. The Public Trustee of Alberta followed that broad mandate in good
24 faith and with the intention solely of ensuring that this Court had the information before it
25 that it required to deal with beneficiary identification for minors in a fulsome manner.

26
27 This Court chose to narrow the scope of relevance from Sawridge 1 and Sawridge 3, and,
28 My Lord, that's the role of the case manager, but to suggest that the Public Trustee should
29 have anticipated that before filing its 215 applications, frankly, My Lord, is simply not
30 reality.

31
32 The Public Trustee has, since Sawridge 3, implemented that narrower focus, it has acted
33 according to that mandate, but it cannot be judged for its 2015 applications on the basis of
34 a decision that was received after those applications were filed and argued.

35
36 My Lord, starting at paragraph 32 of the Public Trustee's written response on costs, which
37 is the August 19th brief, we have our submissions as to why the Public Trustee would
38 take the position that there is no basis to revisit the indemnity order or, indeed, the
39 exemptions order, and indeed, My Lord, no longer the jurisdiction to review that.

40
41 The Public Trustee does not in any way, shape or form, and I'm referring to paragraph 34

1 of the brief, My Lord, suggest that there is not ongoing oversight on the matter of costs.
2 And the Court of Appeal spoke to this in Sawridge 2, but I would ask the Court to read
3 that paragraph very carefully. It's at paragraph 29 of Sawridge 2. It speaks to ongoing
4 oversight about quantum, My Lord. It speaks to ongoing oversight about reasonableness
5 of things like hourly rates, amounts to be paid in advance which, in fact, the Public
6 Trustee has never sought, and other mechanisms for ensuring that the quantum of costs
7 payable by the Trust is fair and reasonable.

8
9 My Lord, that's a very different level of oversight than saying that a statutory body with a
10 right to refuse a litigation representative role, coming to the Court and asking for certain
11 conditions of appointment, and receiving them, and then having those conditions of
12 appointment confirmed fully by a Court of Appeal, can face a situation where those terms
13 can be changed midstream. And our submission, My Lord, is that's not what we're
14 dealing with here. As we say in paragraph 35, the cost -- aside from quantum of costs,
15 the costs indemnity and the exemption themselves became immutable once the limitation
16 to appeal passed.

17
18 And I'm jumping a bit forward in some of my general comments, My Lord.

19
20 I believe I have heard my friend say, or suggest, or perhaps imply, that somehow the
21 Public Trustee of Alberta has acted as if it has a blank cheque, or has acted as if it is not
22 subject to the oversight of this Court. And with the greatest of respect that, My Lord, is a
23 submission that is devoid of merit. The Public Trustee has adjusted its mandate. The
24 Public Trustee, as you can see from the progress made on matters such as a consent order
25 today, has worked to try to achieve some resolution and narrowing of issues, but without
26 ever compromising the best interests of the minors, and that is a difficult balance at times.
27 It's understandable that the Trustees may have different points of view on those issues, or
28 that Sawridge First Nation may have different points of view on those issues. The Public
29 Trustee has no role other than to fulfil the mandate of protecting the interests of the
30 minors, and assisting this Court in doing so, if we understand the scope of our role, My
31 Lord.

32
33 The Courts refined how we're to carry that out, but the overarching theme is that we're
34 here for the children, and I would suggest to you, My Lord, that any submission by
35 Sawridge First Nation to suggest that the Public Trustee has stepped outside of that role is
36 not supported by any evidence and is not supported by the events in this proceeding.

37
38 And I think that's a good point, My Lord, to repeat and remind the Court and my friend
39 what the Public Trustee has said about why we're here on 513 today. And I'm looking at
40 paragraph 4 of our August 5th brief. We're back in front of the Court to make sure that
41 the parties have appropriately applied Sawridge 3. We are back in front of the Court to

1 confirm that the Court is satisfied that all of the evidence needed to identify potential
2 minor beneficiaries is now before the Court, and we're back in front of the Court to
3 ensure that the form of the information, which is an informal form, My Lord, it's a letter
4 in both cases, is satisfactory.

5
6 Those are not unreasonable positions to take, My Lord. Those are not positions taken in
7 bad faith or with an intention to cause an innocent party difficulty, My Lord. Those are
8 positions taken to ensure that when this matter gets before a trial judge, the trial judge has
9 the information that he or she needs to make a final determination in this matter. That
10 is -- that is the only reason, My Lord.

11
12 I think for some of my friend's submissions, My Lord, I'll just refer you to -- there -- my
13 friend has made a number of comments about filing of written submissions and whether
14 the Public Trustee acted appropriately or not in that matter. Our position on that is set
15 out in paragraph 37 through 39 of the brief. We certainly take the position that the Public
16 Trustee has not breached Sawridge 3, nor has it breached any agreed deadlines and, in
17 fact, they've all been honored and followed.

18
19 In terms of my friend's submissions about the OPGT's questioning of Paul Bujold, and
20 we deal with that at paragraph 40 through to paragraph 46, I would simply ask the Court
21 to consider all of those matters in their full context, as opposed to a narrow context, My
22 Lord.

23
24 There was a questioning of Mr. Bujold in 2014. Mr. Bujold did provided Answers to
25 Undertakings, and the Court has those undertakings. They've been filed a number of
26 times. I believe they are in our -- the list of answers, I should say, as opposed to all the
27 documents, are at tab B of our August 5th submission.

28
29 THE COURT: Yeah. I've got it.

30
31 MS. HUTCHISON: And if the Court looks through some of the
32 later undertakings, it actually speaks to why the production application ways was -- was
33 originally brought. Many of the questions are answered to say for the Trustees to provide
34 information that they got from Sawridge First Nation. Mr. Bujold is passing on
35 information he got from another party. And then there are the undertakings where the
36 Trustees are unable to provide an answer, because Sawridge First Nation won't provide
37 the information.

38
39 So for the Sawridge -- for the Public Trustee to question Mr. Bujold further on matters
40 where, A, he was simply passing on information from another entity and, B, where it was
41 clear he couldn't compel more information from the other entity, My Lord, we would

1 suggest would have been rather inefficient. It was recognized that the Sawridge First
2 Nation was the repository of all membership ident -- membership information that might
3 be relevant to beneficiary identification. That was the reason for approaching Sawridge
4 First Nation for production in the first place, My Lord.

5
6 And in terms, My Lord, of the -- why the Public Trustee had not gone forward with a
7 questioning on the assets issues, I don't know if that -- that's part of what Sawridge First
8 Nation is taking issue with. As we explain in our brief from paragraph 40 onwards, My
9 Lord, there were ongoing debates about the scope of relevance, and those matters were at
10 one point thought would be resolved before this Court. They were ultimately resolved by
11 agreement, but to proceed with the questioning of Mr. Bujold while there was another
12 procedural fight brewing over relevance, we would suggest, My Lord, would have been
13 inefficient and a waste of resources. The Public Trustee was waiting until the relevance
14 issues were dealt with. We -- we thought originally that would be by application via the
15 513 assets matter. It turned out it was dealt with by way of a consent order. Once the
16 scope of relevance became narrowed, as it has been in the consent order, it wasn't
17 necessary for the Public Trustee to press on about issues relating to settlement of assets in
18 1982.

19
20 My Lord, there were -- if I understood my friend's submissions, there are some
21 suggestions or allegations that -- I'm not entirely clear if the allegation is that the O -- the
22 Public Trustee continues to engage in a collateral attack on membership, or if it was that
23 the production applications were so, but we've responded starting at paragraph 52 through
24 to paragraph 57 of our written submissions, My Lord.

25
26 The Public Trustee would certainly suggest that the mere mention of membership in its
27 materials can't be treated as a collateral attack. Beneficiary identification, whether we
28 like it or not, will be integrally tied to membership, because that is the beneficiary
29 definition that's being proposed. There is nothing in the Public Trustee's materials, My
30 Lord, that asks this Court to go behind the Sawridge Band membership process, and deal
31 with it in the way a Federal Court would deal with it on judicial review. So I -- we're a
32 bit confused about some of those submissions, My Lord, but we can assure the Court we
33 are not engaging in a collateral attack.

34
35 I believe my friend referred quite a bit to the fact that the Public Trustee was relying on
36 Catherine Twinn's affidavit as evidence that the Public Trustee has not honored Sawridge
37 3, or is attempting to go back into issues of conflict of interest. Again, My Lord, we're
38 somewhat confused by that. There is nothing in our materials that refers to the paragraph
39 numbers of Catherine Twinn's affidavit that Mr. -- that Mr. Molstad has taken you to.
40 The paragraph that we refer to, and it's the paragraph we originally referred to in our July
41 7th letter disclosing particulars of the evidence that would be relied on, is Catherine

- 1 Twinn's -- and I'm looking at our August 5th brief, tab C, page 6, and it's 29(k).
2
- 3 THE COURT: It's the one you've highlighted in the brief?
4
- 5 MS. HUTCHISON: That's correct, My Lord. And it just -- it just
6 sets out the fact that Sawridge First Nation's legal fees are being paid by the Trust.
7
- 8 The Public Trustee has raised that in response to the application for costs, My Lord, and
9 in relation to the double recovery submissions we've made. I'm unaware of anything in
10 the Public Trustee's briefs that would suggest it is seeking some sort of a finding from
11 this Court, directly or indirectly, about conflicts of interests of the Trustees. So that's
12 certainly not our position, My Lord.
13
- 14 THE COURT: Yeah, just -- I just want to make a note. I
15 don't think I -- I'm looking at your footnote 57, page 16 of your brief.
16
- 17 MS. HUTCHISON: This is the August 19th?
18
- 19 THE COURT: The August 19th brief.
20
- 21 MS. HUTCHISON: Page 16, 57. Yes?
22
- 23 THE COURT: So I've got the reference to the Catherine
24 Twinn --
25
- 26 MS. HUTCHISON: Referring --
27
- 28 THE COURT: -- paragraph 29(k).
29
- 30 MS. HUTCHISON: Pinpoint cite to that paragraph, My Lord.
31
- 32 THE COURT: I -- what I don't see, and it's pages 62 to 63 of
33 the questioning of Paul Bujold.
34
- 35 MS. HUTCHISON: My Lord, I don't believe that we included those
36 as a tab, because we were under the impression that this entire transcript had been filed
37 by Sawridge First Nation.
38
- 39 THE COURT: Okay.
40
- 41 MS. HUTCHISON: We can certainly provide those to the Court --

1
2 THE COURT: Okay.
3
4 MS. HUTCHISON: -- with the electronic version of our brief.
5
6 THE COURT: Would you -- would you mind doing that?
7
8 MS. HUTCHISON: Not at all, My Lord.
9
10 THE COURT: Because I went looking, you know, in the
11 material. Again, the filed materials --
12
13 MS. HUTCHISON: My apologies.
14
15 THE COURT: -- never made it to me, just the materials
16 you've sent to me directly.
17
18 MS. HUTCHISON: I apologize, My Lord. I --
19
20 THE COURT: No problem.
21
22 MS. HUTCHISON: We debated it, and did not include it.
23
24 My Lord, I'm just taking a quick look at my -- a few notes responding to Mr. Molstad.
25
26 I -- and, again, it's been a long morning, so if I'm paraphrasing Mr. Molstad at all
27 inaccurately, I apologize, but I believe my friend made some submissions on the costs of
28 the 5.13 assets order, suggesting that some of the wording in the consent order in some
29 way established that the 5.13 application was not necessary. I would simply ask the Court
30 to read that preamble very carefully. That preamble is not drafted as an acknowledgement
31 of fact. The preamble is drafted to set out the representations of the Trustee's counsel
32 upon which the Court and all the parties may rely. So it's not a matter of the preamble
33 referring to affidavit evidence, transcript evidence, undertaking answers. It is a reliance
34 on the representations of Trustee's counsel, and that's a very different animal, I would
35 submit, My Lord, than suggesting that the preamble refers to the evidence before the
36 Court.
37
38 Secondly, My Lord, I believe I heard my friend suggest that the final order entered into is
39 very similar to the May 13th, 2016, clarification that was both -- initially proposed by
40 Dentons.

41

1 The Public Trustee would certainly disagree with that characterization. There was a great
2 deal of time and effort put into admittedly what ended up being short additions, but
3 critical additions, My Lord. They preserve rights for beneficiaries around accounting.
4 They eliminate an entire issue around settlement into the Trust that was a live issue. And
5 I won't take the Court through Mr. Bujold's entire 214 questioning, but Mr. Bujold was
6 questioned in a very preliminary way on some of those topics. So it's been a live issue in
7 this matter since at least 2014. The ultimate order was critically different than the
8 original clarification that was offered, My Lord.

9
10 And if I understood the implication of some of the other submissions, My Lord, it was
11 that Sawridge First Nation perhaps was not expecting the July 27th settlement of the
12 assets consent order the day of Mr. Bujold's questioning. With the greatest of respect, all
13 counsel were involved in the discussions leading up to that order. I think -- I think we
14 were all rather hopeful on the eve of questioning, that that order was about to be finalized.
15 I would -- I would be surprised to hear it was a surprise that that consent order was
16 finalized on that date, but -- and certainly, My Lord, Sawridge First Nation was on notice
17 that the asset issue was completely off the table at the outset of Mr. Bujold's questioning,
18 and if the Court goes through that transcript, I would suggest you'll find that there is
19 almost no time spent on membership issues. There's an extensive amount of time
20 questioning Mr. Bujold on an affidavit he didn't swear, and then there's very little -- or --
21 and then there's the focus on the assets matter. So I believe we've commented on that in
22 our submissions in terms of whether costs would ever be properly awarded for that
23 questioning.

24
25 THE COURT: Well, if you wouldn't mind providing me the
26 full transcript of that?

27
28 MS. HUTCHISON: Paul Bujold's questioning?

29
30 THE COURT: Of Paul Bujold's questions at the end of July of
31 this year.

32
33 MS. HUTCHISON: By -- would email -- by email, My Lord?

34
35 THE COURT: Just electronically.

36
37 MS. HUTCHISON: Yeah.

38
39 THE COURT: Is it in a searchable form, to -- the format you
40 get from the --

41

1 MS. HUTCHISON: I will have to check, My Lord, but if it's not,
2 I'm -- the reporters can usually provide it.

3
4 THE COURT: Okay.

5
6 MS. HUTCHISON: So we'll certainly get you that.

7
8 MS. BONORA: Sir, it is at tab 4 of our -- the transcript brief
9 that we had filed, if you want it that way.

10
11 THE COURT: Okay. Sorry, of the -- of which brief?

12
13 MS. BONORA: The brief in support of the transfer issue. The
14 whole brief. The whole transcript is attached.

15
16 THE COURT: Oh. Okay. Well, thanks. I don't know where
17 I -- where that ended up. Anyway, send --

18
19 MS. HUTCHISON: I can't -- I can't help.

20
21 THE COURT: -- it to me electronically.

22
23 MS. HUTCHISON: Absolutely.

24
25 THE COURT: And then I've got it.

26
27 MS. HUTCHISON: We will, My Lord. If we can get it in a
28 searchable format, we'll get it to you that way.

29
30 In terms of Mr. -- or my friend's comments about some of the correspondence that was
31 exchanged between the parties in March and April of 2016, My Lord, I believe I heard
32 my friend suggest that the Public Trustee did not respond in any way to the Sawridge
33 First Nation's April 2016 letter. We don't agree with that, My Lord, although the Public
34 Trustee was certainly in the process of an ongoing review of Sawridge 3, and certainly in
35 the process of an ongoing assessment of its mandate under Sawridge 3. Its June 17th,
36 2016 letter, which is tab 10 of our August 16th submission, fully responds to all of the
37 parties and participants about what the Public Trustee intends to do with the two 5.13
38 applications. The explanation on the 5.13 application regarding membership is at page 2
39 of that letter. We would suggest, My Lord, that what is set out there is exactly what the
40 Public Trustee has done. So with the greatest of respect, we would suggest that there was
41 correspondence in response.

1
2 And, My Lord, I -- this is in -- I think this is clear in the materials, but I think we'd best
3 respond. There was some suggestion of trial by ambush by the Public Trustee. Clearly,
4 we would regard that submission as devoid of merit, My Lord. Both parties to this
5 application have had the opportunity to file two written briefs. The Sawridge First
6 Nation, if it had any doubt about the evidence it was going to potentially be confronted
7 with, it was served with it on July 7th, and you've been taken to that letter by
8 Mr. Molstad. All of the evidence is available to all the world on the Trust's web site.
9 And, My Lord, I realize I've given you my March brief.

10
11 There is a reference in Sawridge First Nation's March 15th brief that refers to excerpts of
12 evidence that were filed in June. That was a -- actually a bit of an esoteric little volume
13 that only the parties had. It certainly would strike us, My Lord, that Sawridge First
14 Nation has had high level of access. And we're not asking the Court to bend the rules.
15 The evidence was served.

16
17 There was an element of our friend's position in correspondence almost suggesting that
18 the evidence had to be refiled. We've been unable to file -- find any, any rule that would
19 suggest we can't rely on evidence that's already filed in this proceeding. We do have to
20 notify Mr. Molstad on that -- of that, and serve him with copies. And we would suggest
21 our July correspondence did that, My Lord.

22
23 And as I say, I don't -- I don't think any part or participant in this action can suggest they
24 haven't had ample opportunity to speak to the issues. There has been no trial by ambush.

25
26 My Lord, going back to our brief, you will find our submissions on essentially all the
27 merits of Sawridge First Nation's costs application, outside of the initial exemption and
28 costs indemnity issue from paragraph 58 all the way through to -- well, it's paragraph 58,
29 with subparagraphs.

30
31 Then our closing point, My Lord, has been this issue that Sawridge First Nation is
32 claiming, claiming costs recovery in a situation where the Sawridge Trust has already
33 agreed to pay the legal fees of the Sawridge First Nation. Particularly given the existence
34 of the indemnity, My Lord, we would submit that that makes a costs award in this case
35 highly inappropriate, and impractical. It's -- the funds will be coming from the Trust one
36 way or the other. Sawridge First Nation has already been paid.

37
38 I didn't hear my friend denying that today. We have evidence from both Mr. Bujold and
39 Catherine Twinn and, My Lord, we would suggest that the fact that Sawridge First Nation
40 has already been paid in full does raise real issues as to why we've spent all of this time
41 and money fighting over costs in the first place in light of a very clear order by the Court

1 of Appeal on that point.

2
3 Simply in closing, My Lord, the Public Trustee of Alberta takes the position that granting
4 the Sawridge First Nation's application for costs would be directly contrary to the terms
5 of appointment that the Public Trustee advised, and both level of courts accepted, were
6 preconditions to its acceptance of a role as a litigation representative. They would also be
7 directly contrary to the Court of Appeal's decision which upheld the costs exemption in
8 relation to all participants, not this narrower interpretation of parties.

9
10 An order of that nature would also contradict the Court of Appeal's order for full in
11 advance indemnity, bearing in mind, My Lord, that we're not disputing the Court's
12 ongoing discretion and oversight of matters such as quantum, hourly rates, hours spent, et
13 cetera. Those items are detailed by the Court of Appeal, but they don't extend to the
14 indemnity.

15
16 And finally, My Lord, the costs award sought by the Sawridge First Nation would
17 undermine the costs terms that were put in place to ensure the independence of the Public
18 Trustee of Alberta in this proceeding.

19
20 And finally as well, My Lord, they would essentially punish the Public Trustee of Alberta
21 for efforts that were made in good faith to carry out a mandate to protect the interests of
22 the minors in this matter.

23
24 Subject to the Court's questions, those are our submissions.

25
26 THE COURT: Well, just one -- actually two questions, while
27 I'm thinking of them.

28
29 One, it had taken me some time to sign off on that, the order implementing Sawridge
30 number 3. Do you happen to have a filed copy of that with you, or --

31
32 MS. HUTCHISON: My Lord, I did not bring a copy to court with
33 me. I apologize.

34
35 THE COURT: Okay. Include it in that emailed package,
36 okay?

37
38 MS. HUTCHISON: Absolutely.

39
40 THE COURT: And the other question is I take it that if I were
41 to dismiss the costs application of the Sawridge First Nation, so with the result they're

1 not -- they were unsuccessful, I take it the Public Trustee is not seeking costs against
2 Sawridge First Nation.

3

4 MS. HUTCHISON: No, My Lord. The Public Trustee of Alberta
5 has enough costs issues to address with the Trustees. We don't need to address them with
6 anyone else.

7

8 THE COURT: All right.

9

10 MS. HUTCHISON: We will not seek costs against Sawridge First
11 Nation, My Lord.

12

13 THE COURT: All right. Thank you.

14

15 MS. HUTCHISON: Thank you very much.

16

17 THE COURT: Mr. Molstad?

18

19 **Discussion**

20

21 MR. MOLSTAD: I just had one brief comment, Sir. My friend
22 has made a submission that I have mischaracterized her written submissions. That's not
23 true. Here they are. You can read them yourself, Sir, and they're at page 31, paragraph
24 5.

25

26 THE COURT: All right. Which set of submissions is this?

27

28 MR. MOLSTAD: Those were the original submissions she
29 made --

30

31 THE COURT: Oh, back in 2012.

32

33 MR. MOLSTAD: Yeah, back when -- and I believe Ms. Bonora
34 wishes to make a brief comment.

35

36 MS. BONORA: And I apologize. My Lord, I would just -- I'm
37 sure that that's the last paragraph in the brief, and I can't take a look at it right now. I
38 would ask the Court to look earlier in the brief, because my recollection is that it's in the
39 substantive argument that we refer to complete protection and a complete exemption that's
40 not --

41

1 THE COURT:

Well --

2

3 MS. BONORA:

-- limited to parties.

4

5 THE COURT:

Well, actually, that's sort of my recollection.

6

7 MS. BONORA:

Thank you, My Lord.

8

9 THE COURT:

But, here, I'm going to give this back to you. I

10 no doubt probably have that somewhere in the court record or in my -- while I don't think

11 it's in my parallel set of materials. Would you scan that in and just send it in?

12

13 MR. MOLSTAD:

I will.

14

15 THE COURT:

All right.

16

17 MS. BONORA:

Sir, one brief submission. My friend,

18 Ms. Hutchison, started by saying that she thought all counsel would benefit from the

19 clarification of the definitions. We would submit that we are not in that category. We

20 don't think there was any misinterpretation that could be made of those definitions, and

21 that we want to be very clear that our silence in respect of the costs is not meant to be

22 taken as suggesting we're neutral. We wholly support Sawridge First Nation's application

23 for costs, because we believe this application, in terms of being against a third party, was

24 completely unnecessary.

25

26 If a clarification was required, and I don't begrudge Ms. Hutchison for bringing that

27 application to seek a clarification if she needs it, but we didn't need Sawridge First Nation

28 at that table.

29

30 So the 5.13 application is a request for documents. Her application was a request for

31 clarification, and so we think that was an unnecessary application, and so support the

32 application for costs.

33

34 THE COURT:

All right. Well, I'll let you respond to that.

35

36 MS. HUTCHISON:

My Lord, to be -- and to be clear, we are

37 making a request for documents. We have left it in the discretion of Sawridge First

38 Nation as to the form in which they provide the information.

39

40 We've heard a great deal about confidentiality concerns. If the Court determines

41 additional information is required and a list is the only thing that works for Sawridge First

1 Nation, that is all the Public Trustee is seeking.

2

3 The first question to the Court was a clarification of the categories to determine if
4 additional information is needed. We don't have a list of all of the individuals rejected, so
5 we -- as I mentioned, My Lord, we couldn't go and determine their intent, if that's part of
6 our mandate, and we don't have a list of individuals potentially -- when we get into the
7 discussion of what is complete versus incomplete versus pending, do we need a list of
8 individuals who have submitted application, but have not yet been told what's happening
9 with their application, or if it meets Sawridge First Nation requirements? I -- and I'm
10 taking you back to our first discussion --

11

12 THE COURT: Okay.

13

14 MS. HUTCHISON: -- which I don't really -- and I'm not doing it
15 quite as -- in quite the organized manner we did, My Lord. There's a request for
16 documents. We are content to deal with the documents in the form the Sawridge First
17 Nation presents. Thank you.

18

19 THE COURT: All right. But just again so it's clear, I am not
20 plowing through -- I don't even have all the material. I'm not doing that function. All
21 I'll do for you is clarify, if I decide it's necessary to clarify, some of the those terms in
22 Sawridge number 3, and then it will be back to the Public Trustee and you to take those
23 clarification, if there are any, and --

24

25 MS. HUTCHISON: And determine if additional documents are
26 required.

27

28 THE COURT: Okay.

29

30 MS. HUTCHISON: Okay.

31

32 THE COURT: All right.

33

34 MS. HUTCHISON: Thank you, My Lord.

35

36 THE COURT: All right.

37

38 MS. HUTCHISON: That's very helpful.

39

40 THE COURT: All right. That's it for today. So on that
41 particular I'll say set of applications, I am reserving on it, and you'll be receiving a

1 decision in due course. It may be that it's quite short and to the point. I might just call
2 counsel back and do it orally, rather than go through all the rigamarole of a published
3 decision. All right?

4

5 MS. HUTCHISON: My Lord, I should just mention I'm actually
6 taking a holiday, which never happens, August 27th to September 11th, if you were to --

7

8 THE COURT: Oh, all right. Don't worry -- don't worry about
9 it. This thing's -- it might be 2017 before you get this.

10

11 Anyways, thanks, counsel, for all your help.

12

13

14 PROCEEDINGS CONCLUDED

15

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1 **Certificate of Record**

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. . .Christina Wilde, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen’s Bench held in courtroom 611 at Edmonton, Alberta, on the 24th day of August, 2016, and that I, Christina, was the court official in charge of sound-recording machine during the proceedings.

1 **Certificate of Transcript**
2

3 I, Deborah Jane Brower, certify that
4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best 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
10 and is transcribed in the transcript.
11

12
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14 Debbie Brower, CSR(A)
15 Order No. 64442-16-1
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Detailed Transcript Statistics	
Order No. 64442-16-1	
Page Statistics	
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ToC Pages:	1
Transcript Pages:	71
Total Pages:	73
Line Statistics	
Title Page Lines:	51
ToC Lines:	26
Transcript Lines:	3022
Total Lines:	3099
Visible Character Count Statistics	
Title Page Characters:	622
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Multi-Take Adjustment: (-) Duplicated Title Page Characters	116738

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

[Signature]
Clerk of the Court

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

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

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

DOCUMENT **CASE MANAGEMENT ORDER**

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

Reynolds Mirth Richards & Farmer LLP
3200, 10180 101 Street
Edmonton AB T5J 3W8

Attention: Marco S. Poretti
Telephone: (780) 497-3325
Fax: (780) 429-3044

DATE ON WHICH ORDER WAS PRONOUNCED: AUGUST 24, 2016

LOCATION OF HEARING: EDMONTON, ALBERTA

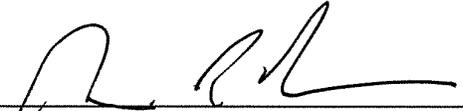
NAME OF JUDGE WHO GRANTED THIS ORDER: MR. JUSTICE D.R.G. THOMAS

UPON reading the written submissions of select counsel and hearing the oral submissions of counsel before this Court; IT IS HEREBY ORDERED THAT:

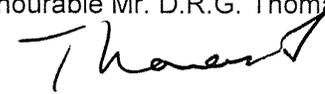
1. The Consent Order regarding the transfer of assets from the 1982 trust to the 1985 trust is granted.
2. The application for advice and direction respecting a revised beneficiary definition and ~~for approval of a distribution proposal~~ is adjourned *sine die*.
3. The application by Maurice Stoney for party or intervenor standing is adjourned and shall be decided by written submissions to the Case Management Justice as follows:
 - (a) The Applicant for standing shall file and serve its Brief on all participants, including the Sawridge First Nation, by September 30, 2016;
 - (b) The Respondents, including the Sawridge First Nation proposed Intervenor shall file and serve their Reply by October 31st, 2016; and,
 - (c) The Applicant for standing's response shall be filed and served by November 15, 2016.
4. The application of Sawridge First Nation for Intervenor Status shall be decided by written submissions to the Case Management Justice as follows:
 - (a) The Sawridge First Nation shall file and serve its Motion, Affidavit evidence and written submissions on all participants by September 30th, 2016;
 - (b) Maurice Stoney, the Sawridge Trustees and the Public Trustee shall file and serve their response by October 31st, 2016; and
 - (c) Sawridge First Nation shall file and serve their Reply by November 15th, 2016.
5. The request to enter a Consent Order for scheduling of the Application by Patrick Twinn, on his behalf and on behalf of his infant daughter Aspen Saya Twinn, and his wife Melissa Megley, and Shelby Twinn and Deborah A. Serafinchon for standing in this matter is denied.
6. The Application for standing by Patrick Twinn, Melissa Megley, Shelby Twinn, Aspen Saya Twinn and Deborah Serafinchon is adjourned and shall be decided by written submissions to the Case Management Justice with the same deadlines as in paragraph 3 above.
7. The Rule 5.13 Application by the Office of the Public Trustee and Guardian of Alberta for document production from the Sawridge First Nation is reserved.

8. The Court's Decision in relation to the Sawridge First Nation's Application for Costs as against the Public Trustee on the basis that these costs not be indemnified from the Sawridge Trust is reserved.

9. The Application by the Public Trustee and Guardian of Alberta for the Court's approval of the list of potential beneficiaries is denied.



The Honourable Mr. D.R.G. Thomas





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

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

APPLICANTS

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

DOCUMENT

**Application (Statement of Issues and
Relief Sought)**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5
Counsel for the Sawridge Trustees

Attention: Doris C.E. Bonora
Telephone: (780) 423-7188
Fax: (780) 423-7276
File No: 551860-001-DCEB

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Case Management Justice.

To do so, you must be in Court when the application is heard as shown below:

Date	To Be Determined
Time	To Be Determined
Where	Law Courts, 1 A Sir Winston Churchill Square, Edmonton
Before Whom	To Be Determined

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

1. The Applicants, the Sawridge Trustees, are the Trustees of the Sawridge Band Inter Vivos Settlement ("1985 Trust"). The Applicants seek determination of an issue and advice and directions from this Court. Pursuant to the comments of the Court of Appeal in *Twinn v Twinn*, 2017 ABCA 419, the Applicants file this document to set out and clarify the advice and directions sought in this Application.
2. The 1985 Trust was settled on April 15, 1985. Thereafter, section 15 of the *Canadian Charter of Rights and Freedoms* came into force, following the signing of the *Charter* into law.
3. After the 1985 Trust was settled, Bill C-31 was passed into law, making significant amendments to the *Indian Act*, R.S.C. 1970, Chapter I-6. Those amendments included the reinstatement of status and membership to women who had married non-Indigenous men and therefore lost their status and membership under the *Indian Act* prior to the amendments.
4. The definition of "Beneficiary" in the Trust Deed of the 1985 Trust makes specific reference to determining members of the Sawridge First Nation ("SFN") by reference to the *Indian Act* as it read as at April 15, 1982, before Bill C-31 was passed. The Trust Deed specifically prohibits amendment of the definition of "Beneficiary".
5. The 1985 Trust was funded from assets that had belonged to the SFN. Currently, there are members of SFN who are not beneficiaries of the 1985 Trust, such as the Bill C-31 women. There are beneficiaries of the 1985 Trust who are not members of SFN.
6. There may be other forms of discrimination in the definition of "Beneficiary".
7. The Applicants seek a determination of the following issue:

Is the definition of "Beneficiary" in the Trust Deed of the 1985 Trust discriminatory, insofar as the

definition refers to provisions of the *Indian Act*, RSC 1970, c I-6, which have since been amended, and 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 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;

Remedy sought:

8. If the definition of "Beneficiaries" is found not to be discriminatory, then the Applicants do not expect to seek any other relief.
9. If the definition of "Beneficiary" is discriminatory, the Applicants seek direction from this Court as to the appropriate remedy, and particularly whether the appropriate remedy is:
 - (a) To modify the definition by striking out language that has a discriminatory effect such that the definition of "Beneficiary" in the 1985 Trust will be reduced to members of the Sawridge First Nation?
 - (b) If the remedy in paragraph 9(a) is not granted to determine if the 1985 Trust can be amended pursuant to,
 - (i) the amending provisions of the Trust Deed, or
 - (ii) Section 42 of the *Trustee Act*?
10. If the definition of "Beneficiary" is modified, by striking out language or otherwise, then:
 - (a) Should there be "grandfathering" such that any of the individuals who met the definition of "Beneficiary" before this relief is granted will remain Beneficiaries?

- (b) If the answer to 10(a) is "yes", what should the terms of such "grandfathering" be and who will be grandfathered?

11. Such further and other relief as this Court may deem appropriate.

Affidavit or other evidence to be used in support of this application:

12. Such material as has been filed to date and has been posted on the applicable court ordered website at www.sawridgetrusts.ca
13. Such further material as counsel may further advise and this Honourable Court may admit.

How the Application is to be heard:

14. The application is to be heard in Special Chambers before the presiding Justice at a date to be determined.

Applicable Acts and regulations and Orders:

15. *Alberta Rules of Court*, Alta Reg 124/2010;
16. *Trustee Act*, RSA 2000, c T-8;
17. Order of the Court of Queen's Bench of Alberta dated January 5, 2018 in case management.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

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
 LOCATION: EDMONTON*

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

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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;

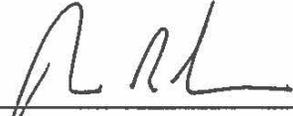
AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

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.

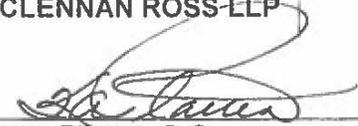
4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as the ~~sole determinative factor~~ that the 1985 Trust should be dissolved. *a ground upon which could.*
5. ~~The provisions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



The Honourable DJR. G. Thomas
Thomas J

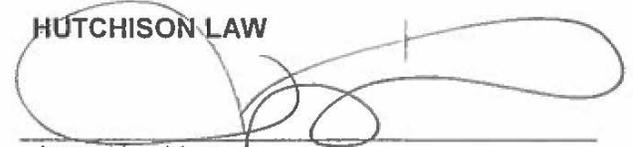
CONSENTED TO BY:

MCLENNAN ROSS-LLP



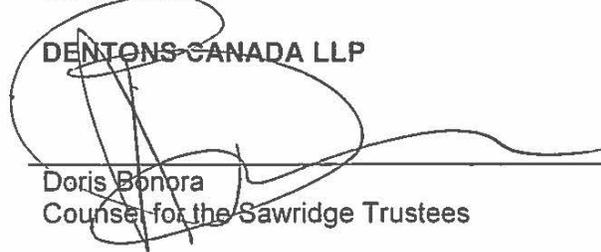
Karen Platten, Q.C.
Counsel for Catherine Twinn as Trustee for the 1985 Trust

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
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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 <i>April 30</i>
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 <i>June 15</i>
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



TRUSTEE MEETING MINUTES

Sawridge Inn, Edmonton South, Edmonton
21 December 2010

Attendees: Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland Twinn, Walter Felix Twin

Guests: Brian Heidecker, Chair, Donovan Waters, Trusts Counsel, Paul Bujold, Trusts Administrator

Recorder: Paul Bujold

1. OPENING AND PRAYER

Brian called the meeting to order at 10:10 AM and opened the meeting with a prayer led by Walter Felix.

2. REVIEW OF AGENDA

Trustees reviewed the agenda for the meeting and added 6.1 Evaluation of Chair's Performance.

2010-073 Moved by Roland, seconded by Clara that the agenda be accepted as amended.

Carried unanimously.

3. REVIEW OF MINUTES 17 NOVEMBER 2010

Minutes from the meeting held 18 October were reviewed.

Under 4. Business Arising, after "Roland indicated that the LSLIRC is having discussions about" add: "problems about" before "continuing with the Federal Services Master Agreement." After this statement add: "This may result in a potential impact on demand for Trust programs by beneficiaries."

Under 5.2 add: "Ardell had indicated that" instead of "Brian indicated that".

Under 5.4 change "...the Trust does not have any way to provide health services..." to :the Trust does not have a program to provide health services...".

Under 6.1.2 insert "impact" in front of "analysis".

Under 6.2.1 add the phrase "...based on the advice of David Ward and Tim Youdan." at the end of the introduction.

2010-074 Moved by Catherine, seconded by Clara that the Minutes of 17 November 2010 be accepted as presented.

Carried unanimously.

4. BENEFICIARIES

4.1 Donovan Waters, Merger of Trusts and Certainty of Beneficiaries

Donovan Waters, Legal Counsel to the Trusts, presented options (attached as part of the Minutes) for review by the Trustees on merging the Trusts and on certainty in determining the beneficiaries. These options were developed by Donovan, in consultation with input from Catherine Twinn, Doris Bonora and Mike McKinney at a meeting held in the Trusts Office 10 November 2010 and were further refined in a conference call meeting on 17 November 2010 between the parties including Roland Twinn as Chief of Sawridge First Nation.

Trustees first reviewed the options presented under **Merger of Trusts**. Trustees felt that it was not time yet to consider Option 1 merging the two Trusts as other matters had to be dealt with first. Option 3 presented the problem of placing one Trust in a minority shareholder position compared to the other Trust and therefore was not a favourable option to consider.

Option 2 seemed to present the best possible solution at this time although it would require that an application be made to the Court for advice and direction on the beneficiary determination clause in the 1985 Trust.

Under the **Certainty of Beneficiaries** options, Option 1 and Option 3 presented significant challenges in that the membership and Band Council of the Sawridge First Nation had the ultimate legal responsibility for determining membership.

Option 2 seemed to present the best solution at this time. Trustees discussed the present difficulties with the Band process of determining membership and the long delays involved in making decisions. After Brian made some observations and suggestions including offers to help on both a technical and process basis, Chief Twinn agreed to encourage the Band, Council and Assembly to work with the Trusts to refine the Band process that would expedite resolving membership applications and questions. This would permit the Trusts to move forward on the question of beneficiary determination. Donovan also offered to assist with advice as a courtesy back to Mike KcKinney for his previous involvement.

2010-075 Moved by Catherine, seconded by Roland that the Trustees resolve:

- 1. To adopt Option 2 under the Certainty of Beneficiaries in the Sawridge Trustee Options—Trustee Meeting 21 December 2010 document dated 17 December 2010 prepared by Donovan Waters and attached,**
- 2. To proactively work with the Sawridge Membership Committee and the Chief and Council to expedite recommendations to the Legislative Assembly so that applications can be determined within 6 months from the date received,**
- 3. To work with Chief and Council to develop proposed amendments to the Sawridge Citizenship Code including outlining legal standards that the decision-making process must meet, and**
- 4. To adopt Option 2 under the Merger of Trusts and to apply to the Court for advice and direction as to whether the definition of ‘beneficiary’ in the 1985 Inter Vivos Settlement is valid.**

Carried, 4 in favour, Walter Felix abstaining.

5. TRUST MATTERS

5.1 Reports

6.1.1 Trust Administrator's Report

Paul reported that most of his time in the last month has been working on determining the beneficiaries and on working out the costs of proposed benefits and savings plans. He has also working on the accounting system to bring matters up to date for the audit and tax preparation.

6.1.2 Trustee Reports

Catherine reported that the third community dialogue of the Economic Development through Reconciliation will take place in Hobbema in January 10 - 11, 2011.

Roland reported that the Regional Council has been given limited options on extending the Master Services Agreement by the Federal Government. The First Nations are not willing to be forced into an agreement that they cannot support. If a new agreement or extension is not signed by 20 January 2011, it is unclear how services will be delivered by the Federal Government.

5.2 Legal

Paul presented information on the three tax lawyers under consideration: Cheryl Gibson, Howard Morry and Chris Anderson. Catherine pointed out that it was important not to sever our long-term relationship with Davies Ward Phillips and Vineberg.

2010-076 Moved by Roland, seconded by Walter that Cheryl Gibson be retained to handle the Trusts' tax matters.

Carried, 4 in favour, Catherine Twinn abstaining.

5.3 Financial

6.5.1 Financial Reports November 2010

Trustees reviewed financial reports for November 2010.

2010-077 Moved by Bertha, seconded by Clara that the November 2010 financial reports be accepted as presented.

Carried unanimously.

5.4 Budget 2011

Trustees reviewed the 2011 Budget Projections, including separate projections for the Phase II benefits. The Phase II benefits will not be implemented until there is more certainty on the identification of beneficiaries.

2010-078 Moved by Clara, seconded by Roland that the 2011 Budget Projections be approved as presented.

Carried unanimously.

6. COMPANY ISSUES

Brian reported that he and Paul had met with Ralph Peterson and John MacNutt on 24 November 2010 to discuss a number of issues of mutual concern.

Trustee Meeting Minutes, 21 December 2010

PB034.0-Minutes, 101221.pdf

A new severance package offer has been presented to Sunil Lall's lawyer and a response is being awaited from Sunil.

John stressed that neither he nor anyone from management had worked with Ardell Twinn on his business proposal to the Trusts. In fact, the Companies were awaiting information from Ardell on his proposal to lease space in the Travel Centre but had received nothing yet.

Justin Twin and the Companies are in discussion on a new arrangement since the arrangement for Justin with Fountain Tire did not work out. Indications are that a win-win situation is achievable for all concerned.

The Companies budget is on track to meet or slightly exceed targets. The airport development is going well.

Brian arranged for John MacNutt to meet with the RCMP K Division officials and officials from Alberta Solicitor General about plans to move the RCMP hangar.

Brian is awaiting a proposal from Ron Gilbertson on the Walter Twinn Memorial Foundation. At present, the Companies do not have anything in their budgets for this project.

Also discussed merging the trusts, developing a tax strategy, diversifying investments, the policy on employee/beneficiary access to hotel and restaurant services, featuring the ownership of the Companies by the Trusts, and plans to replace the CFO position with an Analyst and a Controller position.

A joint meeting between the Directors and the Trustees is planned for sometime in late February 2011.

6.1 Review of Chair Performance

Trustees met in camera with Brian Heidecker on the issue of his performance evaluation.

7. NEXT MEETING AND ADJOURNMENT

Action 1012-01 Trustees decided to hold the next meeting of the Trustees on 15 February 2011 in Slave Lake at the Sawridge Inn.

Brian Heidecker, Chair

SAWRIDGE – TRUSTEE OPTIONS – TRUSTEE MEETING 21 DEC. 2010*Revised following lawyers' meeting on Friday, December 17***October meeting (proposals then made)**

"Beneficiaries" clause is contrary to 1985 (Bill C-31) Charter philosophy. Contrary to public policy? Recommended merge 1985 Trust with 1986 Trust.

Membership code. S. 3(a) of Band Code cannot be enforced against s. 11(1) 1985 *Indian Act* persons. S. 3 of Band code may discriminate (contrary to Charter) against natural children with only one registered parent, and also adopted children.

December meeting (options before the Trustees)**1. Merger of Trusts**

Option 1 Apply to court to terminate the 1985 Trust and transfer the trust fund to the 1986 Trust trustees.

[NB. Merger requires in law that all beneficiaries under the 1985 Trust become beneficiaries of the new (or 1986) Trust. Capacitated and sui juris beneficiaries of the 1985 Trust must approve of the merger themselves. Question: can who are beneficiaries of the 1985 Trust be ascertained for this purpose? The court will only consider the minors' legal position under the proposed merger, and the fact that the minors of the 1985 Trust will become members of a larger beneficiary class under the new (or 1986) Trust.]

Option 2 Leave each of the 1985 and 1986 Trusts in being, and apply to court to determine whether the "beneficiaries" clause of the 1985 Trust is invalidated by the 1985 *Indian Act* or the Charter.

[NB. The argument can be made for the Trustees that the definitional trust clause, though referring to the "Band", should be construed as merely descriptive of the settlor intended class, and that the Charter does not therefore apply. If the court rejects this argument, and decides the clause is invalid, however, possibly on grounds of public policy, the Trustees then decide on a new beneficiary clause for the 1985 Trust to put before the court.]

Option 3 Leave the two Trusts in being. Value the assets of each Trust as of a determined date, and then the Trustees of each trust transfer the assets of that trust to a corporation, which then administers the assets as a whole. Shares would be issued to each Trust in the proportion that the valuation figures bear to each other, e.g., \$600,000 as the valuation figure of one trust, and \$400,000 of the other, resulting in a shareholding of 6 shares to one and 4 shares to the other out of 10 issued shares.

[NB. This is a useful way in which to secure the common administration of both Trusts assets. However, trust law requires that the assets of distinct trusts be kept separate, unless there is a statutorily-approved pooling arrangement in place. Moreover, as each of the 1985 Trust and the 1986 Trust is in favour of Sawridge Band members at a different time, the beneficiaries of the two Trusts

will be different persons. It cannot therefore be argued that there is a common beneficiary class. If this option is chosen, we shall have to work further on it.]

2. Certainty of beneficiaries

Both Trust instruments say the beneficiaries are those who “qualify as Band members”.

Option 1 Apply to court to replace “beneficiaries” clause of 1985 Trust and the 1986 Trust, if there is to be no merger. There will then be no reference to the Band or Band membership. The new description will be the “Sawridge First Nation”, or the customary law description of the Sawridge community. A Trustee appointed tribunal will determine which persons meet this description.

Option 2 **The 1985 Trust**—adopt the Band’s view as to which persons are Band members under the 1982 Band membership class description.

The 1986 Trust—follow the Band Code and Band decisions as to who are registered members (s. 2 and s. 3(b), (c), (d), and (e) of the Code), and also ‘entitled’ persons (s. 11(1) of the Act) as yet unregistered, as and when these persons are registered by the Band.

The Trusts and the Band would then be operating with the one Band membership list.

Option 3 **The 1985 Trust**—the Trustees decide by way of a tribunal who are the persons who satisfy the 1982 Band membership class description.

The 1986 Trust—the Trustees follow the Band Code but decide for themselves for Trust purposes by way of a tribunal as to who qualifies under that Code as Trust “beneficiaries”.

[NB. It is likely that the Band’s ultimate list will largely be the same as the Trustees’ list, but the Trustees will require administrative law standards to apply in determining who are “beneficiaries”].

THE ATTACHED RESOLUTION of the Sawridge Band Council is hereby approved and ratified by the Sawridge Indian Band at a meeting duly convened and consituted at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985.

WITNESS

As to all signatures
Bruce & Thom

Yvonne Muir
Walter F. Fair
Sam J.
G. V. Fair
Walter J.
Della L. J.
Chris J.
Arms Patken
Catherine Twinn

Chronological No. - Numéro consécutif
 454-117-85/86

File Reference - N° de réf. du dossier

BAND COUNCIL RESOLUTION
RÉSOLUTION DE CONSEIL DE BANDE

NOTE: The words "From our Band Funds" "Capital" or "Revenue", which ever in the case, must appear in all resolutions requesting expenditures from Band Funds
 NOTA: Les mots "des fonds de notre bande "Capital" ou revenu" selon le cas doivent paraître dans toutes les résolutions portant sur des dépenses à même les fonds des bandes

THE COUNCIL OF THE LE CONSEIL DE LA BANDE INDIENNE		SAWRIDGE BAND	Current Capital Balance Solde de capital	\$ _____
AGENCY DISTRICT	LESSER SLAVE LAKE		Committed - Engagé	\$ _____
PROVINCE	ALBERTA		Current Revenue balance Solde de revenu	\$ _____
PLACE NOM DE L'ENDROIT	SLAVE LAKE		Committed - Engagé	\$ _____
DATE	15 DAY - JOUR	04 MONTH - MOIS	AD 19	85 YEAR - ANNÉE

DO HEREBY RESOLVE:
 DÉCIDE, PAR LES PRÉSENTES:

WHEREAS Chief Walter P. Twinn holds as trustee for the Sawridge Indian Band a certain debenture dated the 21st day of January, 1985;

AND WHEREAS the aforesaid trust was created to protect the interests of the members of the Sawridge Indian Band;

AND WHEREAS it is deemed expedient and in the interest of the said members to pass this Resolution:

AND UPON IT BEING MOVED by George Twin and seconded by Walter Felix THEREFORE BE IT UNANIMOUSLY RESOLVED at this duly convened and constituted meeting of the Sawridge Band Council at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985, that Chief Walter P. Twinn is hereby directed and authorized to transfer the aforesaid debenture to the Trustees of the trust dated the 15th day of April, A.D. 1985, to be held by the said Trustees as an accretion to the assets of the trust and subject in all respects to the terms and provisions thereof.

A quorum for this Bande
 Pour cette bande le quorum est

consists of 2
 fixé à

Council Members
 Membres du Conseil

 (Chief - Chef)

 (Councillor - conseiller)

FOR DEPARTMENTAL USE ONLY - RÉSERVÉ AU MINISTÈRE					
1. Band Fund Code Code du compte de bande	2. COMPUTER BALANCES - SOLDES D'ORDINATEUR		3. Expenditure Dépense	4. Authority - Autorité Indian Act Sec Act. de la Loi sur les Indiens	5. Source of Funds Source des fonds <input type="checkbox"/> Capital <input type="checkbox"/> Revenue
	A. Capital	B. Revenue - Revenu			
	\$ _____	\$ _____	\$ _____		
6. Recommended - Recommandable			Approved - Approuvable		
			Date _____ Approving Officer - Approuvé par _____		

SAWRIDGE INDIAN BAND

RESOLUTION ADOPTING MEMBERSHIP RULES

WHEREAS subsection 10(1) of the Indian Act, R.S.C. 1970, Chapter I-6, as amended, (the "Act") recognizes that a band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with section 10 of the Act;

AND WHEREAS the Sawridge Indian Band (the "Band") wishes to assume control of its own membership pursuant to section 10 of the Act;

AND WHEREAS the electors of the Band wish to consent to the Band's assumption of control of its own membership and the establishment of the membership rules (the "Rules") annexed as Schedule A hereto;

AND WHEREAS the objective of the Band in approving the establishment of the Rules is to protect the culture and social identity of the Band, to maintain and strengthen the existing sense of community, and to ensure continued peace and good order, among the members of the Band;

NOW THEREFORE BE IT RESOLVED THAT

1. the Band hereby consents to, and approves, the assumption by the Band of control of its own membership; and
2. the Rules be and they are hereby approved, adopted and established.

I certify that the above resolution was passed at a duly convened meeting of the electors of the Sawridge Indian Band held the 4th day of July, 1985 after appropriate notice of such meeting had been given and that such resolution is of full force and effect unamended as of the date hereof.

Dated the 4th day of July, 1985.

Walter P. J. Twinn
CHIEF WALTER PATRICK TWINN

Chronological No. - Numéro consécutif
 454-117-85/86
 File Reference - N° de réf. du dossier

BAND COUNCIL RESOLUTION
RÉSOLUTION DE CONSEIL DE BANDE

NOTE: The words "From our Band Funds", "Capital" or "Revenue", which ever is the case, must appear in all resolutions requesting expenditures from Band Funds.
 NOTA: Les mots "des fonds de notre bande", "Capital" ou "revenu" selon le cas doivent paraître dans toutes les résolutions portant sur des dépenses à même les fonds des bandes.

THE COUNCIL OF THE LE CONSEIL DE LA BANDE INDIENNE		SANRIDGE BAND	Current Capital Balance Solde de capital	\$ _____
AGENCY DISTRICT		LESSER SLAVE LAKE	Committed - Engagé	\$ _____
PROVINCE		ALBERTA	Current Revenue balance Solde de revenu	\$ _____
PLACE NON DE L'ENDROIT		SLAVE LAKE	Committed - Engagé	\$ _____
DATE	DAY - JOUR	MONTH - MOIS	AD 19	YEAR - ANNÉE
	5	04	85	

DO HEREBY RESOLVE;
 DECIDE, PAR LES PRÉSENTES:

WHEREAS Chief Walter P. Twinn holds as trustee for the Sawridge Indian Band a certain debenture dated the 21st day of January, 1985;

AND WHEREAS the aforesaid trust was created to protect the interests of the members of the Sawridge Indian Band;

AND WHEREAS it is deemed expedient and in the interest of the said members to pass this Resolution:

AND UPON IT BEING MOVED by George Twin and seconded by Walter Felix THEREFORE BE IT UNANIMOUSLY RESOLVED at this duly convened and constituted meeting of the Sawridge Band Council at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985, that Chief Walter P. Twinn is hereby directed and authorized to transfer the aforesaid debenture to the Trustees of the trust dated the 15th day of April, A.D. 1985, to be held by the said Trustees as an accretion to the assets of the trust and subject in all respects to the terms and provisions thereof.

A quorum for this Band
 Pour cette bande le quorum est
 consists of 2
 fixé à
 Council Members
 Membres du Conseil

 (Chief - Chef)

 (Councillor - conseiller)

 (Councillor - conseiller)

FOR DEPARTMENTAL USE ONLY - RÉSERVÉ AU MINISTÈRE					
1. Fund Code Code de compte de bande	2. COMPUTER BALANCES - SOLDES D'ORDONNATEUR		3. Expenditure Dépense	4. Authority - Autorité Indian Act Sec Art. de la Loi sur les Indiens	5. Source of Funds Source des fonds
	A. Capital	B. Revenue - Revenu	\$		<input type="checkbox"/> Capital <input type="checkbox"/> Revenue
	\$	\$	\$		
6. Recommended - Recommandé			Approved - Approuvé		
Date	Recommending Officer - Recommandé par		Date	Approving Officer - Approuvé par	



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

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

APPLICANTS

ROLAND TWINN, MARGARET WARD,
BERTHA L'HIRONDELLE, EVERETT JUSTIN
TWIN, and DAVID MAJESKI, as Trustees for the
1985 Sawridge Trust ("Sawridge Trustees")

DOCUMENT

**Application by the Sawridge Trustees
for Advice and Direction (returnable
September 25, 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
Counsel for the Sawridge Trustees

Attention: Doris C.E. Bonora
Telephone: (780) 423-7188
Fax: (780) 423-7276
File No: 551860-001-DCEB

Respondents:

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park AB T8H 2A3
Attention: Janet L. Hutchison

Counsel for the Office of the Public
Guardian and Trustee

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton AB T5N 3Y4
Attention: Karen A. Platten, Q.C. and
Crista Osualdini

Counsel for Catherine Twinn

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Case Management Justice.

To do so, you must be in Court when the application is heard as shown below:

Date	September 25, 2018
Time	10:00 am
Where	Law Courts, 1 A Sir Winston Churchill Square, Edmonton
Before Whom	Case Management Justice D.R.G. Thomas

Go to the end of this document to see what you can do and when you must do it.

Remedy claimed or sought:

A. *Privilege Order*

1. The Sawridge Trustees request that this Court grant an order in the form attached as **Schedule "A"** to deem that lawyer-client privilege has not been waived in respect of the subject matter raised in a number of documents filed in these proceedings; the related Action 1403 04885 (the "1403 Action"); and the questionings on those documents (both in respect of oral responses to questionings, and in respect of written responses such as undertakings, interrogatories, and associated productions/filings).
2. The proposed order would allow the documents to be used in the form they are in and permit the litigation to proceed without delay. The only restriction sought is to protect privilege on documents that have not been released to date. The solution proposed by the Sawridge Trustees will permit any other privileged documents that a party may seek to rely on to be dealt with on a case-by-case basis.
3. The Sawridge Trustees believe that the proposal is efficient and an effective means of proceeding to reach a resolution. It is the quickest means of resolving this claim at the least expense.

4. If the proposed order is not granted, the Sawridge Trustees request that a timetable in respect of an application to determine how the issue of privilege should be dealt with be set according to **Schedule "B"**, attached.

B. Directed Issue Hearing and Litigation Plan

5. The Sawridge Trustees request that this Court grant an order for a question or issue to be determined, pursuant to Rule 7.1 of the *Alberta Rules of Court* ("**Directed Issue Hearing**"), with respect to the following issue:
 - (a) Given that the definition of "Beneficiary" in the 1985 Trust ("**Definition**") has been determined to be discriminatory, is it appropriate to change the Definition on the basis of public policy?
 - (b) If the answer to the above question is "yes", in what manner should it be changed and what should the Definition be?
 - (c) If the answer to the above question is "no", should the Definition be varied pursuant to s. 42 of the *Trustee Act*?
 - (d) If the Definition is not varied on the basis of public policy or s. 42 of the *Trustee Act*, does the definition remain the same?
6. The Sawridge Trustees request a direction that any party that is proposing a variation of the Definition pursuant to s. 42 of the *Trustee Act* must secure approval from the known beneficiaries prior to the Directed Issue Hearing. If 100% approval from known beneficiaries cannot be obtained, that will immediately address the question of whether that provision can be invoked.
7. If the Directed Issue Hearing is ordered, the Sawridge Trustees further request that a timetable in respect of that Hearing be set according to **Schedule "C"**, attached.

C. Non party participation

8. The Trustees seek direction on non party participation as was suggested in Sawridge #5 and as was sought but not dealt with in the January 2018 case management meeting.

Grounds for making this application:

A. Privilege Order

9. Catherine Twinn has sworn an Affidavit of Records on which she intends to rely. Included in that Affidavit of Records are documents that disclose the contents of solicitor-client communications between the Sawridge Trustees (of which Catherine Twinn formerly was one), and their lawyers.
10. A number of those documents were filed simultaneously in this proceeding and in the 1403 Action. Some of them were discussed during questioning, and some documents produced in response to undertakings and/or interrogatories contain such communications as well.
11. The Sawridge Trustees did not intend to broadly waive privilege over the subject matter of those communications. At the time those documents were filed, they were relevant to the issues in dispute

between Catherine Twinn and the Sawridge Trustees. Those issues included the conduct of the Trustees and their possible removal based on conduct and also an indemnity application for costs by Catherine Twinn. The issues of conduct and indemnification were mostly unrelated to the issues in this 1103 Action.

12. The Sawridge Trustees seek an order clarifying and declaring that there is no broad waiver of solicitor-client privilege in respect of any subject matter that is raised in any of the documents filed in these proceedings, the 1403 Action, or the questionings and responses. Attached as **Schedule "D"** hereto is the proposed form of order.
13. This proposed order would permit the use of the documents filed to date, as well as the transcripts of the questionings of Catherine Twinn and Paul Bujold held to date and answers to Undertakings and Interrogatories. It would permit virtually all documents in Catherine Twinn's sworn Affidavit of Records, with the exception of four new documents she seeks to introduce. For any new documents such as those four new documents in Catherine Twinn's Affidavit of Records, the order permits them to be dealt with on a case-by-case basis on the agreement of the parties or the direction of the Court.
14. What the order does is declare that there is no broader waiver of privilege by the use of those documents, or responses, in these proceedings. As such, the Sawridge Trustees cannot be compelled, by anyone, to disclose any further documents or information regarding legal advice in respect of any subject matter raised in the documents and/or questionings.
15. The Sawridge Trustees believe that this declaration is critical to protect the 1985 Trust from arguments of broad waiver by anyone, including strangers to the 1985 Trust.
16. There is also an express provision in the proposed order to clarify that nothing in the order is meant to expand or limit the rights that any beneficiary of the 1985 Trust may have at law to request to see a trust document. Such requests will continue to be governed by the law respecting the rights of a beneficiary to request trust documents, including limits on those rights at law.
17. The Sawridge Trustees believe that this is a practical solution that will permit the parties to this Application to use documents that have been filed to date and use the questioning done to date, while providing critical protection to the 1985 Trust. Since the questionings of the Sawridge Trustees have been held, and all proposed documents have been listed in the parties' Affidavits of Records, the Sawridge Trustees do not see any prejudice to any party that may be caused by an order confirming that privilege is not broadly waived, particularly in contrast to the important role of protecting privilege of the 1985 Trust.
18. In keeping with Rule 1.2 of the Rules of Court, the order will facilitate the quickest means of resolving a claim at the least expense and will provide an effective, efficient system of enforcing the rules with respect to disclosure.
19. If this Honourable Court declines to grant the proposed order in **Schedule "D"**, the Sawridge Trustees request that a timeline be set for an application to determine how the documents that Catherine Twinn proposes to include in her Affidavit of Records should be dealt with in accordance with **Schedule "C"**.

B. Directed Issue Hearing on Definition of Beneficiary

20. The Definition has been deemed discriminatory, pursuant to the Order of this Court issued on January 19, 2018. A copy of that Order is attached for ease of reference as **Schedule "E"**.
21. The next issue, then, is whether the Definition will be changed, and by what procedure. The Sawridge Trustees raised this in their Application filed on January 9, 2018 (Application: Statement of Issues and Relief Sought). The application is attached as **Schedule "F"**.
22. The Sawridge Trustees sent a letter to the parties on June 22, 2018, proposing an Order for dealing with this issue. A copy of that letter is attached as **Schedule "G"**. In terms of the procedure to amend the Definition, the Sawridge Trustees requested that the OPGT and Catherine Twinn advise if they took the position that an application to vary the Trust pursuant to s. 42 of the *Trustee Act* was required, or whether an amendment pursuant to the Trust Deed was required..
23. The Sawridge Trustees propose that there be a Directed Issue Hearing because this question of procedure is essential in determining the course of remaining issues in the Application. The resolution of the Directed Issue Hearing meets the objectives in Subrule 7.1(1):
- (a) Determining whether the Definition may be amended or modified may dispose of the rest of the claim. If it is found that the Definition should not or cannot be modified, the discriminatory nature of the Definition notwithstanding, then that will dispose of the rest of the Application in respect of grandfathering.
 - (b) The determination of whether the Definition may be amended or modified is a necessary precursor to any findings on what grandfathering, if any, is appropriate. Until it is known whether the Definition will change, and if so, then how it may change, there cannot be any determinations or meaningful discussions about whose rights may be affected by any such change.
 - (c) Having this early determination will save expense and court resources, as it will focus the hearing on the issue of grandfathering. Since it will be known in advance what the new Definition will be, then the parties will be in a better position to ascertain whose interests will be affected, and therefore what evidence may need to be led in respect of those individuals. In contrast, if it is not known what the Definition will be before any hearing on grandfathering, then there is likely to be evidence led in respect of individuals who will remain beneficiaries and do not need to be grandfathered. The trial on that issue will almost certainly be longer than necessary as a result, and the parties will be put to additional expense.
 - (d) The question of whether the Definition may be amended or modified is an issue of law. Little evidence will be required. It can proceed quickly in contrast, the remaining issue of grandfathering will require a significant amount of evidence on the issues of individual genealogies and the interpretation of the *Indian Act* as of April 15, 1982. It will require a longer hearing, which, for reasons above, may be entirely unnecessary, depending on how the DIH is determined.
- The Sawridge Trustees are proposing that any change would be made pursuant to common law powers of the courts in respect of the administration of trusts and dealing with

public policy, and as such would not require 100% approval of beneficiaries. In contrast, s. 42 requires that 100% beneficiary approval be obtained in respect of any proposed change to the definition. The parties should take such steps prior to the Directed Issue Hearing as may be necessary to seek approval of any proposed definition. If there is even one beneficiary response opposing a proposed change, and the Court determines that it cannot proceed under the common law, then it will be quickly and readily apparent that such an application would not succeed and grandfathering will not be a question.

- 24. There is little to no overlap between the issue of whether and how the Definition is to be modified, and the issue of who may be grandfathered. The determination of the issue respecting the change to the Definition is a legal question
- 25. If the Directed Issue Hearing is granted, the Sawridge Trustees propose that a litigation plan in the form attached as **Schedule "A"** be approved by this Court. If this Honourable Court declines to grant the proposed order in **Schedule "D"**, the Sawridge Trustees propose that a litigation plan in the form attached as **Schedule "B"** be granted to accommodate the determination of the privilege issue.

C. Litigation Plan

- 26. The Order of this Honourable Court issued January 19, 2018 attached and incorporated, as Schedule "A" thereto, a Litigation Plan. Step 15 of that Litigation Plan provided:

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
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- 27. The Sawridge Trustees and the Respondents did not reach such a Consent Order by July 15, 2018.
- 28. The Sawridge Trustees therefore bring the within application to seek assistance of this Court in setting a Litigation Plan for the remainder of the application as provided in Step 15 of the previous Litigation Plan.

D.Method of Non-Party Beneficiary Participation

- 29. The Sawridge Trustees submitted at the Case Management Conference held on January 19, and their submission remains, that participation in writing only by any person who is a beneficiary and/or potential beneficiary will be the most effective and efficient method of participation in the Trust litigation. The Sawridge Trustees propose that the participation be limited to one submission per individual at each stage of the hearing of issues and that this be incorporated into the Litigation Plan. (If this Court agrees to the Directed Issue Hearing, one submission could be made at that time, and one at the time of any subsequent hearing in respect of grandfathering.)
- 30. There are many people who claim to be potential beneficiaries of whom the Trustees are aware. Given the number of such potential beneficiaries, the Sawridge Trustees further submit that a page

limit of **5 pages per written submission** (including attachments) would provide an appropriate balance between the interests of the beneficiary/potential beneficiary in making a submission in respect of his or her interests, with the need to maintain proportionality and efficiency in the proceedings. The submissions are not to be duplicative of arguments already made. Any duplication could be subject to costs awards.

31. The Sawridge Trustees submit that, for the Directed Issue Hearing, beneficiary evidence from beneficiaries, or potential beneficiaries, would not be required, as it is a question of law. However, if this Court disagrees, the Sawridge Trustees propose that any beneficiary or potential beneficiary who wishes to file an affidavit can only do so to raise evidence that is unique and distinct from evidence that has already been filed by the parties. If a beneficiary or potential beneficiary filed duplicative evidence, the issue of the duplicative nature of the evidence will be addressed in a costs application and there may be costs consequences for duplication of submissions.
32. If participation in this manner is directed, the Sawridge Trustees suggest that a deadline for beneficiary submissions in respect of the Directed Issue Hearing be incorporated into the proposed timetable, as shown in the proposed timetable attached as **Schedule "A"** (or, in the alternative, **Schedule "B"**). The Sawridge Trustees propose that notice be provided by way of case management order, which would be published on the website for this proceeding.

Material or evidence to be relied on:

- D. Affidavits of Paul Bujold filed to date.
- E. The attached Schedules.
- F. Concise Bench Brief to be filed by the Applicants by August 24, 2018.
- G. Such further evidence as may be filed by the Applicant prior to the return date of the Application.

Applicable Rules:

- H. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.2, 4.14, 7.1, 6.44-46

How the Application is proposed to be heard or considered:

- I. The Sawridge Trustees propose that this application proceed by way of an oral hearing on the date set out above.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

SCHEDULE A

**Schedule "A" – Litigation Plan for Directed Issue Hearing
if Privilege Issue Determined September 25, 2018**

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 Trustees' Application for Advice and Direction	September 25, 2018
2.	Questioning by OPGT of Catherine Twinn on Affidavit of Records filed, if required, and further questioning of Paul Bujold (Sawridge Trustees) by OPGT on Affidavits of Records filed, if required.	By October 19, 2018
3.	Notice posted to the website of the Directed Issue Hearing. Letters sent to SFN members of the nature of the application and letters sent to identified potential beneficiaries of the application.	By October 19, 2018
4.	Parties to send any proposal(s) for a varied definition that might be relied on for dealing with s. 42 at the Directed Issue Hearing, with a request that responses to the proposal be returned by November 1, 2018	By October 19, 2018
5.	Brief of the Sawridge Trustees for Directed Issue Hearing filed	By November 9, 2018
6.	Briefs of the OPGT and Catherine Twinn for Directed Issue Hearing filed	By November 23, 2018
7.	Written submissions by any non-party beneficiaries/potential beneficiaries, including any submission by the SFN (maximum of 5 pages, including attachments)	By December 5, 2018
8.	Directed Issue Hearing (one half day)	Dependent on availability of Court (by December 21 if possible)
9.	A new litigation plan will be developed for the steps for grandfathering, if necessary: need witness lists; will-say statements; briefs; hearing date	

SCHEDULE B

**Schedule "B" – Litigation Plan for Directed Issue Hearing
if Privilege Issue Not Determined September 25, 2018**

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 Trustees' Application for Advice and Direction	September 25, 2018
2.	Notice posted to the website of the Directed Issue Hearing. Letters sent to SFN members of the nature of the application and letters sent to identified potential beneficiaries of the application.	By November 19, 2018
3.	Parties to send any proposal(s) for a varied definition that might be relied on for dealing with s. 42 at the Directed Issue Hearing, with a request that responses to the proposal be returned by November 1, 2018	By November 19, 2018
4.	Questioning by OPGT of Catherine Twinn on Affidavit of Records filed, if required, and further questioning of Paul Bujold (Sawridge Trustees) by OPGT on Affidavits of Records filed, if required.	By December 14, 2018
5.	Brief of the Sawridge Trustees for Directed Issue Hearing filed	By December 21, 2018
6.	Briefs of the OPGT and Catherine Twinn for Directed Issue Hearing filed	By January 4, 2019
7.	Written submissions by any non-party beneficiaries/potential beneficiaries, including any submission by the SFN (maximum of 5 pages, including attachments)	By January 18, 2019
8.	Directed Issue Hearing (one half day)	Dependent on availability of Court (by February 1, 2019 if possible)
9.	A new litigation plan will be developed for the steps for grandfathering, if necessary: need witness lists; will-say statements; briefs; hearing date	

SCHEDULE C

Schedule "C" –Litigation Plan for Privilege Hearing

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 Privilege Issue. If proposed order granted, issue is complete.	September 25, 2018
2.	If order not granted September 25, Trustees to put together all documents that contain privileged information and provide to Catherine Twinn to see if agreement can be reached on the exclusion of the whole document or on the exclusion of a redacted portion of the document	By September 28, 2018
3.	All non-contested documents from the Affidavit of Records of Catherine Twinn (i.e., documents over which no issues regarding privilege are raised) delivered to OPGT	By September 28, 2018
4.	If no agreement is reached on exclusions/redactions from contested documents by October 12, 2018, then the parties will agree on a referee to review the documents to determine what documents raise privilege issues. Referee to be appointed by agreement of the parties.	By October 19, 2018
5.	If no agreement is reached on a referee, the parties may apply in regular morning chambers to have a referee appointed.	By October 26, 2018
6.	Referee to make decision and provide report to the Court.	By November 2, 2018
7.	Trustees to file a brief outlining position on privilege.	By November 9, 2018
8.	Any responding briefs to be filed by Catherine Twinn and the OPGT on privilege.	By November 16, 2018
9.	Hearing in respect of the privilege issues	By November 30, 2018 (court time permitting)

SCHEDULE D

Schedule "D" – Proposed Privilege Order

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, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID
MAJESKI, as Trustees for the 1985 Trust ("Sawridge
Trusts")

DOCUMENT **ORDER (PRIVILEGE)**

DATE ORDER PRONOUNCED
LOCATION WHERE ORDER
PRONOUNCED **Edmonton, Alberta**

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

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

AND WHEREAS certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees, The Office of the Public Trustee and Guardian of Alberta ("**OPGT**") and Catherine Twinn agree that there is no intention to waive solicitor-client privilege over the subject matter of the communications contained in the Filed Documents and the 1403 Filed Documents;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. Any waiver of solicitor-client privilege that may be implied from the contents of the Filed Documents, and/or the 1403 Filed Documents, is expressly limited to the contents of those documents.
2. No response in a questioning, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, and/or the 1403 Filed Documents (collectively "Questioning Responses"), can be construed as a general waiver of solicitor-client privilege over the subject matter of any communications contained therein.
3. The Sawridge Trustees are expressly declared not to have waived solicitor-client privilege over the subject matter of any matters discussed in the Filed Documents, the 1403 Filed Documents, and/or the Questioning Responses. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or any Questioning Responses given in these proceedings, can be used to compel the Sawridge Trustees to produce further documents or answer questions in respect of legal advice received by the Sawridge Trustees.
4. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or the Questioning Responses, can be used to compel the Sawridge Trustees to produce

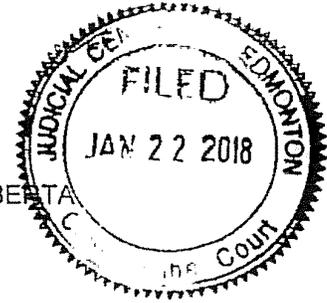
further documents or answer questions in respect of legal advice received by the Sawridge Trustees.

5. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request as a beneficiary of the 1985 Trust.
6. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to use any other document or record in this Application, other than those covered by this Order (being the Filed Documents, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.

The Honourable Justice D. R. G. Thomas

SCHEDULE E

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 TWINN, 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: D.R.G. THORP
 DATE: JAN 19, 2018
 LOCATION: EDMONTON*

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

[Signature]

 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

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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;

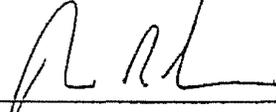
AND UPON noting the consent of the Sawridge Trustees, consent of The Office of the Public Trustee and Guardian of Alberta ("OPGT") and the consent of Catherine Twinn;

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.

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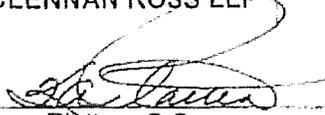
4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as the ~~sole determinative factor~~ that the 1985 Trust should be dissolved.
 a ground upon which ~~could.~~
5. ~~The 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



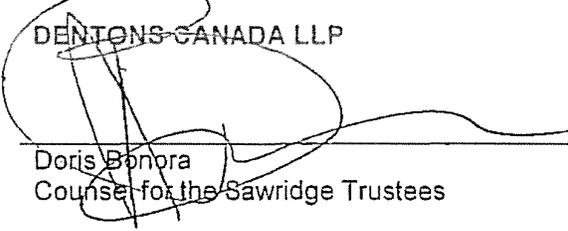
Karen Platten, Q.C.
Counsel for Catherine Twinn as Trustee for the 1985 Trust

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

SCHEDULE F



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

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

APPLICANTS

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

DOCUMENT

**Application (Statement of Issues and
Relief Sought)**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5
Counsel for the Sawridge Trustees

Attention: Doris C.E. Bonora
Telephone: (780) 423-7188
Fax: (780) 423-7276
File No: 551860-001-DCEB

NOTICE TO RESPONDENT(S)

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Case Management Justice.

To do so, you must be in Court when the application is heard as shown below:

Date	To Be Determined
Time	To Be Determined
Where	Law Courts, 1 A Sir Winston Churchill Square, Edmonton
Before Whom	To Be Determined

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

1. The Applicants, the Sawridge Trustees, are the Trustees of the Sawridge Band Inter Vivos Settlement ("1985 Trust"). The Applicants seek determination of an issue and advice and directions from this Court. Pursuant to the comments of the Court of Appeal in *Twinn v Twinn*, 2017 ABCA 419, the Applicants file this document to set out and clarify the advice and directions sought in this Application.
2. The 1985 Trust was settled on April 15, 1985. Thereafter, section 15 of the *Canadian Charter of Rights and Freedoms* came into force, following the signing of the *Charter* into law.
3. After the 1985 Trust was settled, Bill C-31 was passed into law, making significant amendments to the *Indian Act*, R.S.C. 1970, Chapter I-6. Those amendments included the reinstatement of status and membership to women who had married non-Indigenous men and therefore lost their status and membership under the *Indian Act* prior to the amendments.
4. The definition of "Beneficiary" in the Trust Deed of the 1985 Trust makes specific reference to determining members of the Sawridge First Nation ("SFN") by reference to the *Indian Act* as it read as at April 15, 1982, before Bill C-31 was passed. The Trust Deed specifically prohibits amendment of the definition of "Beneficiary".
5. The 1985 Trust was funded from assets that had belonged to the SFN. Currently, there are members of SFN who are not beneficiaries of the 1985 Trust, such as the Bill C-31 women. There are beneficiaries of the 1985 Trust who are not members of SFN.
6. There may be other forms of discrimination in the definition of "Beneficiary".
7. The Applicants seek a determination of the following issue:

Is the definition of "Beneficiary" in the Trust Deed of the 1985 Trust discriminatory, insofar as the

definition refers to provisions of the *Indian Act*, RSC 1970, c I-6, which have since been amended, and 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 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;

Remedy sought:

8. If the definition of "Beneficiaries" is found not to be discriminatory, then the Applicants do not expect to seek any other relief.
9. If the definition of "Beneficiary" is discriminatory, the Applicants seek direction from this Court as to the appropriate remedy, and particularly whether the appropriate remedy is:
 - (a) To modify the definition by striking out language that has a discriminatory effect such that the definition of "Beneficiary" in the 1985 Trust will be reduced to members of the Sawridge First Nation?
 - (b) If the remedy in paragraph 9(a) is not granted to determine if the 1985 Trust can be amended pursuant to,
 - (i) the amending provisions of the Trust Deed, or
 - (ii) Section 42 of the *Trustee Act*?
10. If the definition of "Beneficiary" is modified, by striking out language or otherwise, then:
 - (a) Should there be "grandfathering" such that any of the individuals who met the definition of "Beneficiary" before this relief is granted will remain Beneficiaries?

- (b) If the answer to 10(a) is "yes", what should the terms of such "grandfathering" be and who will be grandfathered?

11. Such further and other relief as this Court may deem appropriate.

Affidavit or other evidence to be used in support of this application:

12. Such material as has been filed to date and has been posted on the applicable court ordered website at www.sawridgetrusts.ca
13. Such further material as counsel may further advise and this Honourable Court may admit.

How the Application is to be heard:

14. The application is to be heard in Special Chambers before the presiding Justice at a date to be determined.

Applicable Acts and regulations and Orders:

15. *Alberta Rules of Court*, Alta Reg 124/2010;
16. *Trustee Act*, RSA 2000, c T-8;
17. Order of the Court of Queen's Bench of Alberta dated January 5, 2018 in case management.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

SCHEDULE G

June 22, 2018

File No.: 551860-1

SENT VIA E-MAIL:

Janet Hutchison
Unit #190 Broadway Business Square,
130 Broadway Boulevard,
Sherwood Park, Alberta, T8H 2A3

Karen Platten, Q.C. and Crista Osualdini
McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton AB T5N 3Y4

Dear Sir/Madam:

**RE: Beneficiary Definition in 1985 Sawridge Trust
Court File No. 1103 14112**

We write further to our letter dated March 21, 2018, to which we have not received a response. A copy of our letter is attached for your ease of reference.

One of the issues in our Application (Statement of Issues and Relief Sought) filed on January 9, 2018 ("Application") has been resolved by way of consent order dated January 19, 2018, with the definition of "Beneficiary" in the Trust Deed having been declared discriminatory.

As you are aware, the current litigation plan has no scheduled steps beyond July 15, 2018. In terms of the next steps, we write to propose that the issue of remedying the definition also be resolved by an order which can either be by consent or by having the parties signify that they do not oppose the order.

Law on amending the trust

Our view is that there is sound legal basis upon which the Court may strike language in the definition of "beneficiary" on the basis that such language has a discriminatory effect.

Two other possible methods of proceeding have been raised during the course of discussions: seeking variation pursuant to s. 42 of the *Trustee Act*, or amending pursuant to the terms of the Trust Deed.

If we were to proceed by way of s. 42 of the *Trustee Act*, which requires 100% consent, the views of even one beneficiary would prevent a remedy even if the substantial majority of other beneficiaries approve. Given the contentious nature of the litigation to date, we doubt that 100% approval of a definition is possible. In addition, there are substantial issues with ascertaining the identities of all of the beneficiaries of the Trust

thus it will not be certain that we have 100% approval. It also perpetuates the discrimination because the very women who are impacted by the discrimination do not have a vote, as they are not beneficiaries.

Our view is that amending pursuant to the Trust Deed is not possible, insofar as paragraph 10 specifies that no change can be made to the definition of "beneficiary" by way of the variation clause in the Trust Deed.

Amendment must precede Grandfathering

We believe that we cannot proceed with discussions about "grandfathering" individuals who may be impacted by a change to the definition until we know how the definition will be amended, as we cannot know if someone needs to be grandfathered until we know what the definition will be and whether they will be excluded. The change of definition must precede the grandfathering issue. Otherwise, we will be spending a great deal of time and expense to discuss what amounts to hypotheticals, and in our view, there is no time or expense to be wasted.

Proposal to Proceed

We therefore are of the view that it is advisable to proceed by seeking the direction of the Court to amend the definition by striking language as follows:

~~"Beneficiaries" 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 1-6 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 all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to 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 1-6 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 1-6, 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;~~

We have enclosed a draft Order to this effect. If agreed to by the parties, we can present that Order to the Court, together with a brief that sets out the law respecting the Court's authority to strike discriminatory language in a trust such as this one, and seek the Court's approval.

If you do not agree with our analysis, or with the terms this Order, we ask that you outline your position for our consideration. If either of your clients oppose this approach, it is important that we be advised of that position.

We look forward to your response, which we request be provided before July 15, 2018.

Yours truly,
Dentons Canada LLP

per 

Doris C.E. Bonora

Encl.

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 ORDER (DEFINITION OF BENEFICIARY)

DATE ORDER PRONOUNCED
LOCATION WHERE ORDER PRONOUNCED Edmonton, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER Honourable Justice D.R.G. Thomas

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the
Sawridge Band Inter Vivos Settlement ("1985 Trust") ("Application");

AND WHEREAS one issue in the Application by the Sawridge Trustees on which direction was
sought was whether the definition of "Beneficiary" in the 1985 Trust is discriminatory;

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AND WHEREAS the definition was declared discriminatory by way of Consent Order issued January 19, 2018;

AND WHEREAS another question in the Application on which direction is sought is what remedy is appropriate in respect of changing the definition that has been declared discriminatory;

AND UPON being advised that the parties ask the Court to consider resolving the definition of Beneficiary 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 there being one remaining substantive issue in the Application to be resolved, being whether there should be any grandfathering of individuals whose status as beneficiaries would be affected by this change of definition, and upon being advised that the parties wish to reserve and adjourn the determination of this issue;

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 the Court being satisfied that it has the authority to amend a Trust Deed by striking discriminatory language;

AND UPON the form of this Order having been approved by the Sawridge Trustees, The Office of the Public Trustee and Guardian of Alberta ("OPGT") and Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust be amended by striking out portions of the language in the Trust Deed, as follows:

~~"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 all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to 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;~~

2. The definition of Beneficiary for the 1985 Trust will be:

"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band.
3. The remaining substantive issue in the Application, being the determination of whether any individual whose status as a Beneficiary is affected by this amendment to the definition should be grandfathered as a Beneficiary, is adjourned *sine die*. The timeline for advancing that issue will be agreed by the parties or may be further determined at a future Case Management Meeting.
4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Order cannot be used in an application for dissolution as a ground upon which the 1985 Trust could be dissolved.

The Honourable Justice D. R. G. Thomas

APPROVED BY:

MCLENNAN ROSS LLP

HUTCHISON LAW

Karen Platten, Q.C.
Counsel for Catherine Twinn

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

Clerk's stamp:



COURT FILE NUMBER

1103 14112

COURT
JUDICIAL CENTRE

COURT OF QUEEN'S BENCH OF ALBERTA
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")

APPLICANT

ROLAND TWINN, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWIN AND DAVID
MAJESKI, as Trustees for the 1985 Trust and the 1986 Trust
("Sawridge Trustees")

DOCUMENT

ANNOTATED AGENDA OF THE SAWRIDGE TRUSTEES
(in respect of the AGENDA FOR CASE MANAGEMENT
MEETING OF DECEMBER 18, 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

DATE OF CASE MANAGEMENT
HEARING

December 18, 2018

LOCATION WHERE CASE
MANAGEMENT HEARING WILL
BE HELD

Edmonton, Alberta

NAME OF JUSTICE HEARING
THIS MATTER

The Honourable Mr. Justice John T. Henderson

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**Annotated Agenda of the Sawridge Trustees
in respect of for Case Management Meeting
December 18, 2018**

We provide annotations for the agenda for the case management meeting set for December 18, 2018. Set out below is a summary of each point listed on the agenda. We believe the purpose of the meeting is to provide an overview of litigation and overview of the steps for which we anticipate requiring judicial assistance.

Agenda

1. Identification of parties and interested persons;
2. Overview of litigation;
3. Jurisdiction Order: which will be presented to the Court as a Consent Order;
4. Privilege Order: identifying those issues for which there is agreement and those issues for which the parties require judicial assistance;
5. Directed Hearing Application;
6. Agreed Statement of Facts negotiations;
7. Participation of beneficiaries and potential beneficiaries including dealing with letter from Shelby Twinn;
8. Litigation plan.

1. Identification of Parties and Interested Persons

Parties:

Sawridge Trustees - Roland Twinn, Everett Justin Twin, Tracey Scarlett, Margaret Ward and David Majeski - represented by Doris Bonora and Mandy England, Dentons Canada LLP

Catherine Twinn - was a trustee at the commencement of the litigation. She has now resigned as a trustee. Pursuant to a court order, even though she resigned as a trustee she is able to participate as though she were a trustee –represented by Crista Osualdini and Karen Platten, McLennan Ross LLP.

Office of the Public Trustee and Guardians Office (OPGT) - represents beneficiaries who are minors or who were minors when the litigation started, children of members, and children of applicants for membership in the Sawridge First Nation (as more particularly set out in Sawridge #3). The OPGT is represented by Janet Hutchison, Hutchison Law.

Interested Persons:

Sawridge First Nation – Sawridge First Nation is the First Nation from whose resource revenues the 1985 trust was funded. The members of the Sawridge First Nation (SFN) are the beneficiaries of the 1986 trust that is referenced throughout. SFN has been involved as there have been applications brought against SFN for the production of documents and SFN had particular knowledge of issues such as those surrounding Maurice Stoney. SFN has advised the court that it may bring an application to declare the trust void for uncertainty in the event that it appears that excessive costs will be spent on continuing the litigation and if there are significant numbers of non-members who will become beneficiaries. SFN believes that the funds in the trust belong to the members and thus are representing the members of the SFN to protect the trust assets. SFN is represented by Edward Molstad, Parlee McLaws LLP. Mr. Molstad will be in attendance at the December 18, 2018 Case Management Hearing.

Beneficiaries and Potential Beneficiaries - There are some beneficiaries or potential beneficiaries who have expressed a desire to participate in the trust litigation. Nancy Golding of BLG LLP had been representing interested parties who sought party status in Sawridge #5. Nancy Golding has filed a notice of ceasing to act. Shelby Twinn, one of the individuals who Nancy Golding represented, has written to the court expressing interest in participating for herself and for others. Shelby Twinn and others may wish to address the Court at the December 18, 2018 case management hearing. They are self-represented at the moment. Item 7 on the Agenda addresses the concerns of Shelby Twinn.

2. Overview

The litigation started in 2011 with the intention of determining if the beneficiary definition in the Sawridge 1985 trust should be amended because it was discriminatory. The definition has been deemed discriminatory by the Court pursuant to an order dated January 19, 2018. The court must now determine the remedy in respect of the discriminatory definition. The resolution may involve a change in the definition or allowing the definition to remain unchanged. If there is change in the definition, there must be a review of whether any of the current beneficiaries are affected and, if affected, what if anything should be done to deal with their interests.

There have been a number of case management decisions (Sawridge #1 to #9), but the Court started with the Procedural orders which directed how documents would be served. There is a website to which all filed documents are posted.

There have been no distributions to beneficiaries from the 1985 trust since its creation in 1985. It would be in the best interests of the beneficiaries to conclude this litigation so that the beneficiaries can begin to receive payments from the trust.

In moving towards a conclusion, we require the court's assistance on the following matters:

3. Jurisdiction Order: which will be presented the Court as a Consent Order

We believe that the Case Management Justice can make an order directing issues related to the jurisdiction of the court in respect of the final decision to be made. It is unclear whether the definition can be amended by virtue of the trust deed; the provisions of s.42 of the *Trustees Act* or by the Court direction under common law. It would be economical to have direction in this respect and the parties have agreed to have the Case Management Justice decide this issue. We are proposing an order setting out issues for which the parties seek this Court's direction. The OPGT, Catherine Twinn and the Trustees have agreed to the order attached as Tab A and seek the Court's approval of such Order.

4. Privilege Order

There have been several documents that have been introduced in this litigation and related litigation that contain privileged information. In the interests of proceeding, and efficiency in litigation, the Trustees are prepared to allow all of those documents that have already been produced to remain produced. The Trustees simply wish to prevent further production of privileged materials. Catherine Twinn wishes to protect the rights of beneficiaries to request trust documents to which they may be entitled, which the Trustees endorse. An order has been drafted and agreed upon with one exception, being paragraph 6 of the proposed order. We will seek the direction of the court to finalize the order respecting privileged documents. The two forms of order being discussed are attached at Tab B. It is only the concluding sentence in paragraph 6 of each form of order which is in dispute.

5. Directed Hearing Application

Once the jurisdiction of the Court is determined, the Trustees will seek to have the Court direct a "directed issue" on the amendment of the beneficiary definition. The options are limited for amendment and will be guided by the determination of the Jurisdiction issue. The issue is one of law. The Trustees believe that this is an issue that can be determined by the Court without the need of a trial. If the Court does change the definition, there can be a further hearing for the determination of whether any beneficiary should be grandfathered if they lose their rights by virtue of the change in definition. Until the definition is changed, the Trustees believe that it is impossible to know which beneficiaries might be grandfathered. The grandfathering issue will be lengthy and could involve oral testimony, as it may require individual genealogies and personal and First Nation histories.

The OPGT and Catherine Twinn have indicated that they do not agree to the directed hearing and thus this matter will need to be addressed before the Court as a contested matter following the Jurisdiction hearing.

6. Agreed Statement of Facts

The parties have been working on an agreed statement of facts to try and save time and costs in the final hearing. There are very few witnesses who have any personal knowledge and the Trustees are hoping to present the history of the trust and the facts which would assist a final hearing Justice to make a decision by agreement. To date there has been some progress with the OPGT and the Trustees reaching some agreement. We continue to work on the process.

7. Participation of Beneficiaries

Following the decision in Sawridge #5, as confirmed by the Court of Appeal, and following the decisions involving Maurice Stoney, no new parties have been added to the litigation. In Sawridge #5 and in the appellate decision, the court suggested that while not a party, a beneficiary of the trust might have some participatory role and the Court of Appeal encouraged the parties to sort out the issue of participation.

We have made a proposal for participation which involves interested parties having a participatory role through limited (5 page) written arguments which are not repetitive of arguments made by the parties. There is some agreement from Catherine Twinn on the Trustees' proposal but with many added elements.

Shelby Twinn has also written to the court on this issue and she raises many of the same issues raised in her previous application including seeking advance costs. Our response to the letter from Shelby Twinn is attached as Tab C.

We will need direction from the Court on beneficiary participation.

8. Litigation Plan

Once the Privilege order and Jurisdiction orders are determined, the parties can move towards a conclusion. We believe it is best to set a litigation plan. The Trustees propose the litigation plan attached at Tab D.

TAB 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, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID
MAJESKI, as Trustees for the 1985 Trust ("Sawridge
Trustees")

DOCUMENT **CONSENT ORDER (Hearing of Jurisdictional Question)**

DATE ORDER PRONOUNCED
LOCATION WHERE ORDER
PRONOUNCED **Edmonton, Alberta**

NAME OF JUSTICE WHO MADE THIS ORDER **Honourable Justice J.T. Henderson**

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the
Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

AND WHEREAS the Sawridge Trustees seek direction respecting the source and nature of the
jurisdiction of this Court to make changes to the definition of "Beneficiary" as set out in the 1985 Trust;

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AND WHEREAS a Case Management Justice has authority under Rule 4.14 of the *Alberta Rules of Court* to make interlocutory orders;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. A hearing on a directed issue will be held, prior to trial, and the issues to be determined (the "Jurisdictional Question") will be as follows:
 - (a) Does the Court have jurisdiction to amend the beneficiary definition contained in the 1985 Trust (the "Definition"), on the basis of public policy, its inherent jurisdiction or any other common law plenary power?
 - (b) If the answer to question (a) is yes, what is the scope of the Court's jurisdiction to amend the Definition, including can the Court:
 - (i) Add words to the 1985 Trust deed;
 - (ii) Delete words contained in the 1985 Trust deed; or
 - (iii) Engage in a combination of addition and deletion of words to the 1985 Trust deed?
 - (c) If the answer to question (a) is no, is the Court's jurisdiction limited to what is permitted by s. 42 of the *Trustee Act*? If so, what evidence would be required by the Court to amend the Definition using s. 42 of the *Trustee Act*?
 - (d) If the Court does not have jurisdiction under any of the methods set out in paragraphs (a), (b) or (c) above, do the Sawridge Trustees have jurisdiction under the existing terms of the Trust Deed of the 1985 Trust to amend the Definition?
 - (e) If the Court proceeds pursuant to paragraph 1(c) or 1(d) above, is the Court's jurisdiction in this application affected by the Minors Property Act, and specifically, does the Court require evidence of consent to the application for a beneficiary definition change from minor beneficiaries who are over the age of 14?
2. This Jurisdictional Question will be heard and determined by the Case Management Justice.

The Honourable Justice J.T. Henderson

**CONSENTED TO BY:
MCLENNAN ROSS LLP**

HUTCHISON LAW

Crista Osualdini
Counsel for Catherine Twinn

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

TAB B

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, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID
MAJESKI, as Trustees for the 1985 Trust ("Sawridge
Trustees")

DOCUMENT **CONSENT ORDER (PRIVILEGE)**

DATE ORDER PRONOUNCED
LOCATION WHERE ORDER
PRONOUNCED **Edmonton, Alberta**

NAME OF JUSTICE WHO MADE
THIS ORDER **Honourable Justice J.T. Henderson**

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the
Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

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AND WHEREAS certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS Catherine Twinn has sworn an affidavit of records dated June 21, 2018, to be filed, which contains records including, but not limited to, the Filed Documents, that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Twinn Affidavit of Records**");

AND WHEREAS the Sawridge Trustees do not object to Catherine Twinn filing the Twinn Affidavit of Records so long as this Order is granted;

AND WHEREAS Paul Bujold deposed affidavits on September 6, 13 and 30, 2011 exclusively in the within Court File ("**1103 Action**"); the Office of the Public Guardian and Trustee ("**OPGT**") questioned Paul Bujold on May 27 and 28, 2014 and on June 11, 2018 and transcripts are produced in respect of those questionings; Paul Bujold answered undertakings from such questionings; Exhibits were marked in such questionings; Paul Bujold deposed an affidavit of records dated November 2, 2015 and a supplementary affidavit of records dated April 27, 2018; and collectively such affidavits, transcripts, exhibits and undertakings shall be referred to as the "**Excluded Documents**";

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees did not have the intention to waive solicitor-client privilege over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents or the Questioning Responses as that term is defined below;

AND WHEREAS the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the aforementioned documents in the prior paragraph ("**Subject Matter Waiver**") has not occurred;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. No response in a questioning to date, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, the Twinn Affidavit of Records, and/or the 1403 Filed Documents (collectively "**Questioning Responses**"), can be construed as Subject Matter Waiver over the subject matter of any communications contained therein.

2. Any waiver of solicitor-client privilege in respect of the contents of the Filed Documents, the Twinn Affidavit of Records, the Questioning Responses and the 1403 Filed Documents is expressly declared to be limited to the content of those documents, and it is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.
3. Further to paragraph 2, nothing in the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents, and/or the Questioning Responses, can be used to compel the Sawridge Trustees to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by the Sawridge Trustees on the basis that Subject Matter Waiver has occurred.
4. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request and obtain as a beneficiary of the 1985 Trust.
5. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to file or otherwise admit evidence any other document or record in the 1103 Action, other than those covered by this Order (being the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.
6. For clarity, the *Alberta Rules of Court* and such other rules of evidence as would ordinarily apply will continue to apply to the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and the Questioning Responses in respect of their use in any aspect of the 1103 Action, and none of the parties may object to the use or admissibility of any of these documents on the basis of an argument of solicitor-client privilege. For further clarity, all transcripts from cross examination on affidavit done to date in the 1103 Action, including any associated undertakings, exhibits or written interrogatories may be used in these proceedings as though they were used in an application and the rules of evidence shall be applied as the hearing Justice shall determine.
7. This order shall not apply to the Excluded Documents.

The Honourable Justice J.T. Henderson

**CONSENTED TO BY:
MCLENNAN ROSS LLP**

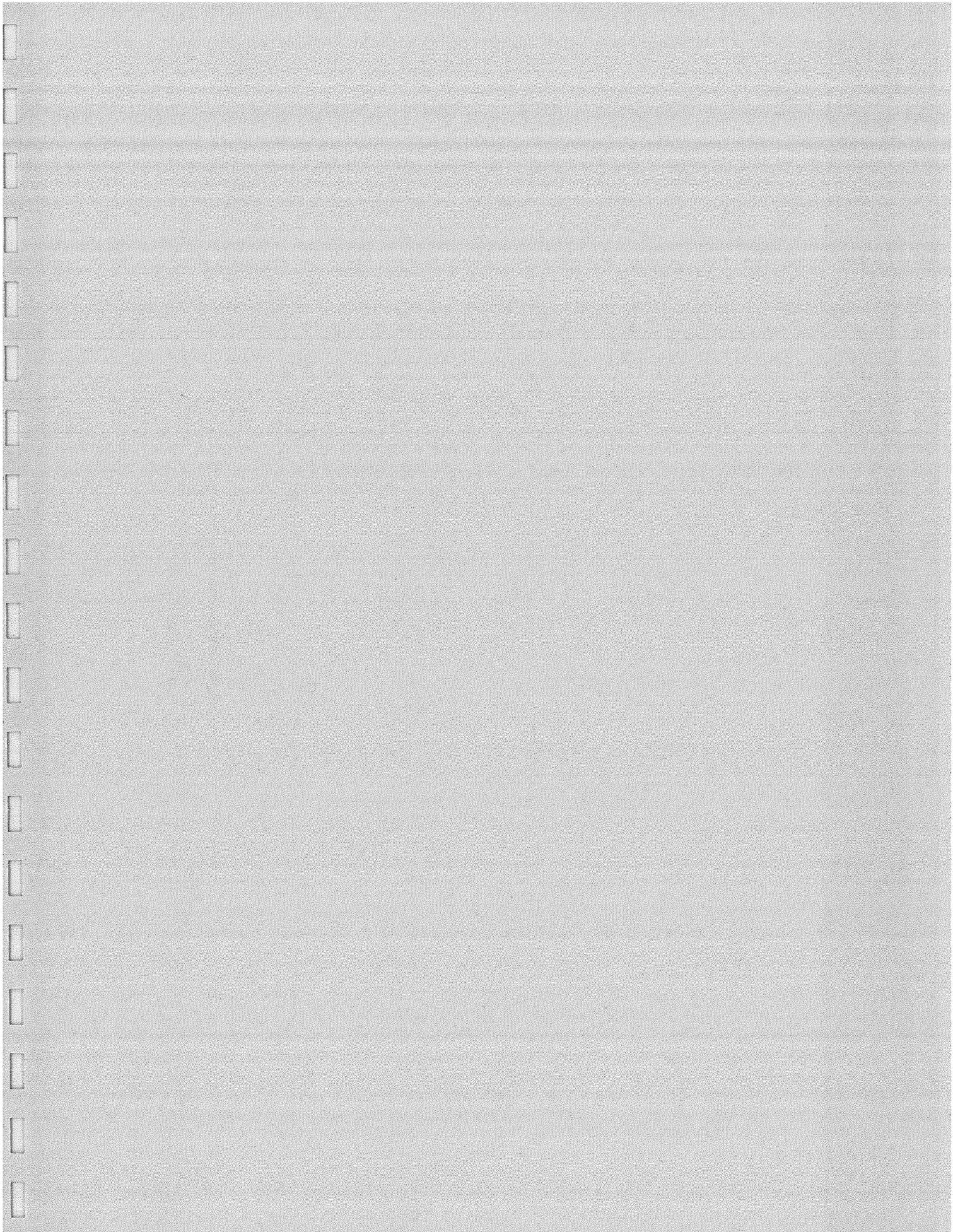
HUTCHISON LAW

Crista Osualdini
Counsel for Catherine Twinn

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees





MCLENNAN ROSS LLP
LEGAL COUNSEL

Our File Reference: 144194

Crista Osualdini
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PLEASE REPLY TO EDMONTON OFFICE

September 13 2018

Sent Via Email:
mandy.england@dentons.com

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

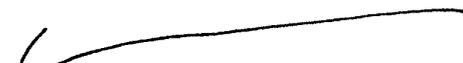
Attention: Mandy England

Dear Madam:

**Re: Privilege Order – 1985 Sawridge Trust
Court File No.: 1103 14112**

We write further to your July 27, 2018 correspondence and our subsequent discussions in respect of this matter. We enclose with this letter a copy of the order that we propose is a resolution to the privilege issues that have been raised by the Sawridge Trustees in respect of the materials referred to therein. We are sending this letter to notify you that we are putting this proposed order on the record and intend to refer to it at the upcoming case management appearance before Justice Thomas in the event that a resolution cannot be worked out in the meantime.

Yours truly,


CRISTA OSUALDINI

CCO/blr
Encl.
00144194 - 4147-2470-6070 v.1

cc: Janet Hutchison
Sent Via Email: jhutchison@jhlhlaw.ca

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Visit our website at www.mross.com

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, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID
MAJESKI, as Trustees for the 1985 Trust ("Sawridge
Trusts")

DOCUMENT CONSENT ORDER (PRIVILEGE)

DATE ORDER PRONOUNCED
LOCATION WHERE ORDER
PRONOUNCED **Edmonton, Alberta**

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

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**

UPON the Application by the Sawridge Trustees for advice and direction in respect of the
Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

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AND WHEREAS certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS Catherine Twinn has sworn an affidavit of records dated June 21, 2018, to be filed, which contains records, including, but not limited to, the Filed Documents, that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Twinn Affidavit of Records**");

AND WHEREAS the Sawridge Trustees do not object to Catherine Twinn filing the Twinn Affidavit of Records so long as this Order is granted;

AND WHEREAS Paul Bujold deposed affidavits on September 6, 13 and 30, 2011 exclusively in the within Court File ("**1103 Action**"); the Office of the Public Guardian and Trustee ("**OPGT**") questioned Paul Bujold on May 27 and 28, 2014 and on June 11, 2018 and transcripts are produced in respect of those questionings; Paul Bujold answered undertakings from such questionings; Exhibits were marked in such questionings; Paul Bujold deposed an affidavit of records dated November 2, 2015 and a supplementary affidavit of records dated April 27, 2018; and collectively such affidavits, transcripts, exhibits and undertakings shall be referred to as the "**Excluded Documents**";

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees did not have the intention to waive solicitor-client privilege over any further information or communications to which solicitor-client privilege would otherwise attach and that relates to the subject matter of any of the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents or the Questioning Responses as that term is defined below;

AND WHEREAS the purpose of this Order is to confirm that waiver of solicitor-client privilege in relation to any further information or communications to which solicitor-client privilege attaches that relate to the subject matter of any of the contents of the aforementioned documents in the prior paragraph ("**Subject Matter Waiver**") has not occurred;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. No response in a questioning to date, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, the Twinn Affidavit of Records, and/or the 1403 Filed Documents (collectively "**Questioning Responses**"), can be construed as Subject Matter Waiver over the subject matter of any communications contained therein.

2. Any waiver of solicitor-client privilege in respect of the contents of the Filed Documents, the Twinn Affidavit of Records, the Questioning Responses and the 1403 Filed Documents is expressly declared to be limited to the content of those documents, and it is further declared that Subject Matter Waiver has not occurred in relation to any issue raised in those documents.
3. Further to paragraph 2, nothing in the contents of the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and/or the Questioning Responses can be used to compel the Sawridge Trustees to produce further documents in respect of legal advice received or answer questions in respect of legal advice received by the Sawridge Trustees on the basis that Subject Matter Waiver has occurred.
4. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request and obtain as a beneficiary of the 1985 Trust.
5. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to file or otherwise admit to evidence any other document or record in the 1103 Action, other than those covered by this Order (being the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.
6. For clarity, the *Alberta Rules of Court* and such other rules of evidence as would ordinarily apply will continue to apply to the Filed Documents, the Twinn Affidavit of Records, the 1403 Filed Documents and the Questioning Responses in respect of their use in any aspect of the 1103 Action, and none of the parties may object to the use of any of these documents on the basis of an argument of solicitor-client privilege. For further clarity, all transcripts from cross examination on affidavit in the 1103 Action, including any associated undertakings, exhibits or written interrogatories may continue to be utilized by any party to the 1103 Action as evidence at any application or trial in the 1103 Action and this Order does not affect this right.

7. This order shall not apply to the Excluded Documents.

The Honourable Justice D. R. G. Thomas

**CONSENTED TO BY:
MCLENNAN ROSS LLP**

HUTCHISON LAW

Crista Osualdini
Counsel for Catherine Twinn

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

TAB C

December 11, 2018

File No.: 551860-1

Court of Queen's Bench of Alberta
6th Floor Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

Attention: The Honourable Mr. Justice John T. Henderson

Dear Sir:

**RE: Sawridge Band Inter Vivos Trust
Twinn v. Trustee Act, Action: 1103 14112**

We write this response in respect to the letter written to the court by Shelby Twinn dated September 21, 2018. We attach the letter with paragraph numbers ascribed to it for ease of reference.

In paragraph 1, Shelby Twinn advises she is writing to the court and that she would be appearing along with Deborah Sarafinchon, Melissa Megley, Aspen Twinn, Ann Mary McDonald, Cameron Shirt and others at the case management meeting that was scheduled for September 25, 2018, for the purpose of speaking on how non-party beneficiaries and potential beneficiaries should be able to participate in future steps, in the litigation. The Trustees do not believe that Deborah Sarafinchon, Ann Mary McDonald and Cameron Shirt are beneficiaries or potential beneficiaries of the trust. In addition, Aspen Twinn is represented by the Office of The Public Guardian and Trustee ("OPGT") and is an infant.

She goes on to say that Patrick Twinn, Isaac Twinn, Julie Rudkowski, Sam Twinn, Kiki Twinn (who we believe is Courtney Twinn) and Wesley Twinn cannot attend. We believe Julie Rudkowski is not a beneficiary or a potential beneficiary. In this sentence, it appears that Shelby Twinn is requesting the ability to speak on behalf of a group of people without advising of her legal authority to do so.

In paragraph 2 of the letter, Ms. Twinn advises that the costs order to be paid by Patrick Twinn and Deborah Sarafinchon were forgiven by the trustees as a goodwill gesture in the settlement of the Catherine Twinn mediation. This issue is a matter that should have been kept confidential and is subject to a Confidentiality Agreement. Further, this is not an accurate characterization, but because the trustees are bound by this Confidentiality Agreement the Trustees cannot properly address this issue. We ask the Court to ignore this paragraph.

In paragraph 2, Shelby Twinn says the decision of the Court says that she and Patrick Twinn are current beneficiaries of the 1985 trust and the court could not foresee a circumstance where their status as a beneficiary would be eliminated. We believe this is obiter, as that issue was not before the court, and certainly this is still a live issue and is unlikely to be binding on the final Judge of this matter. While the trustees do believe that Patrick Twinn and Shelby Twinn would fit the current definition of a beneficiary under the 1985 trust, it is possible that the definition must change and therefore Shelby Twinn, if she is not a member of the Sawridge First Nation, will not be a beneficiary. We do however agree that we do

not see a circumstance in which Patrick Twinn would not be a beneficiary of the trust as he currently fits the definition under the Indian Act of 1982 and further is a current member of the Sawridge First Nation and thus would likely continue to be a beneficiary of the trust if the definition is changed.

In response to paragraph 3 of the letter, we note that Shelby Twinn advises that the costs to attempt to gain party status were significant and unfortunately those costs have left Shelby Twinn in the position where she can no longer afford legal representation. She puts Patrick and Deborah in that same category. However, we know from the questioning during that application that those costs were not entirely borne by Patrick Twinn, Shelby Twinn and Deborah Sarafinchon and in fact were at least partially paid by Catherine Twinn.

Thus, Catherine Twinn has been having her own representation in court and at least partially funding representation of other individuals in court as well. We provide this information only for the edification of the court and not to suggest that there is anything inappropriate, with the exception that when the trustees have to respond to multiple parties, it increases the costs, which reduces the amount that will ultimately be payable to beneficiaries.

In response to paragraph 4 of the letter, Ms. Twinn suggests that the Court of Appeal in its December 12, 2017 decision suggested that class counsel for current and potential added beneficiaries may be appropriate. We do not believe that the Court of Appeal suggested that class counsel for the beneficiaries may be appropriate. We do however note that Catherine Twinn, before resigning as a trustee, took a course on class action lawsuits which was paid for by the trust. We suspect that Shelby Twinn is continuing to receive legal advice and direction from Catherine Twinn, who is a lawyer, as we do not believe the whole concept of class action council is likely to have come from someone who is not a lawyer. In the event that Shelby Twinn wishes to make an application for the class counsel representation then she is at liberty to do so. However, we believe that that matter is *res judicata* in respect of her application to become a party and in respect of having her legal costs paid by the trust. These issues have already been decided by a case management judge and the Court of Appeal in Sawridge #5. The trustees do not believe that an application for class counsel can be made by way of a letter without any affidavit or any justification. The trustees request that, if the court is inclined to hear such an application, it be made on proper notice with proper evidence. The trustees oppose any further legal fees being paid from the trust, particularly as we believe that the interest of these beneficiaries are being represented by the OPGT and by the trustees who are acting on behalf of the beneficiaries as well.

In paragraph 5A of the letter of Shelby Twinn, she suggests that she, Patrick Twinn and Deborah Sarafinchon have not been able to establish a dialogue with the trustees for the purpose of ensuring their status is respected or to provide comments in respect to the beneficiary definition. We are unaware of any attempt by Shelby Twinn, Patrick Twinn or Deborah Sarafinchon to have a dialogue with the trustees. We have asked the administrator of the trust to search for emails or correspondence where such dialogue has been requested and he has found none. We believe it is completely unfair to suggest that they have been unable to establish a dialogue when no attempts for that dialogue has been made. We also note that Shelby Twinn did not respond to the request for a vote on the beneficiary definition recently sent to her by the Trustees.

To date there have been settlement meetings that have occurred between the counsel for the trustees, Catherine Twinn and the OPGT. The trustees' thought that inviting other interested persons would not be

useful at those settlement meetings but certainly left open the possibility that there may be meetings when such involvement of other interested persons may be appropriate. The trustees have never believed that any settlement is completely possible at a settlement meeting. We believe that if there could be any consensus between the trustees, Catherine Twinn, and the OPGT, such consensus would then be presented to the Court on notice to the beneficiaries. Thus, while these meetings have been called "settlement meetings", the Trustees did not understand that a binding settlement could be reached and thus the trustees believed that it was best to have the main parties come to some consensus before introducing others to the settlement process.

In paragraph 5B of the letter from Shelby Twinn, she says she understands the trustees are seeking to schedule an application for the purpose of changing the current definition to include only members of Sawridge First Nation. That has been the application before the court by the trustees since 2011. She goes on to say that we are not concurrently considering how existing beneficiaries will be protected. That is not true as the whole issue of grandfathering has been one that the trustees have been dealing with also since 2011. In fact in 2014, the trustees brought an application to have a settlement approved by the court using its *parens patriae* jurisdiction to grandfather all of the minor beneficiaries of the trust. Thus, it is incorrect to say that the trustees have not been considering how to deal with the interests of the current beneficiaries of this trust as those are defined under the 1982 Indian Act. Shelby Twinn goes on to say that she applied for membership in Sawridge First Nation in April 2018 but is yet to hear anything from Sawridge First Nation and not even an acknowledgement of the receipt of the application. The administrator of the trust has inquired with Sawridge First Nation and has been advised that Catherine Twinn personally submitted the application of Shelby Twinn and thus it is clear that the application was received, and that Shelby Twinn, in speaking with Catherine Twinn, would know that her application was received. We understand it is not the practice of Sawridge First Nation to acknowledge receipt of an application, particularly where one has been submitted in person by a member of the First Nation. We understand that Shelby Twinn's application is in process and that it is not unusual for an application to be reviewed for several months before there is a determination.

In response to paragraph 5C of the letter, it is true that the trustees have agreed to meet with the beneficiaries of the 1986 trust. The 1986 trust is irrelevant to these proceedings. The beneficiaries of the 1986 trust are known and are not uncertain. It is the 1986 trust which has been able to make distributions to beneficiaries and the trustees wish to have a meeting with the 1986 trust beneficiaries for the purpose of presenting an accounting with respect to the 1986 trust and to communicate with the beneficiaries. The trustees have every right to meet with their beneficiaries under the 1986 trust. Shelby Twinn is not a member of the First Nation and thus was not invited to this meeting.

Shelby Twinn suggested it is disappointing that, given the significant legal issues facing the current beneficiaries of the 1985 trust, the trustees are not reaching out to the adult beneficiaries and potential beneficiaries including those who applied to the trust in 2009 and 2010. The trustees have not held meetings with such potential beneficiaries or applicants because the issue of whether those individuals can be beneficiaries under a discriminatory trust is uncertain and is the very reason we are before the court. All of the information around the lawsuit has been posted to a website for easy access to anyone. The trustees do not believe that they should provide financial information to individuals until it is determined who will be the beneficiaries of this trust. It is very nature of this application that we are trying to determine the beneficiaries of the 1985 trust.

In relation to paragraph 5C, Shelby Twinn makes references to those who applied to the trust in 2009 and 2010 as a result of newspaper advertisements. While there were approximately 150 people who applied, many of those individuals are not currently beneficiaries as the trustees have determined and are also not beneficiaries in terms of people who the OPGT and Catherine Twinn have identified as beneficiaries. It would be wholly inappropriate for trustees to reach out to non-beneficiaries and provide them with information.

In relation to paragraph 5D of the letter of Shelby Twinn, she believes the trustees are not trying to meaningfully consult with the affected beneficiaries. The comments above with respect to determining affected beneficiaries is relevant to this comment as well. The trustees have reached out to those individuals they believe are beneficiaries to seek their input on a change of definition according to proposals put forward by the trustees and by the OPGT. We invited Catherine Twinn to put a definition forward as well and she declined. The trustees are not solely focused on changing the definition to First Nation membership, have fully participated in discussions around whether it is possible to grandfather, and we have always left open the possibility that the trust definition may not change.

However, it is significant the funds that were used to fund the trust came from the capital reserve of the Sawridge First Nation. An application was made to the Federal Government to release the funds to be set aside in the trust on the express condition that the funds would be used for the benefit of the members of the First Nation. The Trustees believe there was an intention by the settlor to use these funds for the members of the First Nation. The Trustees believe that the Government of Canada only released the funds because the funds were going to be used for the members of the First Nation. We believe that the Government of Canada would not have released the funds to be put into a trust if those funds were going to be used for people who were not members of the First Nation. We also believe that if the money is set aside for the members of the First Nation and a small grandfathered group, then the Sawridge First Nation will not bring an application to void the trust. Thus, the trustees have been walking a very fine line in trying to manage the trust, trying to keep the trust viable and not face an application to void the trust for lack of certainty, and trying to protect the interests of the current beneficiaries. The trustees have been clear that they understand that they have a duty to the beneficiaries of the 1985 trust.

Shelby Twinn goes on to say that the trustees seem to be focused on and favor the interests of Sawridge First Nation over the potential beneficiaries of the trust. We believe that is not true. We understand that Catherine Twinn has expressed that perception in the past. We have been very clear that we will oppose any application by Sawridge First Nation to void the trust as it is our obligation to protect the trust and to protect the beneficiaries of the trust.

Shelby Twinn goes on to say that it is a perception that the trustees have been paying for Sawridge First Nation's legal fees to participate in the litigation. There have been instances where the legal fees of Sawridge First Nation have been paid but that was because it was necessary to have their involvement for dealing with the request for documents within their control, and for dealing with the issue of Maurice Stoney with which Sawridge First Nation had significant involvement in the past, and thus it was much more efficient to have Sawridge First Nation involved. Sawridge First Nation is not a nation that can afford to spend legal fees without consideration for whose benefit these legal fees are being spent and thus Sawridge First Nation said that we could only have their involvement if in fact we paid for their legal fees. The trustees considered the position and made a decision that it was beneficial to the trust to have the involvement of Sawridge First Nation and agreed to pay their legal fees for their limited involvement.

The involvement of Sawridge First Nation is considered at every stage, and payments of their legal fees are considered at every stage of their involvement. This does not show our bias towards Sawridge First Nation; it just showed a necessity in respect of the litigation steps that have been taken thus far.

In paragraph 5D Shelby Twinn goes on to talk about a settlement proposal that was put before the court by the Sawridge Trustees in June 2015. The Trustees tried to settle with the OPGT. The OPGT refused the settlement and by Court Order the settlement was withdrawn.

In response to paragraph 5E, the trust is having difficulty with respect to its financial resources. The trust does not have a lump sum of money at their disposal for payment. The trust can only fund litigation through the generation of income through the companies in which the trust holds some interest. Those companies are dependent on the economy, including the service industry for oil and gas and the hospitality industry, both of which are very depressed. The ability to generate legal fees to fund this litigation is very difficult for the trust. It is for that reason that we opposed the payment of legal cost for Shelby Twinn. This court ultimately agreed with our position, as did the Court of Appeal, in Sawridge #5. It appears that Shelby Twinn wishes this court to revisit that issue and provide funding for class counsel, which we do not believe is any different than what has already been requested and would be *res judicata*. We believe this request clearly shows why it would not be appropriate to pay the legal fees of others who want to participate. There would simply be a great duplication of effort and if every potential beneficiary was granted costs and legal representation, then we believe it would bankrupt the trust.

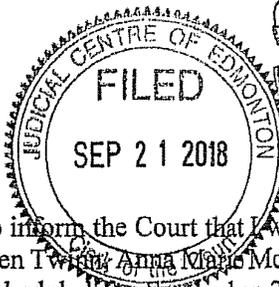
We do not expect to fully argue the issue of class counsel in this letter and will reserve that for when the court actually considers that application if in fact that application is brought. It would be very unfortunate if the desire to change a discriminatory definition would result in bankrupting the trust and thus not leaving any money for any of the beneficiaries.

In respect of paragraph 5F of the letter of Shelby Twinn, we again suggest that if Ms. Twinn wishes to bring an application to have counsel appointed, then such an application must be properly brought and argued, although again we believe that the matter is *res judicata*.

Respectfully submitted,
Dentons Canada LLP

Doris C.E. Bonora

DCEB/sh



Action No 1103 14112
Roland Twinn et al

September 21, 2018

- #1 My name is Shelby Twinn. I am writing to inform the Court that I will be appearing, along with Deborah Serafinchon, Melissa Megley, Aspen Twinn, Anna Marie McDonald, Cameron Shirt, and others at the case management meeting scheduled for September 25, 2018 for the purpose of speaking to how non-party beneficiaries and potential beneficiaries should be able to participate in the future steps in the litigation. Patrick Twinn, Isaac Twinn, Julie Rudkowski, Sam Twinn, Kiki Twinn and Wesley Twin and others cannot attend but agree on what is required to assure our meaningful and just participation in our Trust. I am aware that the Sawridge Trustees have made beneficiary participation an agenda item for the case management meeting. (See paragraphs 24-29 of the written submissions of the Sawridge Trustees filed August 24, 2018).
- #2 You will recall that myself, along with Patrick Twinn and Deborah Serafinchon were represented by Nancy Golding of Borden Ladner Gervais at an application where we were seeking party status in the litigation. The decision that your Honour issued as a result of that application declared that myself and Patrick Twinn are current beneficiaries of the 1985 Trust. You also stated that you could not foresee a circumstance where my status as a beneficiary of the 1985 Trust would be eliminated.
- #3 The legal fees that myself, Patrick and Deborah incurred as a result of our attempts to gain party status were significant. Unfortunately, the costs of these prior applications have left us in a position where we can no longer afford legal representation. This is why I, rather than Ms. Golding, am writing to you today. Late afternoon, September 20, 2018 Dentons' emailed Ms. Golding the Trustees' brief, but Ms. Golding is not acting for us.
- #4 I understand that the Court of Appeal in their December 12, 2017 decision suggested that class counsel for current and potential adult beneficiaries may be appropriate and that this issue should be dealt with in case management. The purpose of my letter is that at the September 25, 2018 case management meeting, we are seeking the appointment of class counsel for the current and potential adult beneficiaries of the 1985 Trust and that such lawyer be paid for by the 1985 Trust. Our free, prior and informed consent requires we have access to independent class counsel.
- #5 Briefly put, the reasons we believe class counsel is needed are:
- #5A • Myself, Patrick and Deborah have not been able to establish a dialogue with the Trustees for the purpose of ensuring our status is respected or to provide comments in respect of the "beneficiary" definition. See paragraphs 39 and 43 of your decision on party status that directed this to occur. We understand that settlement meetings have been occurring between the Trustees' lawyers and the other parties' lawyers, but we have not been invited by the Trustees to attend these meetings or our input sought. It is very difficult to protect our interests when we are not privy to how the parties are trying to resolve the litigation.
 - #5B • I understand that the Trustees are seeking to schedule an application for the purpose of changing the current beneficiary definition to only include members of the SFN without concurrently considering how existing beneficiaries, like myself, will be protected. If the trustees are successful, then my status as a beneficiary could be eliminated. It is very

concerning to me that the Trustees are doing this given your comments that my beneficiary status would be respected. I note that I did apply for membership in the SFN on April 23, 2018, but have yet to hear anything from the SFN, not even an acknowledgment of receipt of my application. It is very unclear whether I will ever be a member of the SFN, despite being the late Chief Walter Twinn's granddaughter, and therefore entitled to beneficiary status on this basis;

- #5C • I have come to learn from Patrick Twinn that the Trustees are holding a meeting "only with approved beneficiaries of the Sawridge Trust (1986 Trust) ...that includes only members of the Sawridge First Nation" the weekend of October 13-14, 2018. It is my understanding that the "approved beneficiaries" would only be band members of the SFN. See attached letter. It is disappointing that given the significant legal issues facing the current beneficiaries of the 1985 Trust, that the trustees are not reaching out to the adult beneficiaries and potential beneficiaries, including those who applied to the Trust in 2009/10 to keep us informed given the significant threat to our legal interests;
- #5D • We do not believe the Trustees are trying to meaningfully consult with the affected beneficiaries and are instead solely focused on changing the definition to band membership. Myself and those in my circumstances cannot rely on the trustees to represent our interest as my perception is that they favour the interest of the SFN over ours. This perception is also informed by my understanding that the Trustees have been paying the SFN's legal fees to participate in this litigation, despite their vigorous opposition to the payment of mine. In June 2015 the Trustees filed then later withdrew a Settlement Proposal with the Court. Had it been accepted, my beneficiary status would have ended, and the irrevocable status of other beneficiaries, like Patrick Twinn, would be revocable;
- #5E • I have reviewed the written submissions provided by the Trustees for this case management meeting and in particular their proposal on how non party beneficiaries like myself, can participate. I am very afraid of their proposals regarding cost consequences for failure to comply with their process. I am not a lawyer. I genuinely wish to comply with the process that is ultimately set out by the Court, however, my lack of legal training may result in me, and others like me, making mistakes. In order to properly represent my interests, I very much need a lawyer, which is why I am asking for class counsel to be appointed.
- #5F • I understand that the trustees are seeking to set timelines to have the issue of the beneficiary definition change heard. Their application could result in me being disentitled as a beneficiary. I believe that appointing counsel for me and the other adult beneficiaries would not result in unnecessary expense as the ultimate issue is on the verge of being decided and justice requires we be heard about our Trust.

With Respect,


Shelby Twinn



NOTICE OF BENEFICIARY ANNUAL GENERAL MEETING 2018

The Trustees of the Sawridge Trust (1986 Trust) have recently passed a policy to hold an annual meeting with the beneficiaries of the Trusts. The first such meetings will be held on:

Saturday, 13 October 2018
10:00 AM to 4:00 PM
Sawridge First Nation Office, Slave Lake, AB

AND

Sunday, 14 October 2018
10:00 Am to 4:00 PM
Jasper Room, Sawridge Inn-Edmonton South, Edmonton, AB

At this meeting, Trustees will present:

- An explanation of the Trusts,
- An explanation of the current actions being undertaken by the Trusts,
- An explanation of the benefits, and
- The audited financial statements for 2017.

In addition, the Trustees will consult with the beneficiaries about future directions for the Trusts and the benefits programs.

Only approved beneficiaries of the Sawridge Trust (1986 Trust) may attend this meeting. That includes only members of the Sawridge First Nation. If you are receiving this notice, you may attend but are not permitted to bring any guests or non-approved beneficiaries. You may attend either one of these meetings as the same information will be presented at each meeting.

PLEASE LET ME KNOW WHICH MEETING YOU WILL BE ATTENDING SO THAT WE CAN PLAN THE MEALS AND REFRESHMENTS.

214, 10310-124 Street NW
Edmonton, AB T5N 1R2
Office: 780-988-7723
Fax: 780-988-7724
Toll Free: 888-988-7723
Email: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca

TAB D

CLERK'S STAMP

COURT FILE NUMBER

1103 14112

COURT OF QUEEN'S BENCH OF
ALBERTA JUDICIAL CENTRE

Edmonton

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

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

APPLICANTS

ROLAND TWINN, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWIN AND
DAVID MAJESKI as Trustees for the 1985
Sawridge Trust;

DOCUMENT

LITIGATION PLAN

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.	Deadline to deliver to the Justice Henderson the week prior to the hearing your letter setting out the outstanding issues and your Agenda outlining items to be discussed at this meeting	December 11, 2018
2.	Case Management Meeting	December 18, 2018
3.	If privilege order not granted on December 18, 2018, the parties will provide written briefs on the issues in dispute and the matter will be decided without oral submissions	Briefs to be filed by Catherine Twinn and OPGT by January 15, 2019 and response by the Trustees by January 30, 2019
4.	Catherine Twinn to provide parties with her Affidavit of Records and documents once the Privileged Order is issued .	By January 7, 2019 (if Privilege Order dealt with December 18, 2018 or in any event one week following the Privilege order being granted
5.	Brief of the Sawridge Trustees on the Jurisdictional Issue Hearing to be filed.	Three weeks prior to the Jurisdictional hearing
6.	Any responding brief on Jurisdictional Issue to be filed by Catherine Twinn and the OPGT. Written Submissions by any non-party beneficiaries/potential beneficiaries on Jurisdictional Issue (maximum of 5 pages, including attachments), if permitted by the Court.	Two weeks prior to the Jurisdictional hearing Two weeks prior to the Jurisdictional hearing
7.	Reply Brief of the Sawridge Trustees on the Jurisdictional Issue Hearing to be filed	One week prior to the Jurisdictional hearing
8.	Hearing in respect of the Jurisdictional Issue	TBD
9.	Deadline to hold Questioning of Catherine Twinn and Paul Bujold on Catherine Twinn's Affidavit of Records, if any.	<*determine based on date of jurisdiction issue being decided>
10.	Answers to undertakings, from questioning of Paul Bujold and Catherine Twinn, if any.	<*determine based on date of jurisdiction issue being decided>
11.	All other steps to be determined in a case management hearing	TBD

Action No.: 1103-14112
E-File No.: EVQ18TWINNR
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 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")

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE,
EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for
the 1985 Trust ("Sawridge Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
December 18, 2018

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,
2 Alberta

3
4 December 18, 2018

Morning Session

5
6 The Honourable Mr.
7 Justice Henderson

Court of Queen's Bench
of Alberta

8
9 D.C. Bonora

For 1985 Sawridge Trustees

10 M.L. England

For 1985 Sawridge Trustees

11 J.L. Hutchinson

For the Office of the Public Guardian and
Trustee

12
13 P.J. Faulds, Q.C.

For the Office of the Public Guardian and
Trustee

14
15 C. Osualdini

For Catherine Twinn

16 E.H. Molstad, Q.C.

For Sawridge First Nation

17 A. Young

Court Clerk

18

19

20 **Discussion**

21

22 THE COURT:

Good morning. Please be seated.

23

24 Okay, we are going to deal this morning with a Case Management meeting on the
25 Sawridge Trust.

26

27 MS. BONORA:

Good morning, Sir. My name is Doris Bonora.

28 I'm with the firm of Dentons Canada and perhaps I can just start with the introduction for
29 you for the parties that are sitting at the table.

30

31 Mandy England is with me, also from Dentons and we represent the five Trustees of the
32 Sawridge Trust. Start -- I'll continue this way.

33

34 Mr. Molstad is here and he represents the Sawridge First Nation. Jan Hutchison is here
35 and she represents the Office of the Public Trustee and Guardian, and today she has
36 added Mr. Faulds from the law firm of Field Law. And so he will also be a second law
37 firm representing the Office of the Public Trustee and Guardian. The Office of the Public
38 Trustee and Guardian has in the past also had Eugene Meehan from Supreme Law, so
39 there's three law firms that represent the Office of the Public Trustee and Guardian. And
40 then Crista Osualdini from McLennan Ross who represents Catherine Twinn.

41

1 Sir, the -- I think there have been some -- you've seen a note from Shelby Twinn. My
2 understanding is that yesterday she attempted to have counsel. He is in a conflict, and so
3 when we get to third party representation I'll make some more representations about
4 involvement and people who might be able to speak on that issue.

5
6 THE COURT: Okay.

7
8 MS. BONORA: And my understanding is there really isn't
9 anyone speaking particularly on that issue on behalf of Shelby Twinn today.

10
11 **Submissions by Ms. Bonora**

12
13 MS. BONORA: The agenda was approved by the three parties to
14 the litigation. The Trustees provided an annotated agenda to you and I certainly don't
15 intend to repeat what's in that annotated agenda.

16
17 This morning my proposal to you with your acceptance would be that we would -- I
18 would provide a short overview of the litigation and then there are two matters which
19 now are consent matters. The jurisdiction order and the Privilege Order have been totally
20 agreed upon, and so we'd like to present those to you for your signature in the event that
21 you are prepared to grant those today.

22
23 And then a short overview of the directive hearing application, the Agreed Statement of
24 Facts and then dealing with two issues that may involve more submissions to you which
25 is the participation of other beneficiaries or potential beneficiaries, and finally the
26 litigation plan.

27
28 Sir, with respect to the main message, and my clients have asked me to say this to you, is
29 we are sincerely hoping for your assistance in getting this matter to a conclusion. We've
30 been -- we will be coming up on eight years in this litigation and the costs of this
31 litigation to the Trust when it's paying for its own lawyers in defending numerous
32 applications from Sawridge 3 to Sawridge 9, and of course with the advance indemnity
33 costs of the Public Trustee are a serious drain on the Trust. And there is a concern that
34 there may be no money left for the beneficiaries after all this fighting is done.

35
36 I think it's also important because of the value of the Trust has certainly been mentioned,
37 that the Trust doesn't have a pool of funds. It has a number of businesses which are its
38 investments, and therefore can only fund the litigation through the profits from those
39 businesses and those businesses have been severely hurt in this economy. And so the
40 costs of litigation have been a drain on the Trust certainly.

41

1 The Public Trustee has provided an extensive overview to you. I don't intend to go into
2 the details today, but I can tell you that we are troubled by some of the characterizations
3 in that document. And I -- I think that in the course of litigation that -- and further case
4 management meetings, certainly we can address those. But the one that I do want to
5 address which is most concerning for the Trustees is that the Office of the Public Trustee
6 and Guardian suggested that the first settlement meeting happened in 2017, and in fact
7 we do not believe that -- and certainly that's not our perception of it. The Trustees have
8 been engaged in attempts at settlement throughout this litigation. We -- the -- certainly
9 the officers of the Trust and employees of the Trust engaged in settlement discussions
10 after every questioning that happened. We were in a very public settlement that we asked
11 the Court to impose using its parens patriae jurisdiction, and so we don't want the Court
12 to have the impression that the first settlement meeting happened in 2017 because we
13 believe that we've been attempting to get to the end of this litigation from the very start.
14 If you looked at the procedural orders, you will see that we were very bold in thinking we
15 could settle this in a year.

16
17 THE COURT: Yes. You know I am not too much concerned
18 about what has gone on. What I am concerned about is what we are going to do starting
19 today to get this thing finished.

20
21 MS. BONORA: Okay.

22
23 THE COURT: That is really what I am interested in.

24
25 MS. BONORA: So then Sir, let me move into the two orders
26 where we've been able to reach settlement and which do in fact ad -- advance the
27 litigation.

28
29 So the first is the jurisdiction order. So the parties have agreed that you as the case
30 management judge can in fact decide how the -- what the jurisdiction of the Court will be
31 in amending the definition if it's to be amended. And so the -- the litigation --

32
33 THE COURT: It seems to me there are two questions there.
34 One, can I? And secondly, should I? And thirdly -- I guess a third question, how should
35 -- how should the amendment play out?

36
37 But the first question seems to me from reviewing your materials which were very
38 helpful, thank you very much. It seems to me the first issue is fundamental to everything.
39 Either the Court has the jurisdiction to approve an amendment of this Trustee or it does
40 not, and that is a question of law. And the amount of factual information that I would
41 need to be able to answer that question would be quite limited, I would think. I see in

1 materials that there is a suggestion that an amendment to overcome this discriminatory
2 language would expand potentially the beneficiaries of the Trust. Okay, so that is one
3 fact.

4
5 There was the potential that some existing beneficiaries could potentially be excluded,
6 although that could be ameliorated to some degree by grandfathering. But just on those
7 basic facts there is a fundamental question. Can the Court approve a variation to the
8 Trust, either through the Trustee -- I have not seen the Trust Deed so I do not know what
9 the language is, but in terms of the variation or under Section 42 or under the common
10 law.

11
12 Is -- do we need -- do we need more examination or document production or anything
13 else to answer that fundamental question, because if the answer to that question is no then
14 we have to go off on a completely different track, it seems to me.

15
16 MS. BONORA: Well, I would --

17
18 THE COURT: And that is not a -- that is not -- the answer to
19 that question is not a foregone conclusion. It -- it is a difficult issue and I do not know
20 what the answer would be, but it certainly is not terribly obvious at the moment. But that
21 is a legal question.

22
23 MS. BONORA: We absolutely agree with that and we have been
24 saying that. That the factual underpinnings of the jurisdiction are very limited.

25
26 What we are looking for in the jurisdiction application is the method by which the Trust
27 would be amended if it's going to be amended. So you are -- you identified Section 42 of
28 the *Trustee Act*, you identified the Trust Deed itself and then you identified common law
29 and public policy. And so what the jurisdiction question is going to ask the Court is can
30 we eliminate any of those methods and what is the method that the Court can use. And if
31 it does go into a public policy discussion, can it be that we could replace a definition?
32 Can words be added, can words just be subtracted? And that is what we're asking this
33 Court in a case management setting to determine for the final hearing judge.

34
35 THE COURT: Well, is the -- is the public policy issue just the
36 common law?

37
38 MS. BONORA: It is just the common law.

39
40 THE COURT: It is part of the common law.

41

1 MS. BONORA: That's right, yeah.

2
3 THE COURT: So still there is three possible ways to vary this
4 Trust.

5
6 MS. BONORA: That's correct, yes.

7
8 THE COURT: Common law, Section 42 or the Trust Deed.

9
10 MS. BONORA: And the Trust Deed for your edification, it says
11 that the beneficiary definition cannot be amended and that any amendment in the Trust
12 requires 80 percent approval but that the beneficiary definition cannot be amended. So --

13
14 THE COURT: Okay. Well, that is not going to be helpful to us
15 then.

16
17 MS. BONORA: It's not going to be helpful but Sir, the problem
18 has been through this litigation that those issues of whether Section 42 apply, whether the
19 Trust Deed is the way to amend it or how under common law it's to be amended have
20 stymied us moving forward. And even the Court of Appeal addressed that in respect of
21 Sawridge #5 appeal in terms of saying these issues should be addressed so that it can be
22 moved for -- so that the Trust can move forward.

23
24 It's the Trustee's position that Section 42 does not apply. The Trustee cannot be used to
25 amend and that we're really under public policy, but we'd like to get that issue behind us
26 so that we can move forward to a final hearing.

27
28 THE COURT: What is the citation for Sawridge #5? We keep
29 referring to it but I have no idea where it is.

30
31 MS. BONORA: Sir, I have a copy for you. And Sir, I wonder if
32 it might be helpful to you -- I have both a copy of the Court of Appeal's Decision as well
33 as Justice Thomas' Decision, but I wonder if we could as Trustees provide you with a
34 complete set of all of the Decisions made.

35
36 THE COURT: That would be very helpful.

37
38 MS. BONORA: So we'll undertake to do that and provide that to
39 you.

40
41 On the Court of Queen's Bench Decision on the front page it's identified as Sawridge #5.

1
2 THE COURT: Okay.
3
4 MS. BONORA: Court of Appeal is not identified that way --
5
6 THE COURT: Okay.
7
8 MS. BONORA: -- but that is the -- those are the two Decisions.
9
10 THE COURT: Okay. Good, thank you.
11
12 MS. BONORA: Sir, there was a copy of a jurisdiction order that
13 had been provided to you. Perhaps if I can hand up the form of order that has been
14 approved by all of the parties. And there has been time set aside -- there was a date
15 booked by the Trial Coordinator's Office on April 25th, and it would have been our
16 proposal that we have this matter heard on April 25th.
17
18 THE COURT: Okay, April 25th it is.
19
20 MS. BONORA: Sir, the two issues I should have mentioned for
21 my friend from the Office of the Public Trustee and Guardian is she also added an issue
22 under the *Minors' Property Act* which you see in 'E' of the -- in 1(e), and that is also on
23 the agenda for the jurisdiction matter.
24
25 THE COURT: So in 'A' you have excluded the possibility of
26 the Trustee providing relief because obviously by its terms --
27
28 MS. BONORA: Sir, the -- the Trustee is referenced in 'D'.
29
30 THE COURT: Okay. Okay. Okay, good. Yes indeed, okay.
31 Good.
32
33 MS. BONORA: Thank you, Sir.
34
35 THE COURT: All right, April 25th.
36
37 MS. BONORA: And I believe my friends don't have anything to
38 add on that point.
39
40 So then we will move on to the next point which is the Privilege Order. And to give you
41 some background on this matter, there have been several pieces of litigation that have

1 sort of combined themselves and intertwined. So there was a 1503 action, there was a
2 1403 action, there was a mediation arbitration that occurred and then there was the 1103
3 action.

4
5 In the 1103 action there was an indemnity costs application made by Catherine Twinn
6 that all she made -- combined with the 1403 action. So there have been a number of
7 actions in which documents have been produced and they've been produced for various
8 reasons, not relevant to the 1103 action particularly.

9
10 THE COURT: Okay.

11
12 MS. BONORA: And in that -- in all of that production there
13 have been documents that have been produced that are privileged documents. They
14 contain solicitor-client opinions and -- and so in terms of moving this forward we had a
15 discussion about how to deal with those issues.

16
17 The Trustees have chosen in the interest of efficiency to allow all of those documents that
18 have been produced to date with those privileged information in it --

19
20 THE COURT: That is --

21
22 MS. BONORA: -- to be released.

23
24 THE COURT: Those are documents that you would have been
25 able to claim a privilege over, the Trustees?

26
27 MS. BONORA: Correct. Correct.

28
29 THE COURT: Okay.

30
31 MS. BONORA: Yes. So by way of example, there are
32 solicitors' opinions. There are also many discussions at the Trustee meetings about this
33 litigation, so we would have been able to claim privilege. We don't believe that much of
34 that is relevant because it is -- involves past actions and that we -- in -- in the interests of
35 moving forward we'd like to just move forward. And so the -- with respect to all of those
36 documents we have agreed that those can be -- remain produced in the litigation.

37
38 THE COURT: Okay.

39
40 MS. BONORA: Our concern was about the fact that of course
41 when privileged material is released there's potential that all privileged material going

1 forward would be released. So the Privilege Order is a compromise of the past is
2 released but the future is not released.

3
4 THE COURT: Okay.

5
6 MS. BONORA: The other issue that is addressed in the Privilege
7 Order which was raised by Ms. Osualdini and we agreed, trus -- beneficiaries of the Trust
8 have special rights to obtain documents from the Trust, and we didn't want anything in
9 this order to take away those rights from beneficiaries as they existed any particular time.
10 Obviously, beneficiaries are also bound by privilege during the course of litigation but
11 certainly if beneficiaries have rights, they were not affected by this order.

12
13 The last order of business in this Privilege Order was that the -- how evidence would be
14 dealt with and how these documents would be dealt with. To date, the questioning has all
15 been on affidavit and we've agreed that those questioning transcripts would be used as
16 though they were in the application, thus they are all evidence.

17
18 With respect to the documents that have been produced through the course of that -- those
19 questionings, so undertakings and written interrogatories and exhibits, we have said that
20 the Rules of Evidence basically will apply and that whoever is the hearing judge will
21 determine the -- the relevancy of those documents. All the Rules of Evidence that would
22 normally apply to those documents. There's a lot of discussion around how we could
23 deal with those documents and that's what we have settled on.

24
25 And so the Office of the Public Trustee and Guardian has very kindly -- did not look at
26 the documents to avoid any concerns about privilege until we got this issue settled. So by
27 getting this issue settled, the Office of the Public Trustee and Guardian can now review
28 the documents in preparation for the next round of questioning. And Sir, then this is the
29 Privilege Order which has been consented to by all the parties.

30
31 THE COURT: So there was an issue with respect to Clause 6
32 and that has been sorted out, has it?

33
34 MS. BONORA: That's been sorted out, Sir.

35
36 So the last issue I addressed which is how we dealt with the transcripts -- oh, well that
37 was never actually an issue. It was with the written interrogatories, exhibits and the
38 undertakings that were an issue.

39
40 THE COURT: Okay, I have signed the Order.

41

1 MS. BONORA: Thank you, Sir.

2
3 MS. OSUALDINI: And -- and Sir, just for -- just for the record.
4 Osualdini, first initial 'C' for Catherine Twinn.

5
6 My friend made various representations about the content of the Order and positions that
7 some of these records were not relevant or that they were in fact privileged. Just for the
8 record today, it is our view that these documents are relevant and we are not conceding
9 that they are in fact privileged, as there's a common interest privilege between Trustees
10 and beneficiaries. So we simply wish --

11
12 THE COURT: Okay. Well, those issues will be sorted out --

13
14 MS. OSUALDINI: -- to put that on the record, Sir.

15
16 THE COURT: -- when the evidence tries to go in.

17
18 MS. BONORA: Thank you.

19
20 Sir, just quick, two brief points that were on the agenda which is the directive hearing
21 application. Just so that you know what's coming after the jurisdiction hearing, the
22 Trustees have on the record already an application for a directive hearing on the
23 amending of the beneficiary definition. So that will come before you after April.

24
25 And then there have been discussions about an Agreed Statement of Facts. The parties
26 are working on that. They've been working on it on a without prejudice basis. I don't
27 think there's any need for you to know anything about that at this point other than it's
28 ongoing.

29
30 And therefore, Sir, we get to the issue of the participation of other persons. So those
31 people could be beneficiaries, they could be potential beneficiaries depending on what
32 the definition ultimately is. The whole question of who is a beneficiary, and you're going
33 to hear more about this, but I will just say is a complex issue because it involves
34 legislation that is no longer in -- in place. So legislation relates back to the *1982 Indian*
35 *Act* which was amended by Bill C-31 which is exactly why we're here. The Trustees
36 started off by saying there are women who were member -- or who regained status
37 through Bill C-31. They had married someone who was not a First Nation member, they
38 lost their status and their membership and they've regained membership. So now we
39 have a Trust which is ostensibly for the members of the First Nation and -- but that
40 excludes -- continues to exclude those individuals who were brought back in by the more
41 current legislation, Bill C-31.

1
2 So the antiquated legislation has a number of factors that don't apply anymore. It is
3 difficult to determine even if someone is a beneficiary. Much time has been spent by the
4 parties in without prejudice conversations about who is a potential beneficiary of this
5 Trust.
6

7 As you know -- well, which you'll see in Sawridge 5, there were three parties who made
8 an application. Actually, there were probably five in total. Ultimately, it was basically
9 three that made an application to become parties. Patrick Twinn, who is a current
10 Sawridge Band Member and -- and a beneficiary of the Trust by the definitions. Shelby
11 Twinn who is not a Sawridge Band Member, although who has applied and probably is a
12 beneficiary of the Trust, and finally Deborah Sarafinchon who is not a member and not a
13 beneficiary in our opinion. And the Court decided that they would not be parties and that
14 they could have -- there was some question about what kind of participation they could
15 have in this litigation. And the Court of Appeal went on to agree that they should not be
16 parties. Changed the costs award, but ultimately agreed they would not be parties. The
17 Court of Appeal encouraged the parties to deal with or encouraged people to deal with
18 the issue of what were their participatory rights.
19

20 The Trustees -- I'm not sure it was necessarily the Trustees' role to determine and bring
21 applications around participation of potential beneficiaries, but as a fiduciary and as the
22 response -- having the responsibility of beneficiaries, we have made some proposals.
23 Starting back in January we made our first proposal. We reiterated that in the application
24 that was to be before the Court in September and then reiterated here which is we
25 believed that the -- we have satisfied what Justice Thomas said in Sawridge #5 by having
26 them file -- not have any oral representations and participate by filing short Briefs that are
27 non-repetitive, and that is our proposal for any representation by those parties.
28

29 So I -- I think that perhaps I'll say that Shelby Twinn had written a letter to the Court in
30 September. We've now responded to that letter. We think there are -- obviously I won't
31 repeat what's in our response today given the limited time that we have, and I think the
32 number of people that would like to speak on the issue of participation today. So perhaps
33 I will leave it at that and ask for an opportunity to respond in respect of the parties who
34 might speak on this issue of participation today.
35

36 THE COURT: Okay.

37
38 MS. BONORA: So perhaps Mr. Molstad could start.
39

40 **Submissions by Mr. Molstad**
41

1 MR. MOLSTAD: Yes, Justice Henderson, I represent the
2 Sawridge First Nation in relation to this matter. And just by way of background, there
3 are 44 members of the Sawridge First Nation at this time. They have two Trusts. They
4 have what we refer to as the 1986 Trust and all of the members of Sawridge First Nation
5 are beneficiaries in relation to that Trust. And we have the subject matter of this
6 application, the 1985 Trust of which most of the members are beneficiaries of that Trust,
7 excluding those few that were reinstated as members pursuant to Bill C-31.

8
9 It's important to understand briefly the source of the funds. The funds that established
10 this Trust were for the most part royalty monies that were paid to the Crown in trust for
11 the benefit of the Sawridge First Nation and their members. Former Chief Walter Twinn
12 was ahead of his time. He realized with the greatest of respect, that the rate of return paid
13 by the Government of Canada in the Consolidated Revenue Fund would not be as great
14 as what the investment of these funds could create. So Trusts were created and the 1985
15 Trust which was created then unfortunately has had no distribution since that time. The
16 money that was used to establish that Trust was paid out by the Crown pursuant to
17 Section 64(1)(k) of the Indian Act for the benefit of the members of the Sawridge First
18 Nation.

19
20 Sawridge First Nation has participated from time to time in these proceedings as a
21 Respondent in relation to an application for production and as an Intervener in relation to
22 the application of Mr. Stoney to be a party Intervener.

23
24 The Public Trustee provided us with a copy of their submission and the description of
25 their role -- albeit she has described that it is not complete, was missing something that
26 was very important from the perspective of the Sawridge First Nation, and that's found in
27 the Order which I had copies for the Court of Mr. Justice Thomas made August -- or
28 pardon me, December 17th, 2015 which restricted the ability of the Public Trustee and
29 the Trustees to make inquiries about the Sawridge First Nation membership, membership
30 processes and potential conflicts of interest.

31
32 And in paragraph 3 of this Order which is dated December 17th, 2015, Justice -- Justice
33 Thomas ordered that the Public Trustee shall not conduct an open-ended inquiry into the
34 membership of the Sawridge First Nation and the historic disputes that relate to that
35 subject.

36
37 In paragraph 4 he stated:

38
39 The Public Trustee shall not conduct a general inquiry into potential
40 conflicts of interest between Sawridge First Nation, its
41 administration and the Sawridge Trustees.

1
2 And in paragraph 15, he ordered that the Public Trustee shall not engage in collateral
3 attacks on membership processes of the Sawridge First Nation. He also ordered that the
4 Sawridge Trustee shall not engage in collateral attacks on Sawridge First Nations
5 membership processes.
6

7 The reason that he made those orders is that at that time the Public Trustee was carrying
8 on an inquiry that was far beyond in the view of the Court, the scope of what they ought
9 to be doing, and those orders deal with the membership.
10

11 Sawridge First Nation in these proceedings is very concerned that the matter be resolved
12 on terms that are reasonable, as expeditiously as possible and without further impairing
13 the ability of the trust to provide benefits to the beneficiaries.
14

15 We wrote to counsel asking some basic fundamental questions and that is found in Tab
16 11 of Ms. Hutchison's submissions to this Court. Ms. Bonora on behalf of the Trustees
17 responded and they answered those questions for us in terms of the position of the
18 Sawridge Trustees. Unfortunately, Ms. Osualdini and Ms. Hutchison have not responded
19 to those questions.
20

21 We say that Sawridge First Nation needs to know the position of the participants before it
22 decides whether it is necessary for it to apply to intervene or to take any other action in
23 relation to this Trust. You might be able to assist and we encourage you to look at that
24 letter at Tab 11 and if you feel, Sir, that it's appropriate that the parties should tell the
25 Court what their position is so that we might know, that would be of a great deal of
26 assistance.
27

28 Lastly Sir, we ask that when you're addressing the submissions by non-parties, as we are
29 not a party yet to these proceedings, that Sawridge First Nation not be limited to five
30 pages. And that they be allowed a reasonable period of time to respond to the position
31 put forward by the Public Trustee and Ms. Osualdini on behalf of Ms. Twinn before they
32 make written submissions. We have no concern with providing them with a reply, but we
33 need to know what their position is in order to respond. Those are our submissions, Sir.
34

35 **Submissions by Ms. Osualdini**

36
37 MS. OSUALDINI: On behalf of Ms. Twinn, the issue of
38 beneficiary participation is a particularly important issue for her. As you identified this
39 morning, My Lord, the existing beneficiaries of the Trust, certain members of that class
40 stand to lose their beneficial interest as a result of the relief that's being sought by the
41 Trustees. This is very significant.

1
2 In the appeal of Sawridge #5 which my friend provided to you, I would submit that the
3 Court of Appeal did more than suggest we deal with the issue of beneficiary
4 participation.

5
6 At paragraph 22 of that Decision, the Court of Appeal stated that:

7
8 A second issue is what procedure will be implemented for the
9 beneficiaries and/or potential beneficiaries to participate in the Trust
10 litigation.

11
12 They finish this paragraph with, We strongly recommend that they be dealt with
13 forthwith, and that being in reference to the various issues in that paragraph.

14
15 It was our position, Sir, that the issue of beneficiary participation must be dealt with
16 forthwith before any further actions or decisions are taken in this matter without the
17 benefit of their input. And I understand that their counsel who is conflicted is here today
18 and is intending to speak to that, and I also understand that another counsel is potentially
19 willing to pick up where he left off and this is a very important issue for the Court.

20
21 In regards to the participation of the Sawridge First Nation, Sir, Mr. Molstad suggested to
22 the Court that neither the OPGT or Ms. Twinn responded to his correspondence. That --
23 that's not accurate. We did respond, it just perhaps wasn't with the response that he was
24 seeking because from our perspective we need to understand what the jurisdiction of the
25 Court is or isn't before we can take a position on what should be done in this litigation.

26
27 And we also, Sir -- in terms of participatory status for individuals, the Sawridge First
28 Nation at this point in time is not a party, nor has there been any direction of participatory
29 rights. And so as part of determining how parties are able to proceed and make
30 submissions in this matter or non-parties, that issue also needs to be determined. And I
31 would draw to the Court's attention that earlier this year, the Sawridge First Nation did
32 write to Justice Thomas advising that they had instructions to consider dissolving the
33 Trust and that is very significant in this matter, and -- and their participation needs to be
34 addressed, especially in light of the fact that the Chief of the Sawridge First Nation is also
35 one of the Trustees.

36
37 THE COURT: Well, he is either going to do that or he is not.
38 There is nothing outstanding now other than a suggestion that that may happen.

39
40 MS. OSUALDINI: Right.

41

1 THE COURT: So let us worry about it if it happens.

2

3 MS. OSUALDINI: But --

4

5 THE COURT: But right now we are moving toward April 25th
6 with a view to determining whether or not variation is possible. That is what we should
7 be focusing on, it seems to me.

8

9 MS. OSUALDINI: No, no, I agree with you, Sir, however, the
10 parties and the persons that have an ability to make submissions to the Court needs to be
11 clarified. Potential beneficiaries were denied an ability in the past to make submissions,
12 so I think that's a very important issue.

13

14 THE COURT: Well, sure. If someone wants to apply to
15 participate on April 25th, whether it be Mr. Molstad or others, they are free to do that.
16 Bring an application and I will decide.

17

18 MS. OSUALDINI: Okay.

19

20 THE COURT: But you know, it -- there is nothing outstanding
21 today so I am not going to make an order in the air.

22

23 MS. OSUALDINI: No, but the -- the outstanding issue today, Sir,
24 though is the Court of Appeal direction that we're to consider beneficiary participation in
25 these proceedings going forward.

26

27 THE COURT: Sure, but I cannot consider it in the air. If a
28 beneficiary wants to come forward to say they want to participate or if Sawridge wants to
29 come forward to say they want to participate, good. I will consider that and make a
30 ruling on it but in the absence of an application, what can I do? I am not going to do
31 anything, okay.

32

33 MS. OSUALDINI: I think that that's, yeah, something that needs to
34 be scheduled.

35

36 THE COURT: Good. Thank you.

37

38 **Submissions by Ms. Hutchison**

39

40 MS. HUTCHISON: Good morning, My Lord. I'll be very brief, Ms.
41 Osualdini's covered the majority of my comments.

1
2 I would like to make it clear there are a number of submissions that have been made
3 today by my friend Ms. Bonora and Mr. Molstad that the OPGT would not support or
4 endorse. It's our understanding today's not the day for positioning and argument, Sir, so
5 we'll refrain from response on that until another day.
6

7 On the parties and who should be involved in the litigation, Sir -- My Lord, it's quite
8 important and I believe the Court's aware of this. There are only three parties to this
9 litigation at this point in time, the Trustees, the Office of the Public Guardian and Trustee
10 and Ms. Osualdini's client, Ms. Twinn. And as you commented, there are no pending
11 applications by anybody to be granted participatory rights --
12

13 THE COURT: Right.

14
15 MS. HUTCHISON: -- in a part of the proceeding.
16

17 In terms of the importance of -- of looking at that issue, Sir, our understanding is that the
18 OPGT is probably only representing about slightly less than 50 percent of the individuals
19 who may or may not have interests in the -- in the Trust. So there's a large contingent
20 that is currently unrepresented.
21

22 THE COURT: Yes.

23
24 MS. HUTCHISON: And with that, Sir, I believe there may be
25 people here that wish to comment on their right to standing and I don't think we'll take
26 any more air time from them. Thank you.
27

28 MR. WHITLING: Sir, as my friends have mentioned, I'm
29 conflicted from acting in relation --
30

31 THE COURT: Right.

32
33 MR. WHITLING: -- to this matter but I have been approached by a
34 number of people who are here in the courtroom who would like to generally make a
35 brief submission to Your Lordship at the moment. I wonder if I might be permitted to
36 speak as an Amicus or in some such capacity?
37

38 THE COURT: Certainly you can, yes.
39

40 MS. BONORA: Sir, I just -- I just have to put on the record that
41 Mr. Whitling was a partner at Fraser Milner Casgrain when I was, and he participated in

1 this case for the Trustees.

2
3 THE COURT: Okay, so he is conflicted. He is not going to
4 represent any of the parties. Mr. Whitling, is that right?

5
6 MR. WHITLING: That's correct, Sir.

7
8 MS. BONORA: Thank you.

9
10 THE COURT: So -- and we are -- we are not making any
11 substantive or procedural orders today. There are lay people who want to make
12 submissions. Mr. Whitling thinks he could act as an Amicus to just pass on more
13 efficiently the message that they want to provide to me. I am not seeing anything that
14 would violate any obligations that Mr. Whitling has in that regard. He is not acting for
15 anyone, he is just speaking.

16
17 MS. BONORA: Yes.

18
19 THE COURT: So I am inclined to let him speak as long as he
20 can speak quickly.

21
22 MS. BONORA: Thank you, Sir.

23
24 MR. WHITLING: All I have to say briefly, Sir, is that there are a
25 number of people here that are very concerned about this proceeding and Your Lordship
26 has pointed out there is no application at the moment for them to participate in this --

27
28 THE COURT: Right.

29
30 MR. WHITLING: -- proceeding but they would like to bring -- the
31 problem is they had someone to bring it, me, but conflicts have been raised so I can't
32 bring it. So I think all I can say is that these people would like to bring an application
33 that -- just on the nature that Your Lordship was just contemplating but at the moment
34 they're unrepresented. We don't want to -- they don't want to derail the current
35 scheduling that we were talking about, a date in April. I think all I can tell you at the
36 moment is we're -- they are going to try and bring this application as soon as they can but
37 you know, there's real barriers to their participation here because they're potentially
38 going to have to find someone else who is willing to act pro bono for them.

39
40 THE COURT: Okay. Well --

41

1 MR. WHITLING: And there's not --

2
3 THE COURT: Well, listen, April 25th is going to be a hard
4 deadline so if anyone wants to make an application to participate in that motion, it is
5 going to have to happen pretty quickly because there will be filing deadlines and the like
6 that have to be complied with. And this is something that has to move forward and
7 delays beyond April 25th are not going to be looked upon with favour.

8
9 MR. WHITLING: Okay, thank you very much, Sir.

10
11 MS. BONORA: Sir, thank you for those and perhaps we'll of
12 course put that in the form of a case management direction so that it's clear that that has
13 to occur.

14
15 The -- just in the interests of the fact that the courtroom is rather full and it's important I
16 think for parties to know that in the course of this case management there have been
17 directions in Sawridge #4 about the costs consequences of people who come forward
18 without good reason to come forward. And so I will provide that to you in the binder of
19 materials, but I thought I would put that on the record for parties to review because
20 there's some very strong language about that. Some of the parties that Mr. Whitling has -
21 - was going to represented are enfranchised individuals. That has gone to the Court of
22 Appeal several times with Maurice Stoney, that enfranchised individuals don't have a
23 seat at this table.

24
25 So just in the interests of the fact that we obviously will potentially be dealing with costs,
26 that those costs directions in Sawridge #4 should be reviewed by the parties -- by persons
27 who wish to come forward.

28
29 THE COURT: Well, fortunately they are seeking counsel who
30 would be able to advise them on that issue, so --

31
32 MS. BONORA: Right. It's just that there's a lot --

33
34 THE COURT: -- they will know there is an issue.

35
36 MS. BONORA: -- a lot of materials so I thought I'd perhaps
37 short circuit it and put it on the record.

38
39 THE COURT: Okay.

40
41 MS. BONORA: Sir, then the final issue then is the litigation

1 plan and -- and so we had proposed a litigation plan and the -- at first we had the issue of
2 the privileged matter in, but that has come now -- been taken out of the litigation plan and
3 thus for the most part the litigation plan that have been discussed with my friends really
4 just deals now with the jurisdiction matter.

5
6 Sir, perhaps if I could just hand you a copy of -- of the Trustee -- and you'll see, Sir, that
7 we had -- this had been interspersed with privilege so there are some gaps, but we're
8 proposing to keep the dates the same because we think they work. So we will take a very
9 short deadline to file an additional very short affidavit in respect of the jurisdictional
10 question with respect to some proceedings that happened under Section 42 of the Trustee
11 Act, and then we'd proceed with questioning and answers to Undertakings and the Briefs
12 being due by the Trustees on March 29th. The Brief of the OPGT and Catherine Twinn
13 are due April 12th.

14
15 We had actually inserted the Brief by any non-party beneficiary or potential beneficiary
16 to April 12th. That of course will be subject of course to any other application that comes
17 before you prior to this date. And then the application will happen on April 25th.

18
19 We also set tentative dates for questioning on affidavits of records in May and June and
20 then answers to Undertakings. So we believe this gets us forward in respect of the
21 jurisdictional question and then moving to the next step which is questioning and answers
22 on Undertakings, and we're seeking your direction on that plan today.

23
24 THE COURT: Well, one thing that seems to be missing from
25 your plan though is the contemplated additional parties. So I would like to try to fix a
26 deadline for anyone who wants to come forward to make an application to participate. I
27 think we should set some deadlines for that.

28
29 MS. BONORA: I would be very happy to set the deadline. Of
30 course, our proposal was just that they would be able to participate by written form so --

31
32 THE COURT: Well, I am hearing now that they --

33
34 MS. BONORA: Yeah.

35
36 THE COURT: -- have counsel --

37
38 MS. BONORA: Yes.

39
40 THE COURT: -- or hope -- hoping to have counsel and they
41 would like to apply, and whether -- whether they will have a full right of participation or

1 no right of participation, I do not, but I cannot determine that until I hear the application.
2 But I would like to set some deadlines for that. I do not want to be coming to April 15th
3 to find out that someone wants to participate.
4

5 MS. BONORA: We don't desire that either.
6

7 THE COURT: And the other slight problem here is that my
8 availability to hear these applications over the next four months is going to be, you will
9 find, very limited.
10

11 MS. BONORA: Sir, just in the interests of setting that date
12 because I'm going to ask for a very -- a date that's quite soon, I want to just provide a
13 little bit of history.
14

15 There was from the initial order an ability for people to participate by filing affidavits.
16 That was back in 2011. When the Court of Appeal came out with their decision we filed
17 an application on January 9th of 2018 suggesting participation by written Brief. That was
18 again before the Court. Had we had the application in September, it was extensively
19 canvassed. Those applications are posted on a public website which is how documents
20 are served in this litigation, so it's not as though these persons have not had ample
21 opportunity to bring this application before now. And so I say that in the interests of
22 saying I would like them to file their application before January 15th.
23

24 THE COURT: January 15th? That is right around the corner.
25

26 Mr. Whitling, is that a date that is realistic, do you think?
27

28 MR. WHITLING: Well Sir, given the holidays I would think we
29 should go to at least the end of January.
30

31 MS. HUTCHISON: My Lord, in terms of the litigation plan, our
32 submission would be that there's -- there's really not a useful purpose in passing the one
33 that's been discussed today. Much has changed even in the last 24 hours. I think if
34 counsel had some time to discuss what a reasonable deadline would be for non-parties to
35 submit their application, that process, and also to rework some of the deadlines. We'd
36 agreed to a very ambitious and in some cases quite -- quite short timeframes for very
37 important steps. I think we can get back to the Court with the litigation plan by
38 agreement.
39

40 On the non-parties I would very much support Mr. Whitling's view that more time is
41 required and I -- I do tend to question -- although I recognize it was a notice requirement

1 set by court order, we're dealing with a relatively remote Indigenous community and the
2 assumption that everybody affected by this has access to a computer, let alone access to
3 the internet is -- is not always an accurate assumption. And we've certainly got parties
4 before you that -- or individuals before you that wish to participate and are trying to
5 retain counsel. I think it's appropriate to give them an opportunity. It's less likely it will
6 be derailed again at a later stage in this proceeding as well if we give them a chance to do
7 what they need to do. Thank you, My Lord.
8

9 THE COURT: So can we re -- rework the litigation plan within
10 the next few days?
11

12 MS. BONORA: Sir, if we can have an opportunity to come back
13 before you if we can't reach agreement. I understood we had reached agreement on these
14 dates subject to clients. Obviously, I'm hearing that that -- I don't think that this is an
15 aggressive plan. This takes four months to get to a court application and I -- I believe
16 that the dates are very generous in terms of reaching that application. It's interspersed. I
17 mean, I'm happy to discuss this with the parties but I'm hoping that we could have a half
18 hour of your time this week to come back before you if we don't reach agreement, so
19 going into the Christmas break there is a litigation plan in place.
20

21 THE COURT: Okay. Well, I am available Friday afternoon if
22 that is suitable to the parties.
23

24 MS. BONORA: Okay. So if we could set Friday afternoon at
25 2:00 to come back before you in the event we aren't sending you a consent litigation
26 plan?
27

28 THE COURT: Is that date suitable to the parties? Friday at
29 2:00? I am not seeing any objection so we will go with Friday at 2:00.
30

31 MS. BONORA: Thank you, Sir. And we have no objection to
32 having --
33

34 THE COURT: You do not have to come back.
35

36 MS. BONORA: Right.
37

38 THE COURT: You send in a litigation plan, you do not have to
39 come back.
40

41 MS. BONORA: Exactly, Sir. We'll strive for that. And Sir, we

1 have no objection to setting a date for an application by other interested persons to
2 January 30th.

3
4 THE COURT: Well, that seems to make a bit more sense,
5 given that we are so close to Christmas.

6
7 MS. BONORA: Yes.

8
9 THE COURT: So that would make some sense.

10
11 MS. BONORA: So if that's your direction, Sir, we'll put that in
12 a case management direction --

13
14 THE COURT: Yes.

15
16 MS. BONORA: -- that then again will be posted to the website
17 for anyone who would want to see that and then have the opportunity to bring an
18 application.

19
20 And so in terms of setting that down, how will we find time in your calendar so we can
21 pick a date?

22
23 THE COURT: Well, I can tell you that between the 25th of
24 January and the 18th of March I am in Edmonton for a grand total of one week. So -- and
25 that is the week of February 4th or thereabouts or one of the other weeks of February. I
26 think it is the week of the 4th. So -- and I am in a lengthy trial starting on March 18th
27 which I -- mean I would probably have little time to deal with this. So we are very tight
28 on time.

29
30 MS. BONORA: Yes.

31
32 THE COURT: And I have been giving away bits and pieces of
33 my -- the week I am in Edmonton already so it is been a big struggle.

34
35 MS. BONORA: I wonder if we could perhaps have your
36 indulgence by having your assistant send us dates that might be useful, and then we
37 would undertake to post that to the website and provide Mr. Whitling with that date.

38
39 THE COURT: Well, sure. You can -- you can speak with
40 Sharon Heinz or her replacement. She's away right now and -- and get a date.

41

- 1 MS. BONORA: We will do that, Sir.
2
- 3 THE COURT: But if the deadline is January 30th and if I am
4 only here for one week and that is early February, it is going to be hard to find -- it is
5 going to be very difficult to find a time. Very, very difficult unless -- unless the
6 application is done in writing only.
7
- 8 MS. BONORA: Well, Sir, I don't think -- I'm not sure that that
9 isn't a good solution because otherwise if your next available date then is April 25th, we
10 are now delayed for four months just to determine participation and won't proceed with
11 any other matters. So I think the Trustees would certainly desire that this move more
12 expeditiously and therefore written submissions would be, I think, preferable to the
13 Trustees than having this be delayed for so long.
14
- 15 THE COURT: Well, let us find out whether there is a day or a
16 half day that could be available so that we have it, and we will see if -- if that works.
17 Firstly, we will see if there is going to be any applications I suppose.
18
- 19 MS. BONORA: Yes, I guess we should see that.
20
- 21 THE COURT: I am not sure what Mr. Molstad's position is.
22 Are you likely to bring an application?
23
- 24 MR. MOLSTAD: I don't have instructions at this point, Sir.
25
- 26 THE COURT: Okay.
27
- 28 MS. BONORA: Sir, just by way of canvassing your schedule. Is
29 it that you potentially are close to Edmonton? Could you be in Wetaskiwin or something
30 in other weeks?
31
- 32 THE COURT: Wetaskiwin, Grande Prairie.
33
- 34 MS. BONORA: Yeah, I don't want to come to Grande Prairie.
35
- 36 THE COURT: But when I am --
37
- 38 MS. BONORA: But I'm wondering if we could think about --
39 Wetaskiwin isn't that far and sometimes matters settle there if you had time.
40
- 41 THE COURT: Well, usually when I am there it is -- it is a

1 pretty busy spot.

2

3 MS. BONORA: It is. Okay.

4

5 THE COURT: And so I -- I -- to give away those dates would
6 be challenging I think.

7

8 MS. BONORA: Okay. So I'll can -- then we'll leave it at I'll
9 canvass dates and in the event that the parties find it difficult to achieve those dates given
10 that the application deadline is the end of January, we'll perhaps seek some further
11 direction from you on participating in written form.

12

13 THE COURT: Sure. We -- we will work something out to
14 ensure that anyone who wants to apply to participate will have an opportunity to be
15 heard.

16

17 MS. BONORA: Okay.

18

19 THE COURT: Hopefully in person and if not in person, in
20 writing.

21

22 MS. BONORA: Thank you so much, Sir. Those are all the
23 matters that I have this morning and that were on the agenda, so thank you very much.

24

25 MR. MOLSTAD: I forgot to give you, Sir, the copy of this order.

26

27 THE COURT: Thank you very much. Anything else from any
28 of the parties?

29

30 So we will then possibly reconvene on Friday at 2:00 to sort out anything in relation to
31 the litigation plan or any other issues that arise from today that occur to you and that we
32 have not dealt with. And then we will just carry on with the litigation plan that is agreed
33 upon or which I will decide on Friday.

34

35 Okay, anything else?

36

37 MS. BONORA: Thank you, Sir.

38

39 THE COURT: Thank you very much.

40

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PROCEEDINGS CONCLUDED

1 **Certificate of Record**

2
3 I, Alyssa Young, certify that this recording is the record made of the evidence in the
4 proceedings in Queen’s Bench, held in courtroom 612 at Edmonton, Alberta, on the 18th day
5 of December, 2018, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.

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1 **Certificate of Transcript**

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I, Wendy Gretzinger, certify that

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

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

Wendy Gretzinger, Transcriber
Order AL-JO-1002-1816
December 20, 2018

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, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID
MAJESKI, as Trustees for the 1985 Trust ("Sawridge
Trustees")

DOCUMENT CONSENT ORDER (Hearing of Jurisdictional Question)

DATE ORDER PRONOUNCED December 18, 2018
LOCATION WHERE ORDER PRONOUNCED Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER Honourable Justice J.T. Henderson

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

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

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("1985 Trust") ("Application");

AND WHEREAS the Sawridge Trustees seek direction respecting the source and nature of the jurisdiction of this Court to make changes to the definition of "Beneficiary" as set out in the 1985 Trust;

36397342_3|NATDOCS

AND WHEREAS a Case Management Justice has authority under Rule 4.14 of the *Alberta Rules of Court* to make interlocutory orders;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

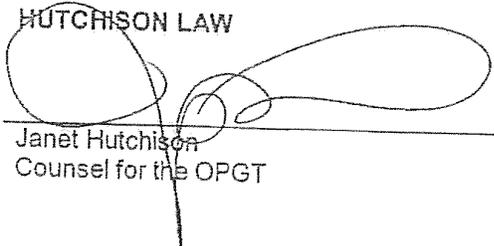
1. A hearing on a directed issue will be held, prior to trial, and the issues to be determined (the "Jurisdictional Question") will be as follows:
 - (a) Does the Court have jurisdiction to amend the beneficiary definition contained in the 1985 Trust (the "Definition"), on the basis of public policy, its inherent jurisdiction or any other common law plenary power?
 - (b) If the answer to question (a) is yes, what is the scope of the Court's jurisdiction to amend the Definition, including can the Court:
 - (i) Add words to the 1985 Trust deed;
 - (ii) Delete words contained in the 1985 Trust deed; or
 - (iii) Engage in a combination of addition and deletion of words to the 1985 Trust deed?
 - (c) If the answer to question (a) is no, is the Court's jurisdiction limited to what is permitted by s. 42 of the *Trustee Act*? If so, what evidence would be required by the Court to amend the Definition using s. 42 of the *Trustee Act*?
 - (d) If the Court does not have jurisdiction under any of the methods set out in paragraphs (a), (b) or (c) above, do the Sawridge Trustees have jurisdiction under the existing terms of the Trust Deed of the 1985 Trust to amend the Definition?
 - (e) If the Court proceeds pursuant to paragraph 1(c) or 1(d) above, is the Court's jurisdiction in this application affected by the *Minors Property Act*, and specifically, does the Court require evidence of consent to the application for a beneficiary definition change from minor beneficiaries who are over the age of 14?
2. This Jurisdictional Question will be heard and determined by the Case Management Justice.


The Honourable Justice J.T. Henderson

CONSENTED TO BY:
MCLENNAN ROSS LLP

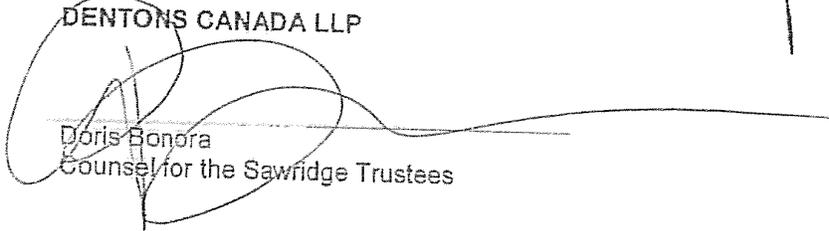
Crista Osualdini
Counsel for Catherine Twinn

HUTCHISON LAW



Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP



Doris Bonora
Counsel for the Sawridge Trustees

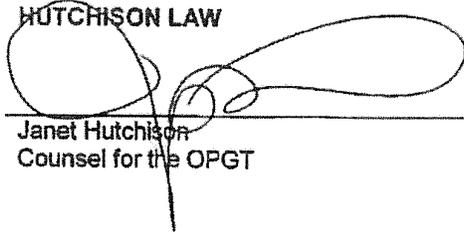
**CONSENTED TO BY:
MCLENNAN ROSS LLP**



Crista Osualdini
Counsel for Catherine Twinn

DENTONS CANADA LLP

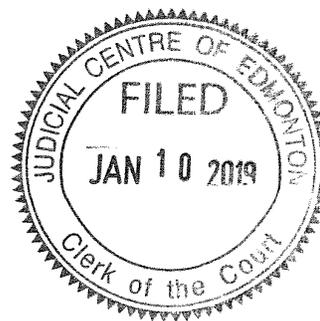
HUTCHISON LAW



Janet Hutchison
Counsel for the OPGT

Doris Bonora
Counsel for the Sawridge Trustees

Clerk's Stamp:



Form 26
[Rule 5.6]

COURT FILE NUMBER 1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, RSA
2000, c T-8, AS AMENDED

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

APPLICANTS ROLAND TWINN, MARGARET WARD, BERTHA
L'HIRONDELLE, EVERETT JUSTIN TWIN and
DAVID MAJESKI, as Trustees for the 1985
Sawridge Trust (the "Sawridge Trustees")

DOCUMENT **AFFIDAVIT OF PAUL BUJOLD –**
Jurisdiction Application

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) 423-72764
File No: 551860-1-DCEB

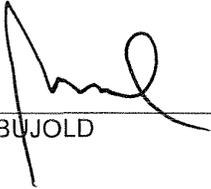
AFFIDAVIT OF PAUL BUJOLD
SWORN ON THE 9 DAY OF January, 2019

I, Paul Bujold, of the Edmonton, Alberta, make oath and say:

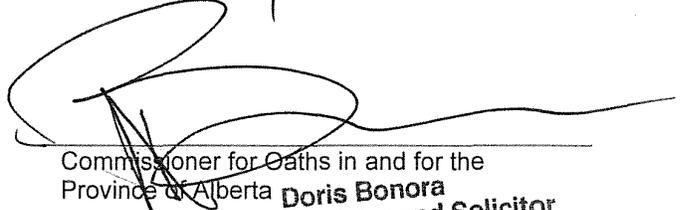
1. I am the Chief Executive Officer ("CEO") of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.
2. The Office of the Public Guardian and Trustee ("OPGT") and Catherine Twinn, as the only other parties to this litigation, have referenced amending the 1985 Trust pursuant to section 42 of the Trustee Act. The Trustees have maintained that 100% of the beneficiaries must approve the change under the Trustee Act and until we have approval of Catherine Twinn, who is a beneficiary of the 1985 Trust and a party to this action, and the OPGT, who represents a number of beneficiaries, to a change in definition an amendment under section 42 of the Trustee Act will not be successful.
3. The Trustees directed me to make an attempt to obtain approval to a change in the definition of beneficiaries. I carried out the following steps:
 - (a) I drafted letters to potential beneficiaries and persons who may have an interest proposing two definitions in the letters attached as Exhibit "A". One definition was proposed by the Trustees and the second definition was proposed by the OPGT in correspondence. Catherine Twinn was asked to provide a definition but she declined to do so.
 - (b) The letters attached as Exhibit "A" were sent to the individuals that the Trustees believe may be beneficiaries or to persons identified by the OPGT and Catherine Twinn as interested persons of the 1985 Trust. The Trustees are not confident that the list is exhaustive for the reasons set out below. The list of persons to whom the letters were sent is attached hereto as Exhibit "B". I eventually found addresses for most of the people on the list. The people whose addresses I did not find are marked on Exhibit "B".
 - (c) A total of 8 votes were received and the votes are as shown on the attached chart marked as Exhibit "C".
4. In my experience as the CEO, I have found that it is extremely difficult to get beneficiaries to respond to any kind of communication and thus I did not expect that there would be a good response.
5. I said above that I do not believe that the list of people to whom the list was sent was exhaustive. The three parties to this litigation do not agree on a list of beneficiaries of the 1985 Trust and thus I believe it will be impossible to satisfy the requirement to obtain approval of 100% of the beneficiaries because to date there is no agreement on who belongs in the beneficiary pool.

6. I make this Affidavit in support of an application to have the court direct the jurisdiction of the court under which the definition of the 1985 Trust could be amended.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA ON THE 9 DAY OF JANUARY, 2019.



PAUL BUJOLD



Commissioner for Oaths in and for the Province of Alberta
Doris Bonora
Barrister and Solicitor
In and for the Province of Alberta

Appointment Expiry Date



This is Exhibit "A" referred to in the Affidavit of

PAUL BUTOLD

Sworn before me this 9 day of JANUARY A.D., 20 19

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Donna Benora
Barrister and Solicitor
in and for the Province of Alberta

NOTICE TO POTENTIAL BENEFICIARIES

Sawridge Band Intervivos Settlement (1985 Trust)

Court Action 1103 14112 to review the definition of "Beneficiaries" in the 1985 Trust is reaching the final steps in seeking direction about a change in the definition of "Beneficiaries" in this Trust and to seek remedies for those who may be affected by the change to the current definition.

The current definition has been declared discriminatory and therefore the Trustees have determined that the definition should be changed to eliminate discrimination.

One possible action to effectively change the current definition would be to ask those persons identified as potential beneficiaries or persons who may have an interest under the current definition to approve a new definition. Under Section 42 of the Trustee Act of Alberta, the potential beneficiaries can vote on a new definition but 100% of these persons would have to agree to the new definition. Such a change would still be subject to court approval.

The current definition is provided below:

"Beneficiaries" 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 all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to 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;

You are receiving this notice because our preliminary analysis has determined that you may be a beneficiary of the trust under the current definition of beneficiaries of the trust. In order to determine if someone may be a beneficiary, an analysis of their qualifications as a member under the Indian Act as it existed in 1982 must be done.

Any change in the definition may affect your rights as a person who has been identified as having an interest under that trust. The results of this vote will be presented to the court.



Two possible definitions have been proposed:

1. By the Trustees of the Sawridge Band Intervivos Settlement

"Beneficiaries" at any particular time shall mean all persons who are members of the Sawridge Indian Band under the laws of Canada in force from time to time, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code are incorporated into, or recognized by, the laws of Canada;

2. By the Alberta Office of the Public Guardian and Trustee

"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, 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 provided, for greater certainty, that any person who shall voluntarily 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 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

As a potential Beneficiary in the 1985 Trust you are being asked to vote on whether you could accept a variation of the trust that one of these two proposed definitions would be acceptable. We require your answer by **19 November 2018**. Please return your vote in the self-addressed, stamped envelope provided with this Notice.

The vote cannot be anonymous. We must have your name and identification so that we know that you as a beneficiary voted.

If 100% of those being asked to vote for a definition choose the same definition, this definition will be proposed to the court as a proposed New Definition. If 100% of those being asked to vote do not choose the same definition, the court will be asked to find another remedy to resolve the current discriminatory definition.



**VOTE ON A PROPOSED NEW DEFINITION FOR "BENEFICIARIES"
IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT**

NAME	
IDENTIFICATION (Driver's Licence Number, Social Insurance Number, Alberta Health Care Number or Treaty Number)	

I VOTE FOR THE FOLLOWING DEFINITION (place a mark in the appropriate box):

VOTE	PROPOSED DEFINITION
	<i>"Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time, including without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;</i>
	<i>"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the <u>Indian Act R.S.C. 1970, Chapter I-6</u> as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily 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 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;</i>

SIGNATURE	
DATE	

Return your vote in the self-addressed, stamped envelope no later than **19 November 2018**.



NOTICE TO PERSONS WHO MAY HAVE AN INTEREST

IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT (1985 TRUST)

Court Action 1103 14112 to review the definition of "Beneficiaries" in the 1985 Trust is reaching the final steps in seeking direction about a change in the definition of "Beneficiaries" in this Trust and to seek remedies for those who may be affected by the change to the current definition.

The current definition has been declared discriminatory and therefore the Trustees have determined that the definition should be changed to eliminate discrimination.

One possible action to effectively change the current definition would be to ask those persons identified as potential beneficiaries or persons who may have an interest under the current definition to approve a new definition. Under Section 42 of the Trustee Act of Alberta, the potential beneficiaries can vote on a new definition but 100% of these persons would have to agree to the new definition. Such a change would still be subject to court approval.

The current definition is provided below:

"Beneficiaries" 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 all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to 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;

You are receiving this notice because our preliminary analysis has determined that someone has identified you as a person who may have an interest in the trust under the current definition of beneficiaries of the trust. In order to determine if someone may be a beneficiary, an analysis of their qualifications as a member under the Indian Act as it existed in 1982 must be done.

Any change in the definition may affect your rights as a person who has been identified as having an interest under that trust. The results of this vote will be presented to the court.



Two possible definitions have been proposed:

1. By the Trustees of the Sawridge Band Intervivos Settlement

"Beneficiaries" at any particular time shall mean all persons who at that time are members of the Sawridge Indian Band under the laws of Canada in force, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code is incorporated into, and recognized by, the Sawridge Indian Band and the laws of Canada;

2. By the Alberta Office of the Public Guardian and Trustee

"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, 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 provided, for greater certainty, that any person who shall voluntarily 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 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

As a person who may have an interest in the 1985 Trust you are being asked to vote on whether you could accept a variation of the trust that one of these two proposed definitions would be acceptable. We require your answer by **19 November 2018**. Please return your vote in the self-addressed, stamped envelope provided with this Notice.

The vote cannot be anonymous. We must have your name and identification so that we know that you as an interested person voted.

As a person who has not yet been identified as a potential beneficiary, your vote will be presented to the court as the vote of a person of interest.

If 100% of those being asked to vote for a definition choose the same definition, this definition will be proposed to the court as a proposed New Definition. If 100% of those being asked to vote do not choose the same definition, the court will be asked to find another remedy to resolve the current discriminatory definition.



**VOTE ON A PROPOSED NEW DEFINITION FOR “BENEFICIARIES”
IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT**

NAME	
IDENTIFICATION (Driver’s Licence Number, Social Insurance Number, Alberta Health Care Number or Treaty Number)	

I VOTE FOR THE FOLLOWING DEFINITION (place a mark in the appropriate box):

VOTE	PROPOSED DEFINITION
	<i>“Beneficiaries” at any particular time shall mean all persons who at that time are members of the Sawridge Indian Band under the laws of Canada in force, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code is incorporated into, and recognized by, the Sawridge Indian Band and the laws of Canada;</i>

	<i>“Beneficiary” at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the <u>Indian Act R.S.C. 1970, Chapter I-6</u> as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily 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 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;</i>
--	--

SIGNATURE	
DATE	

Return your vote in the self-addressed, stamped envelope no later than **19 November 2018**.

EXHIBIT "B"
Mailing List Beneficiary Definition

No.	Name	Initial Age Status as at 2011	Current Age Status	No Address Found
1	Burd, Svea A.	Minor	Adult	
2	Cardinal, Kieran	Adult	Adult	
3	Cardinal, Peter Allan	Adult	Adult	X
4	Donald, Gina	Adult	Adult	
5	Lamouche-Twin, Everett	Minor	Minor	
6	Lamouche-Twin, Justice	Minor	Minor	
7	Lamouche-Twin, Kalyn	Minor	Minor	
8	Lamouche-Twin, Maggie	Minor	Minor	
9	Lindberg, Rosina	Adult	Adult	
10	McDonald, William	Adult	Adult	
11	McCoy, Vera	Adult	Adult	
12	McDonald, Joshlyn	Adult	Adult	X
13	Megley, Melissa	Adult	Adult	
14	Moodie, Jorja L.	Minor	Minor	
15	Nataucappo, Ariana J.I.	Minor	Minor	
16	Potskin, Keanu N. A.	Minor	Minor	
17	Potskin, Aaron	Adult	Adult	
18	Potskin, Ethan E.R.	Minor	Minor	
19	Potskin, Jaise A.	Minor	Minor	
20	Potskin, Jeanine	Adult	Adult	
21	Potskin, Jonathon	Adult	Adult	
22	Potskin, Talia M.L.	Minor	Minor	
23	Potskin, Trent	Adult	Adult	
24	Potskin, William	Minor	Minor	
25	Quinn-Twin, Kaissac P. C.	Minor	Minor	
26	Robberstad, Jadyn	Minor	Minor	
27	Rudkowski, Julie	Adult	Adult	X
28	Shirt, Cameron	Adult	Adult	
29	Twin (Anderson), Laurie	Adult	Adult	
30	Twin, Alexander L.	Minor	Minor	
31	Twin, Autumn J.	Minor	Minor	
32	Twin, Brianne	Adult	Adult	
33	Twin, Brittany	Adult	Adult	
34	Twin, Darcy	Adult	Adult	
35	Twin, Destin D.	Minor	Minor	
36	Twin, Jaclyn	Adult	Adult	
37	Twin, Justice W.	Minor	Minor	
38	Twin, E. Justin	Adult	Adult	
39	Twin, Kerri-Lynne	Adult	Adult	
40	Twin, Logan F.	Minor	Minor	
41	Twin, Naomi	Adult	Adult	
42	Quinn-Twin, Rainbow	Minor	Adult	
43	Twin, River C.	Minor	Minor	
44	Twin, Starr	Minor	Minor	
45	Twin, Walter F.	Adult	Adult	
46	Twin, Wesley	Adult	Adult	
47	Twin, Winona	Adult	Adult	
48	Twin, Yvonne	Adult	Adult	
49	Twinn, Alexander G.	Minor	Adult	
50	Twinn, Ardell	Adult	Adult	
51	Twinn, Arlene	Adult	Adult	
52	Twinn, Aspen S.	Minor	Minor	

This is Exhibit "B" referred to in the Affidavit of

PAUL BURJOLD
Sworn before me this 9 day
of JANUARY A.D., 2019

Doris Bonora
Barrister and Solicitor
for the Province of Alberta

A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

EXHIBIT "B"
Mailing List Beneficiary Definition

53	Twinn, Catherine	Adult	Adult	
54	Twinn, Clinton	Minor	Adult	
55	Twinn, Cody	Adult	Adult	
56	Twinn, Corey R.	Minor	Adult	
57	Twinn, Courtney	Adult	Adult	
58	Twinn, Graham	Adult	Adult	
59	Twinn, Haitina	Adult	Adult	
60	Twinn, Irene	Adult	Adult	
61	Twinn, Isaac	Adult	Adult	
62	Twinn, Kaitlin	Minor	Adult	
63	Twinn, Patrick	Adult	Adult	
64	Twinn, Paul	Adult	Adult	
65	Twinn, Roland	Adult	Adult	
66	Twinn, Roy	Adult	Adult	
67	Twinn, Samuel	Adult	Adult	
68	Twinn, Shannon	Adult	Adult	
69	Twinn, Shelby	Adult	Adult	
70	Twinn-Vincent, Seth	Minor	Minor	
71	Twinn-Vincent, W. Chase	Minor	Adult	
72	Ward, Angie	?	Adult	X
73	Ward, Elvina Beatrice	?	Adult	X
74	Ward, Georgina	Adult	Adult	
75	Ward, Margaret S.	Adult	Adult	
76	Ward, Michelle	Adult	Adult	
77	Ward, Nathan	Adult	Adult	

EXHIBIT "C"

Mailing List for Beneficiary Definition with Vote Tabulation

No.	Name	Initial Age Status as at 2011	Current Age Status	Date Ballot Received	TABULATION OF VOTE ON S.42 DEFINITION	
					Trustee	OPGT
1	Burd, Svea A.	Minor	Adult			
2	Cardinal, Kieran	Adult	Adult			
3	Cardinal, Peter Allan	Adult	Adult			
4	Donald, Gina	Adult	Adult			
5	Lamouche-Twin, Everett	Minor	Minor			
6	Lamouche-Twin, Justice	Minor	Minor			
7	Lamouche-Twin, Kalyn	Minor	Minor			
8	Lamouche-Twin, Maggie	Minor	Minor			
9	Lindberg, Rosina	Adult	Adult			
10	McDonald, William	Adult	Adult			
11	McCoy, Vera	Adult	Adult			
12	McDonald, Joshlyn	Adult	Adult			
13	Megley, Melissa	Adult	Adult			
14	Moodie, Jorja L.	Minor	Minor			
15	Nataucappo, Ariana J.I.	Minor	Minor			
16	Potskin, Keanu N. A.	Minor	Minor			
17	Potskin, Aaron	Adult	Adult	19-Nov-18	1	
18	Potskin, Ethan E.R.	Minor	Minor			
19	Potskin, Jaise A.	Minor	Minor			
20	Potskin, Jeanine	Adult	Adult	19-Nov-18	1	
21	Potskin, Jonathon	Adult	Adult	13-Oct-18		1
22	Potskin, Talia M.L.	Minor	Minor			
23	Potskin, Trent	Adult	Adult			
24	Potskin, William	Minor	Minor			
25	Quinn-Twin, Kaissac P. C.	Minor	Minor			
26	Robberstad, Jady	Minor	Minor			
27	Rudkowski, Julie	Adult	Adult			
28	Shirt, Cameron	Adult	Adult			
29	Twin (Anderson), Laurie	Adult	Adult			
30	Twin, Alexander L.	Minor	Minor	14-Nov-18	1	
31	Twin, Autumn J.	Minor	Minor			
32	Twin, Brianne	Adult	Adult			
33	Twin, Brittany	Adult	Adult			
34	Twin, Darcy	Adult	Adult			
35	Twin, Destin D.	Minor	Minor			
36	Twin, Jaelyn	Adult	Adult			
37	Twin, Justice W.	Minor	Minor			
38	Twin, E. Justin	Adult	Adult	18-Oct-18	1	
39	Twin, Kerri-Lynne	Adult	Adult			
40	Twin, Logan F.	Minor	Minor			
41	Twin, Naomi	Adult	Adult			
42	Quinn-Twin, Rainbow	Minor	Adult			
43	Twin, River C.	Minor	Minor			
44	Twin, Starr	Minor	Minor			
45	Twin, Walter F.	Adult	Adult			
46	Twin, Wesley	Adult	Adult			
47	Twin, Winona	Adult	Adult			
48	Twin, Yvonne	Adult	Adult			
49	Twinn, Alexander G.	Minor	Adult			
50	Twinn, Ardell	Adult	Adult			
51	Twinn, Arlene	Adult	Adult			

This is Exhibit "C" referred to in the Affidavit of

PAUL BUSOLD
 Sworn before me this 9 day
 of FEBRUARY A.D., 2019
 A Notary Public, A Commissioner for Oaths
 in and for the Province of Alberta

Doris Bonora
 Barrister and Solicitor
 in and for the Province of Alberta

EXHIBIT "C"

• Mailing List for Beneficiary Definition with Vote Tabulation

52	Twinn, Aspen S.	Minor	Minor			
53	Twinn, Catherine	Adult	Adult			
54	Twinn, Clinton	Minor	Adult			
55	Twinn, Cody	Adult	Adult			
56	Twinn, Corey R.	Minor	Adult	Returned		
57	Twinn, Courtney	Adult	Adult			
58	Twinn, Graham	Adult	Adult			
59	Twinn, Haitina	Adult	Adult	14-Nov-18		1
60	Twinn, Irene	Adult	Adult			
61	Twinn, Isaac	Adult	Adult			
62	Twinn, Kaitlin	Minor	Adult			
63	Twinn, Patrick	Adult	Adult			
64	Twinn, Paul	Adult	Adult	Returned		
65	Twinn, Roland	Adult	Adult	14-Nov-18		1
66	Twinn, Roy	Adult	Adult			
67	Twinn, Samuel	Adult	Adult			
68	Twinn, Shannon	Adult	Adult			
69	Twinn, Shelby	Adult	Adult			
70	Twinn-Vincent, Seth	Minor	Minor			
71	Twinn-Vincent, W. Chase	Minor	Adult			
72	Ward, Angie	?	Adult			
73	Ward, Elvina Beatrice	?	Adult			
74	Ward, Georgina	Adult	Adult			
75	Ward, Margaret S.	Adult	Adult	13-Nov-18		1
76	Ward, Michelle	Adult	Adult			
77	Ward, Nathan	Adult	Adult			

TOTAL VOTES

6

2

From: Joy Jarvis
Sent: Thursday, April 25, 2019 10:02:55 AM
To: doris.bonora@dentons.com;michael.sestito@dentons.com;jfaulds@fieldlaw.com;Janet Hutchison;S.twinn@live.ca;cosualdini@mross.com;kplatten@mross.com
Subject: Sawridge Trust matter, Court File No. 1103 14112
Importance: High

Good morning, counsel. Please see below an email from Mr. Justice Henderson:

The application regarding the "Jurisdictional Issue" will be heard this afternoon. I have reviewed the briefs which have been filed in relation to the motion and have also reviewed other parts of the file including in particular the Brief of the Trustees in relation to the proceedings which took place on August 24, 2016 before Justice Thomas. I have also reviewed the transcript of those proceedings and the Consent Order which was signed by Justice Thomas on August 24, 2016.

In my view it is necessary, as part of the Jurisdictional Issue, to consider the terms of the Consent Order and to fully consider what impact that Order has on the trust terms pursuant to which the trust assets are currently being held. One possibility is that the trust assets are being held for the benefit of the "Beneficiaries" as defined in the 1985 Trust and the 1985 Trust terms govern. However, that is not the only possibility. The Consent Order says that the transfer of assets is "approved *nunc pro tunc*". But the Order does not address the issue of the terms under which the assets are being held. The Consent Order does not appear to be a variation of the 1982 Trust and a variation would likely not be possible without the consent of the beneficiaries (although this clearly looks like what the trustees were attempting to do in 1985). It is possible that the 1985 Trust is a successor trust, but again that does not address the question of the terms on which the trust assets are being held or whether there is an ongoing requirement for the 1985 Trust to account to the 1982 Trust with respect to the trust assets.

I raise these issues so that you will be aware that I am concerned about them. Counsel may have a simple explanation which I have overlooked. In any event this is a foundational issue which needs to be addressed before considering whether the 1985 trust can be varied.

Thank you.

Joy M. Jarvis
Judicial Assistant
Court of Queen's Bench
Edmonton, AB

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

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

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

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

Applicants

PROCEEDINGS

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

2

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.

10 Twinn, and D. Majeski

11 M.S. Sestito

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

12 Twinn, and D. Majeski

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.

41

1 MS. BONORA:

Thank you, Sir.

2

3 UNIDENTIFIED SPEAKER:

Thank you, My Lord.

4

5

6

7 PROCEEDINGS ADJOURNED

8

9

10

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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.

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

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TEZZ TRANSCRIPTION, Transcriber
Order Number: AL-JO-1003-0576
Dated: April 26, 2019

Action No.: 1103-14112
E-File No.: 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 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 TWIN AND DAVID
MAJESCKI, as Trustees for the 1985 Sawridge Trust

Applicants

P R O C E E D I N G S

Edmonton, Alberta
September 4, 2019

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

2 _____

3

4 September 4, 2019 Morning Session

5

6 The Honourable Mr. Justice Henderson Court of Queen's Bench of Alberta

7

8 D.C.E. Bonora For R. Twinn, M. Ward, B. L'Hirondelle, E.

9 Twinn and D. Majeski

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

11 Twinn and D. Majeski

12 C. Osualdini For Catherine Twinn

13 D.D. Risling For Catherine Twinn

14 J.L. Hutchison For the Office of the Public Trustee

15 R.J. Faulds, Q.C. For the Office of the Public Trustee

16 E.H. Molstad, Esq. For the Sawridge First Nation

17 E. Sopko For the Sawridge First Nation

18 M. O'Sullivan Court Clerk

19 _____

20

21 **Discussion**

22

23 THE COURT CLERK: Order in court. All rise.

24

25 THE COURT: Good morning. Please be seated.

26

27 MS. BONORA: Good morning.

28

29 MS. OSUALDINI: Good morning, My Lord.

30

31 MR. FAULDS: Good morning, My Lord.

32

33 THE COURT: Good morning.

34

35 **Submissions by Ms. Bonora**

36

37 MS. BONORA: Thank you, My Lord, for seeing us today and
38 making the time for us. I'll just do some introductions.

39

40 Doris Bonora and Michael Sestito of Dentons on behalf of the Sawridge Trustees.

41 John Faulds and Janet Hutchison are representing the Office of the Public Trustee and

1 Guardian. Crista Osualdini and Dave Risling are here for Catherine Twinn. And Mr.
2 Molstad, at Molstad, and Ellery Sopko from Parlee are here on behalf of the Sawridge
3 First Nation. And while they're not parties or intervenors, I'll be asking to hear -- or to
4 have you hear them this morning.

5
6 In terms, we assume you have some limited time this morning, so we've all agreed that
7 we'd try and limit our submissions to ten minutes, and -- and then you can decide with
8 respect to Mr. Molstad, but he told me to advise you that he would only be ten minutes as
9 well.

10
11 THE COURT: Okay.

12
13 MS. BONORA: Just a bit of history. We last appeared before
14 you in April. You gave us some directions about something you wanted to hear about
15 which was with respect to your concerns around the transfer of assets from the 1982
16 Sawridge Trust to the 1985 Sawridge Trust. We suggested, and you agreed to adjourn the
17 application so that we could make further submissions to you on that point, and we also
18 agreed to try and work out a schedule which, unfortunately, we've not been able to do.

19
20 We secured the date of November 27th for that application with respect to the transfer.
21 We did prepare a draft litigation plan and exchanged that with the parties. We have not --
22 really didn't receive a response to the first draft application plan. In late July, the parties
23 advised us -- well, for sure Office of the Public Trustee advised us they had concerns over
24 the procedure and the remedies that were being sought and how we would do the
25 application, and they're going to address that --

26
27 THE COURT: Okay.

28
29 MS. BONORA: -- for you today, and so then we wrote to secure
30 this date. I think joining in that concern is Catherine Twinn, and they will address that
31 with you today.

32
33 We did prepare another draft litigation plan, and I'll just hand that up for reference. We're
34 hoping to get some direction from you today with respect to getting to -- getting us to
35 November 27th and making sure that goes ahead.

36
37 The parties have advised that they think that litigation plan is premature, because they
38 need some direction on procedure. We thought your direction was clear, but we certainly
39 understand the other parties' needs to speak to you about that today. And while I think
40 there's been a bit of a leisurely stroll to getting to today and raising some objections about
41 the procedure around November 27th, we're sincerely asking you to now push the parties

1 to get to November 27th and have that go ahead --

2

3 THE COURT: Yeah.

4

5 MS. BONORA: -- as you have expressed the last time. This
6 litigation has been dragging on and we -- and your time, of course, is very precious and
7 limited in terms of trying to get in front of you. So we're asking you very sincerely to try
8 and get us to that date so that we can have that application on the transfer of assets.

9

10 With respect to Mr. Molstad, I advised you when I was here last that he had some
11 concerns about the application and wanted some time to consider it. He is here today. He
12 will be speaking about becoming an intervenor as -- because, as you know, in the 1982
13 Trust, the trustees of that Trust are the Sawridge First Nation council, chief and council,
14 and there is no one, despite all of the lawyers here today, it's -- it would only be Mr.
15 Molstad and Ms. Sopko who would be representing chief and council. And so in the
16 event that we've --

17

18 THE COURT: Chief and council from --

19

20 MS. BONORA: Sawridge --

21

22 THE COURT: -- 1982.

23

24 MS. BONORA: That's right. Well --

25

26 THE COURT: Or today --

27

28 MS. BONORA: -- it would be --

29

30 THE COURT: -- or --

31

32 MS. BONORA: Yeah. I think that the Trust would be that it
33 would be the chief and council, the current chief and council.

34

35 THE COURT: M-hm.

36

37 MS. BONORA: At any given time.

38

39 THE COURT: M-hm.

40

41 MS. BONORA: That's the way I would read the Trust.

1
2 THE COURT: Okay.

3
4 MS. BONORA: There was a subsequent order that extended the
5 length of time for any trustee so there was continuity, but I think that's the way I would
6 read the Trust, would be --

7
8 THE COURT: Okay.

9
10 MS. BONORA: -- current chief and council.

11
12 The -- in respect of that intervenor application, just in terms of getting to November 27th,
13 we would ask that if, in fact, there is opposition to that, that it be done in writing. The test
14 for becoming an intervenor is obviously not very onerous. There just needs to be an
15 interest in the outcome. So we're hoping that that might be some consensual matter, but
16 in any event, if that has to be determined by you, then we would ask that it be done in
17 writing so there doesn't need to be yet another court application.

18
19 So my last comment, although I'd ask for time to reply if there's anything I need to say, is
20 just that we sincerely ask you to help us with getting to November 27th.

21
22 THE COURT: Okay.

23
24 MS. BONORA: Thank you.

25
26 THE COURT: Mr. Faulds?

27
28 **Submissions by Mr. Faulds**

29
30 MR. FAULDS: Thank you, My Lord. The genesis of this
31 appearance before you is, of course, the remarks that you made on April the 25th.

32
33 THE COURT: Right.

34
35 MR. FAULDS: And in the subsequent discussions between the
36 parties it became clear that the implications of what Your Lordship had said were not --
37 there wasn't necessarily consensus on what those implications were and nor was there
38 agreement on what the procedural way forward was and, as a result of that, we asked our
39 friends if they could arrange this hearing and we're grateful to them for doing so.

40
41 THE COURT: M-hm.

1
2 MR. FAULDS: Just by way of very brief background, the role of
3 the Office of the Public Guardian and Trustee is, of course, to protect the interests of
4 minor beneficiaries who are beneficiaries under the 1985 Trust and its definition of who
5 its beneficiaries are. A reversion to the kind of definition in the 1982 Trust, as was
6 referred to in our brief for April 25, would result in a number of those individuals losing
7 their status as beneficiaries and having an interest in the Trust, because while they fall
8 under the definition of beneficiaries in 1985 in that they would be members of the band if
9 the 19 -- if the 1982 *Indian Act* was still in effect, they are -- would not be beneficiaries
10 under the current definition.

11
12 So the --

13
14 THE COURT: Yeah, I'm not -- I'm not sure I follow that or
15 accept it, but you -- you could well be right, but I would have thought that the breadth of
16 the definition in 1982 is broader than 1985. I -- you -- you know more about it than I, so
17 I'm --

18
19 MR. FAULDS: In certain respects it is, My Lord.

20
21 THE COURT: Yeah.

22
23 MR. FAULDS: But remember the 1985 definition is
24 beneficiaries are persons who would be entitled to membership in the band under the
25 provisions of the *Act* as it read on April the 15th, 1982.

26
27 THE COURT: Yes?

28
29 MR. FAULDS: The way in which membership is determined
30 has changed very dramatically --

31
32 THE COURT: Okay.

33
34 MR. FAULDS: -- since that day, and persons who would have
35 qualified in 1982 and who are beneficiaries on that basis --

36
37 THE COURT: Okay.

38
39 MR. FAULDS: -- are no longer beneficiaries if we revert to the
40 1982 definition which requires actual membership in the band.

41

1 THE COURT: So --
2
3 MR. FAULDS: So this is --
4
5 THE COURT: -- this is -- this is a more complex issue than I
6 would have thought.
7
8 MR. FAULDS: Yeah.
9
10 THE COURT: Not surprisingly, but --
11
12 MR. FAULDS: And that --
13
14 THE COURT: So if you have -- if you have the band
15 membership ebbing and flowing at the discretion of what? Council or --
16
17 MR. FAULDS: Yes.
18
19 THE COURT: -- someone?
20
21 MR. FAULDS: Yes.
22
23 THE COURT: You can take -- add or remove beneficiaries
24 from the Trust, is that what you're telling me?
25
26 MR. FAULDS: Well, what I'm -- what I'm saying is that the
27 1982 definition requires actual membership in the band.
28
29 THE COURT: M-hm.
30
31 MR. FAULDS: And that actual membership in the band is
32 currently determined by -- by the band itself.
33
34 THE COURT: Okay.
35
36 MR. FAULDS: Pursuant -- pursuant to the rules.
37
38 THE COURT: So --
39
40 MR. FAULDS: So there's a --
41

1 THE COURT: -- I -- I accept that there are implications.
2
3 MR. FAULDS: Yeah.
4
5 THE COURT: And I --
6
7 MR. FAULDS: And -- and --
8
9 THE COURT: And I knew there would be when I made my
10 comments. And when I was making my comments, as I -- as I tried to make clear, it was
11 -- it was a concern I was expressing, and I wasn't able to work it out on my own and I
12 need to hear from you on that.
13
14 MR. FAULDS: Yes, and --
15
16 THE COURT: Hear from all of you on that.
17
18 MR. FAULDS: Yes.
19
20 THE COURT: It's a concern.
21
22 MR. FAULDS: And that -- and I -- and I raise that point, My
23 Lord, just to say this is a matter of grave concern --
24
25 THE COURT: Sure.
26
27 MR. FAULDS: -- to the OPGT because of that.
28
29 THE COURT: Okay.
30
31 MR. FAULDS: The second thing --
32
33 THE COURT: Well, we're -- we're not going to deal with it
34 lightly, I can tell you that.
35
36 MR. FAULDS: Yes. The second thing is that -- that there has
37 been, throughout the history of these proceedings, a certain lack of procedural clarity at
38 times which has caused problems, and we are anxious not to replicate that --
39
40 THE COURT: Right.
41

1 MR. FAULDS: -- in these circumstances.
2
3 THE COURT: Yeah.
4
5 MR. FAULDS: And therefore when, as my friend correctly
6 points out, we were unable to agree with the litigation plan that was presented, it was
7 because we felt we needed further direction on exactly what we were litigating, and how,
8 and with who.
9
10 THE COURT: M-hm.
11
12 MR. FAULDS: And that's why again we thought further
13 direction --
14
15 THE COURT: M-hm.
16
17 MR. FAULDS: -- was required.
18
19 So that brings us really to what -- what we're looking for for some further direction on
20 today, and that is this. In Your Lordship's comments on April 25th, you raised questions
21 which -- which concern both the validity of the Consent Order which was entered into in
22 August, of 2016.
23
24 THE COURT: Yeah.
25
26 MR. FAULDS: And the meaning of that Order.
27
28 THE COURT: Well, the consequence, what -- what flows from
29 that Order.
30
31 MR. FAULDS: Exactly.
32
33 THE COURT: Yeah.
34
35 MR. FAULDS: Exactly. And we wanted to note that in the four
36 and a half months since Your Lordship made those observations, no one has -- no party
37 has stepped forward and brought any kind of application to challenge or --
38
39 THE COURT: M-hm.
40
41 MR. FAULDS: -- you know, to set aside or vary in any way --

1
2 THE COURT: Yeah.
3
4 MR. FAULDS: -- that order, and no interested or concerned
5 nonparty has done so either and, therefore, it seemed to us that on the face of it, that order
6 stands, and that the issues which are determined by that order are *res judicata* and that we
7 should not be, when we come back in front of you on -- in November, be arguing about
8 the validity of the litigants or rearguing -- or rearguing what led to that Order, because
9 that's been decided.
10
11 THE COURT: Sure. But what hasn't been decided is what
12 flows from that.
13
14 MR. FAULDS: Right. And so that is -- and we wanted to see if,
15 in fact -- or we wanted to be sure that the parties were proceeding on some sort of
16 common understanding of what was going to happen in November 27th and what was --
17
18 THE COURT: Okay.
19
20 MR. FAULDS: -- on the table, because, of course --
21
22 THE COURT: Right.
23
24 MR. FAULDS: -- you know, the proposed litigation plan has
25 opportunities for filing new affidavits and documents and records, all that kind of thing.
26
27 THE COURT: M-hm.
28
29 MR. FAULDS: And we were concerned that those -- that that
30 not be used to, in effect, relitigate what's already decided.
31
32 THE COURT: Well, there wasn't much litigation involved in
33 that 2016 Order. It was a Consent Order.
34
35 MR. FAULDS: That --
36
37 THE COURT: So we have not wasted a lot of energy on that.
38
39 MR. FAULDS: Well, it is true, My Lord, but the order was
40 supported by a brief.
41

1 THE COURT: Yeah, I read the brief.
2
3 MR. FAULDS: Which -- so it was not -- it was not a bare order,
4 and it was preceded by a great deal of negotiation.
5
6 THE COURT: M-hm. Yeah. Okay.
7
8 MR. FAULDS: And had a great deal of litigation.
9
10 THE COURT: Okay.
11
12 MR. FAULDS: So it was not a -- it was not lightly arrived at.
13
14 So that's that -- but that's the issue that we're concerned about. What is it exactly that we
15 should be addressing when we come back before you?
16
17 THE COURT: M-hm.
18
19 MR. FAULDS: And our view is, quite simply, the Order is what
20 it is, says what it says. In our view, it settles two questions. It settles the fact of the
21 transfer, that the assets were, in fact, transferred.
22
23 THE COURT:
24
25 MR. FAULDS: And it settles the authority of 1982 Trustees to
26 make that transfer.
27
28 THE COURT: H-mm.
29
30 MR. FAULDS: Under the terms of the -- under the terms of the
31 Trust, because that was the subject of the brief that was presented to --
32
33 THE COURT: Okay.
34
35 MR. FAULDS: -- to the Court.
36
37 THE COURT: Well, okay.
38
39 MR. FAULDS: But that -- so we seek that kind of direction
40 from Your Lordship so that we don't go off in very widely divergent directions --
41

1 THE COURT: M-hm.

2

3 MR. FAULDS: -- in terms of what we're putting in front of you

4 --

5

6 THE COURT: M-hm.

7

8 MR. FAULDS: -- in November. And then the last point I just

9 simply wanted to make is we -- we understand Mr. Molstad will wish to be heard and will

10 be bringing some kind of application to participate, and we -- and we haven't seen an

11 application from him so we can't say specifically what our view is, but the one thing we

12 do want to say is the Sawridge First Nation was the engineer of the transfer, and if they

13 are to participate in these proceedings and if there are substantive issues which remain to

14 be resolved --

15

16 THE COURT: M-hm.

17

18 MR. FAULDS: -- we think the terms of such participation

19 should include some kind of obligation, production obligation in relation to those

20 substantive matters. Those are my submissions.

21

22 **Submissions by Ms. Osualdini**

23

24 MS. OSUALDINI: Good morning, My Lord. Osualdini, first initial

25 C. As my friend indicated, we act for Catherine Twinn. She's a former trustee of the

26 1985 Trust. She's continued her party status in this application as though she were a

27 trustee, and carries forward those concerns.

28

29 I echo my friend Mr. Faulds' concerns about the implications of a reversion back to the

30 terms of the 1982 Trust deed. We're aware of many individuals who would be adversely

31 affected and then lose their status as a beneficiary. One of those individuals is actually

32 in the courtroom today, Shelby Twinn. She's an example of an individual who currently

33 qualifies as a beneficiary under the 1985 terms, but is not a member of the First Nation.

34 So she is a practical example of someone who would be affected.

35

36 Sir, we think it might be helpful to reiterate to the Court the party's understanding of the

37 consent order that was entered into in 2016, or at least our understanding. We agree with

38 Mr. Faulds' submissions in terms of procedural clarity. It's very important to our client, as

39 was reiterated by the Court of Appeal in regards to some of the procedural issues that

40 have plagued this litigation, that there be clarity as to what the parties are arguing and

41 what issues are before the Court in this matter.

1
2 So in terms of the 2016 order that Your Lordship has raised query with, your email of
3 April 25th, 2019, that initially flagged this matter for the parties, asked the parties to
4 consider the terms of the consent order and what impact the order has on the Trust. And,
5 Sir, today we can advise the Court that our understanding of the scope of the order is that
6 it approved the irrevocable transfer of assets from the 1982 Trust to the trustees of the
7 1985 Trust to be held pursuant to the terms of the 1985 Trust, and we have not heard any
8 of the parties to this application suggest otherwise. And we do note that in the affidavit of
9 the trustees, of their representative, Paul Bujold, that was before the Court on that
10 application, it expressly says so at paragraph 25 of that affidavit, that what the trustees
11 were seeking is confirmation that the transferred assets are held in trust for the benefit of
12 the beneficiaries in the 1985 Trust.

13
14 So from our perspective, Sir, none of the parties -- or all of the parties appear to be on the
15 same page in terms of what flows, or what the intention of that 2016 Order was.

16
17 THE COURT: M-hm. I guess you'd have to look at the express
18 terms of the Order, what does it actually say, and I don't have it here with me today, but --
19 so I hear you at this time. The best I can do is I hear you.

20
21 MS. OSUALDINI: Yeah, but --

22
23 THE COURT: I know that's your position.

24
25 MS. OSUALDINI: Yeah, and we would just bring that to the
26 Court's attention --

27
28 THE COURT: Sure. Yeah.

29
30 MS. OSUALDINI: -- which is partly, in part, why we seek
31 procedural clarity --

32
33 THE COURT: Yeah.

34
35 MS. OSUALDINI: -- as to what the Court is seeking.

36
37 THE COURT: Yeah.

38
39 MS. OSUALDINI: And we query whether the Court is seeking an
40 application to determine the scope of the 2016 Order before we move forward with other
41 matters.

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THE COURT: Well, it seems to me that that is the foundation of what we are going to be doing with these assets, these Trust assets. That's a foundational issue. You need to get that dealt with immediately. You may all agree that it's adequately dealt with and you -- I -- but I need to hear from you on that. I -- as I tried to explain last time, I just look at that 2016 Order and to me it doesn't do it, but I'm totally happy to hear from you. And you may persuade me that that was a stamp of approval of the transfer of the assets and a change of beneficiaries from 1982 to 1985. Maybe you can persuade me of that, and as I tried to indicate last time, every one of you knows much, much more about this than I do. I'm just coming in expressing concerns that I saw when I initially looked at it.

If it was as easy to change the terms of the Trust as to go ahead and do what was done between 1982 and 1985, why don't you just go ahead and do that very same thing again and see how far it gets you. I -- it's -- it strikes me as being a pivotal issue, and we need get that sorted out. Is -- does the -- does the 2016 Order mean that the monies or the assets are transferred from 1982 to 1985 and that those assets are then to be administered under the terms of the 1985 Trust for the benefit of those beneficiaries as described in the 1985, or are the 1985 Trustees holding the assets in some form, and I use the term loosely, so I -- without meaning to ascribe any legal definition to it, are they holding it by way of constructive trust for the beneficiaries as defined in the 1982 Trust? It may be -- it may be that it's completely clear. Mr. Faulds seems to indicate that it is, and he could well be right, but as I look at it superficially, I don't see it, but I intend to look at it in great detail.

So that's where I'm at, and that seems to me to be the core issue that's troubling me at the moment, and it's an issue that we need to sort out before we go any further down the path. This litigation's been going on for a long, long time, and it seems to me that that was an issue that probably should have been dealt with years and years ago, and it may have been dealt with in 2016. It may have been.

So I don't know that I'm saying anything more than I did on April 25th, but I have that concern. It's a foundational concern. If we can't get by that hurdle, we've got a major problem. If we get by it, then we can go ahead and talk about what we can do to potentially amend the 1985 Trust, but it --

MS. OSUALDINI: And, Sir, from a procedural perspective --

THE COURT: Yeah?

MS. OSUALDINI: -- my understanding is none of the parties to this litigation have brought an application challenging the terms upon which the assets are

1 held. So I think that's an area that we could use procedural clarity on, is what --

2
3 THE COURT: Well, you can go ahead and continue with the
4 application that is currently before me, that is whether or not the 1985 Trust terms should
5 be modified so as to change the beneficiary, definition of beneficiaries, but as I tried to
6 explain last time, one of the things that's -- if I can't satisfy this foundational problem, one
7 of the options available to me is to say I'm not going to do anything to modify the
8 definition of beneficiary in the 1985 Trust terms, because there are no Trust assets held
9 for the benefit of the 1985 beneficiaries. They're being held for the benefit of 1982
10 beneficiaries. That's the Trust terms that we need to be dealing with. That's one of the
11 options that's available. So unless we deal with this foundational issue, I'm not going to
12 be able to carry forward and give you a meaningful answer in relation to the modification
13 of the 1985 Trust terms.

14
15 MS. OSUALDINI: Sir, I hear you describing what perhaps is a
16 mootness issue, whether the issue is moot, but I would draw the Court's -- the Court's
17 attention that the assets of the 1985 Trust are not only comprised of these transferred
18 assets. Mr. Bujold's affidavit speaks to there being other assets transferred --

19
20 THE COURT: Okay.

21
22 MS. OSUALDINI: -- after the fact. So it's not a mootness issue.

23
24 THE COURT: Transferred from where?

25
26 MS. OSUALDINI: It doesn't indicate, but it does say that there's
27 other assets. So I guess in terms of procedural clarity, is there an application that needs to
28 occur on this transfer issue prior to getting to the jurisdiction issue?

29
30 THE COURT: Well, I -- you know, I'm not sure. We could
31 probably deal with both of them at the same time, but at some point I need that argument
32 and I'm going to -- I'll give you a decision on it.

33
34 MS. OSUALDINI: And then some other issues may arise out of
35 this, My Lord, in terms of beneficiary participation, because this has now really changed
36 the complexion of what the jurisdiction application was initially thought to be when those
37 submissions were made, because for individuals like Shelby Twinn --

38
39 THE COURT: Yeah.

40
41 MS. OSUALDINI: -- this could be a life changing --

1
2 THE COURT:

Yeah, sure.

3
4 MS. OSUALDINI:

-- decision for her. Presently the beneficiaries are not represented by counsel, so this may, in terms as -- as we're talking about litigation plans, involve an issue where these beneficiaries require participation and some rights to be heard on this.

5
6
7
8
9 And then I guess in term -- you know, in terms of Mr. Molstad's participation, there isn't
10 an application before us, so it would it be very preliminary to comment on his
11 involvement, but there may be other applications that need to flow if the First Nation
12 becomes involved. We do note to the Court that the Chief of the First Nation is also a
13 trustee which will likely create some issues if they're taking an adverse position to the
14 beneficiaries of the 1985 Trust.

15
16 THE COURT:

Okay. Mr. Molstad?

17
18 **Submissions by Mr. Molstad**

19
20 MR. MOLSTAD:

Thank you, Mr. Justice Henderson.

21
22 We represent the Sawridge First Nation, instructed by council of the Sawridge First
23 Nation as they exist today, and on August 29th of this year we sent a letter to all legal
24 counsel that are before the Court advising that the Sawridge First Nation will be applying
25 to intervene in the jurisdiction application scheduled for November 27th.

26
27 We have a copy of that letter and we have not produced it, but we're prepared to produce
28 it. But we advised counsel in that letter that the position that the Sawridge First Nation
29 would be advancing would be that if the Consent Order of August 24th, 2016, stands, the
30 assets in the 1985 Trust must remain subject to the terms of the 1982 Trust which
31 prohibits their use for anyone other than the present and future members of the Sawridge
32 First Nation. We also advised them that, in the alternative, we would be advancing the
33 position that if the Consent Order stands, any jurisdiction to amend the beneficiary
34 definition in the 1985 Trust is restricted to making it consistent with the beneficiary
35 definition in the 1982 Trust which, as you know, is for the members of the Sawridge First
36 Nation. And in the alternative, in the further alternative, we advised that if the Consent
37 Order is not valid and does not bind the Sawridge First Nation, then the Court should
38 order that there was no effective transfer of the assets and that those assets remain in the
39 1982 Trust.

40
41 We would propose that, subject to the Court's direction, that the application to intervene

1 that we file be heard, be made in writing and be heard on that basis. We've asked counsel
2 if they would be prepared to consent, but in light of the short notice, we understand that
3 they would want to see the application before they provide us with a response.
4

5 And I would just add that I know Mr. Faulds has advised you of his view in terms of the
6 definition of beneficiary under the 1985 Trust. I can tell you that we don't agree with that,
7 but that's a matter that you'll be addressing in the future in terms of the respective
8 positions of the parties.
9

10 So we will be making an application to intervene, and we would appreciate your direction
11 as to whether that application should be dealt with in writing.
12

13 **THE COURT:** Well, Mr. Molstad, what about the issue of
14 conflict that your friend has raised? If it is the case, and I know you may not agree with
15 this, but if it is the case that there are some beneficiaries of the 1985 Trust who would
16 lose their status if the assets are held subject to the terms of the 1982 Trust, do you, acting
17 on behalf of the band, have a conflict with respect to those people, or not?
18

19 **MR. MOLSTAD:** Well, we're talking about people that are or not
20 members, and we're talking about --
21

22 **THE COURT:** Well, I'm hearing Mr. Faulds say, and this is
23 new to me so I'm not --
24

25 **MR. MOLSTAD:** Right.
26

27 **THE COURT:** -- not really totally understanding, but in broad
28 terms he's saying if these assets are held subject to the terms of the 1982 Trust for people
29 who are currently beneficiaries under the definition of the 1985 Trust who will lose that
30 status --
31

32 **MR. MOLSTAD:** And --
33

34 **THE COURT:** -- those people -- those people's rights are being
35 affected by what we're doing here today or what we will likely do in November.
36

37 **MR. MOLSTAD:** Yeah. And what I -- what I can --
38

39 **THE COURT:** You know, do --
40

41 **MR. MOLSTAD:** Yeah.

1
2 THE COURT: -- do they need representation and --

3
4 MR. MOLSTAD: What I can tell you is that generally speaking,
5 and I'd have to get instructions, the Sawridge First Nation takes the position that there are
6 some who should be grandfathered in terms of continuing to be beneficiaries, but I would
7 have to get specific instructions in terms of who.

8
9 THE COURT: Okay.

10
11 MR. MOLSTAD: And when they would, in fact, qualify for that
12 grandfather, but the Sawridge First Nation does not take the position that the beneficiaries
13 of the 1985 Trust will continue to grow, notwithstanding they're not members of the
14 Sawridge First Nation.

15
16 THE COURT: Okay.

17
18 MR. MOLSTAD: Thank you, Sir.

19
20 THE COURT: Mr. Faulds?

21
22 **Discussion**

23
24 MS. BONORA: Sir, I wonder if I might just address the last --

25
26 THE COURT: Sure.

27
28 MS. BONORA: -- comment? In respect of those beneficiaries
29 that are not -- that may not be beneficiaries under 1982, that's exactly true in terms of
30 what Mr. Faulds has said. I think there's sort of a Venn diagram of people who are
31 members, nonmembers and where they fit in terms of beneficiaries. So there is a group of
32 people who would not be members and, thus, not -- as we read it, potentially not
33 beneficiaries under the 1982 Trust.

34
35 In terms of who represents them or who speaks on their behalf, we have always taken the
36 position that as trustees of the 1985 Trust, we represent those people and we are speaking
37 on their behalf. You've obviously heard Ms. Osualdini speak eloquently about the fact
38 that she's very concerned about Shelby Twinn. The OPGT has concerns about those
39 people. So I think all of those beneficiaries --

40
41 THE COURT: Okay.

1
2 MS. BONORA: -- who might be left behind, are -- have a voice
3 --
4
5 THE COURT: Someone is speaking for them.
6
7 MS. BONORA: -- at this table. In addition, in the litigation
8 plan, to address another concern of Ms. Osualdini's, number 9 has the participation of
9 beneficiaries or potential beneficiaries to file written submissions not to exceed five pages
10 in respect of any position they want to put forward, and we have had that in litigation
11 plans before and they have filed materials. So there is an opportunity --
12
13 THE COURT: Yeah.
14
15 MS. BONORA: -- for their participation in respect of that.
16
17 The other issue on the conflict, my understanding is the Chief has been very concerned
18 about his role as Chief and as Trustee, has sought counsel in respect of when he should
19 act and has been very careful not to be involved in the issue on both sides of that table.
20 That's my understanding.
21
22 So then finally I guess in reply, we're asking that you approve our litigation plan so that
23 we can move forward, and use your comments that you made on April 25th and today in
24 respect of the issues that are before the Court.
25
26 THE COURT: I guess that step 1 is to determine whether or not
27 Mr. Molstad's application can be made in writing. Does anyone have any issue with
28 respect to that? Can that be dealt with in writing, or do we need a hearing on that?
29
30 MR. FAULDS: I think the -- from the -- from the position of the
31 OPGT, the primary issue is what are the terms of that going to be?
32
33 THE COURT: You want some disclosure.
34
35 MR. FAULDS: Yeah, exactly.
36
37 THE COURT: Disclosure vis-a-vis what?
38
39 MR. FAULDS: Disclosure vis-a-vis whatever the issues are that
40 are --
41

1 THE COURT: Okay. Well, we're going to come around to, I
2 think, clearly defining what issue we're going to be dealing with --
3
4 MR. FAULDS: Right.
5
6 THE COURT: -- on --
7
8 MR. FAULDS: Yes.
9
10 THE COURT: -- November 27th, or whatever day has been
11 booked.
12
13 MR. FAULDS: Just --
14
15 THE COURT: November 27th.
16
17 MR. FAULDS: Just so Your Lordship understands, the Consent
18 Order of 2016 was preceded by an enormous amount of argument concerning potential
19 production by the First Nation. That got short circuited when the parties all con -- agreed
20 to --
21
22 THE COURT: Okay. All right.
23
24 MR. FAULDS: -- consent to the terms of that order, and we
25 never finished that -- finished that up. So that's been kind a kind of an issue that's been
26 under the surface for quite a while.
27
28 MS. BONORA: Sorry, Mr. Faulds, I -- I appreciate you haven't
29 been involved, but there was an extensive application on production of records, so it
30 wasn't short circuited by this order. That application was made by the Public Trustee, so
31 --
32
33 MS. HUTCHISON: With respect, Sir, the 513 application about
34 assets was withdrawn on the basis of this consent order being negotiated.
35
36 MR. FAULDS: That's what I meant by short circuited.
37
38 MS. BONORA: That is not my recollection, but in any event, I'm
39 just going to hand you the Consent Order in case you want to take a look. I mean, the -- I
40 think it's important to know that, certainly I agree with Mr. Faulds, that an extensive
41 amount of negotiation in respect of that order, especially with respect to --

1
2 MR. FAULDS: Yeah.

3
4 MS. BONORA: -- leaving open certain issues. So if you see the
5 whole issue around the accounting with respect to the assets being transferred in, so
6 there's no question we were trying to get an approval of the transfer, but I think it's
7 important that the Court is aware in looking exactly at that order, that it wasn't just a
8 simple order saying the transfer is done; that the parties were very concerned about
9 leaving open the whole question around accounting, and that, of course, can leave open
10 many issues. So I just want to make sure that that was -- that everyone was aware of that.
11 In any event, those are my submissions.

12
13 MR. FAULDS: And, My Lord, if I -- if I might just conclude the
14 remark I was making, and I appreciate Mr. Bonora's comment. The other thing relating to
15 Mr. Molstad's application is this. He indicated when he set out the various kind of suite
16 of possible arguments or positions that would be advanced, one of them, as I heard him
17 describe it, was that the transfer of assets from the 1982 to the 1985 Trust be, in effect, I
18 don't know if he used the word vacated or not to -- to be null or something of that sort, as I
19 -- as I understood it, that would fly in the face of the order which has been consented to
20 and which stands and would involve an application of a nature that's, you know --

21
22 THE COURT: Well, I think -- I mean, I heard Mr. Molstad, but
23 the practical reality is we have an Order of the court which has not been subject to appeal.
24 No one has applied to set it aside. The Order is there and there's nothing I can do about it
25 other than look at the Order and try to determine what consequences flow from it. When
26 the Order says that the transfer of assets from 1985 to 1982 is approved, it's approved, so
27 the assets are here to there. On what terms are those assets then being held?

28
29 MR. FAULDS: Right.

30
31 THE COURT: Are they being held subject to 1985 or subject to
32 1982? That's the issue for me.

33
34 MR. FAULDS: And I appreciate Your Lordship's setting that
35 out clearly. My concern was that if Mr. Molstad seeks the kind of relief to which he
36 referred, that might actually involve an application to set a side the Order.

37
38 THE COURT: Well, when -- if there's an application, I will
39 deal with it. Right now there's no application.

40
41 MR. FAULDS: Right, and --

1
2 THE COURT: He's, as I understand it, seeking status to
3 intervene on the jurisdictional issue which has, as part of it, the issue I raise that -- and
4 that that relates to the transfer of assets from 1982 to 1985.
5
6 MR. FAULDS: In the circumstances, My Lord, I think the
7 OPGT would prefer not to commit itself to any particular approach until we've seen Mr.
8 Molstad's intervention --
9
10 THE COURT: Okay.
11
12 MR. FAULDS: -- application and know its scope.
13
14 THE COURT: Okay. Well, listen. That -- when can you file
15 your application, Mr. Molstad?
16
17 MR. MOLSTAD: The -- I believe the litigation plan provides for it
18 to be filed by September 27th.
19
20 THE COURT: And is that with a brief?
21
22 MR. MOLSTAD: Well, that would be with a motion and an
23 affidavit in support.
24
25 THE COURT: Okay. Well, I think Mr. Faulds needs to have
26 something more substantial from you to explain why you think you're entitled to
27 intervene.
28
29 MR. MOLSTAD: Well, we can -- we can include the brief at that
30 time.
31
32 THE COURT: That wouldn't be a very lengthy brief, it seems
33 to me.
34
35 MR. MOLSTAD: Sure.
36
37 THE COURT: And then he would be able to tell you whether
38 he -- we need a hearing --
39
40 MR. MOLSTAD: Right.
41

- 1 THE COURT: -- on the issue.
2
- 3 MR. MOLSTAD: We'll file the motion, the affidavit and the briefs
4 --
5
- 6 THE COURT: Okay.
7
- 8 MR. MOLSTAD: -- on the 27th.
9
- 10 THE COURT: Good. And then say a week later any of the
11 parties can let me know whether or not you need an oral hearing on that, and if you need
12 an oral hearing, we'll deal one -- deal with it in mid-October some time. It's -- it will be a
13 short hearing, I'm thinking. So you can contact my assistant and say you need a time at
14 8:45 one morning, knowing that I will be gone by 10. So the 15th or 16th or 17th or 18th
15 of October, if need be, but if you all agree that we can deal with it in writing, I'll just give
16 you a response. Okay?
17
- 18 MR. FAULDS: That would certainly be agreeable.
19
- 20 THE COURT: Good. So that the second major issue that we've
21 got to deal with today is defining with precision what it is we're going to do on November
22 27th, and really there are two options. One is whether we're going to deal with a whole
23 suite of issues relating to the jurisdictional question, or whether we're going to target this
24 one issue. Those are -- those are the two options.
25
- 26 So the first option is to deal with it narrowly. The question that would be put, presumably
27 someone would file a motion, and I don't know, the Trustees perhaps would file a motion
28 to have the issue of the meaning and consequences that flow from Justice Thomas' order
29 of August 24th, 2016, specifically with respect to whether or not after the transfer of
30 assets to the 1985 Trust, those assets are being held subject to the terms of the 1985 Trust,
31 or whether they're being held subject to the terms of the 1982 Trust.
32
- 33 MS. BONORA: Sir, we'll take that on to file a motion in respect
34 of those questions to be answered.
35
- 36 THE COURT: So that's the first option. The second option is
37 we try to deal with that, as well as everything else that we had originally planned to deal
38 with, and then if -- now, I can tell you this before you make submissions on that. If you
39 were to phone down today to book a time, January and February and March, the calender
40 hasn't been set for that, so you could jump the cue by booking a date in January. So you
41 could -- you -- we could deal with a narrow issue on November 27th, and you could come

1 back fairly quickly to deal with the jurisdictional issue once I've given a decision with
2 respect to what I would describe as the fundamental problem I've been having.

3
4 MR. FAULDS: Might I -- might I suggest, My Lord, that
5 dealing with the -- with the narrow issues you've described with the motion which my
6 friends will file, it would seem to be perhaps more logical since, depending on the
7 outcome of that motion, the jurisdiction -- what we are arguing about on jurisdiction may
8 or may not be there. And so I -- I'd submit that doing it sequentially, and hopefully in
9 short order, would be the -- would be the preferable course.

10
11 THE COURT: Well, as I say, we're -- the timing is good,
12 because the spring schedule hasn't been set. So if you -- if you were to book a day in the
13 next few days, there would be no problem getting a quick -- and you could book a full
14 day.

15
16 MS. BONORA: We agree to the sequential, as well. We think
17 that's the appropriate way to deal with things.

18
19 THE COURT: Mr. Molstad? Yeah, I know you're not a party
20 to this --

21
22 MR. MOLSTAD: We -- yeah, we're not a party.

23
24 THE COURT: -- just yet, but --

25
26 MR. MOLSTAD: But we would agree with that too, Sir.

27
28 MS. OSUALDINI: And, Sir, we also agree with it being dealt with
29 sequentially.

30
31 THE COURT: Okay.

32
33 MS. OSUALDINI: I should also draw to the Court's attention, now
34 that we have more clarity in terms of what we're arguing in November is that we
35 potentially have a relevant witness, Maurice Cullity, who was the lawyer behind the
36 drafting who might be available to give *viva voce* evidence on the matter, because if the
37 Court's looking at --

38
39 THE COURT: Well, I'm just wondering how that evidence
40 would be relevant in terms of the issue that I'm trying to deal with.

41

1 MS. OSUALDINI: Well, my understanding, sir, of the direction is
2 that first we'll be analyzing whether the issue was dealt with by the 2016 order.

3

4 THE COURT: Right.

5

6 MS. OSUALDINI: And if it's not dealt with by the two-six -- the
7 2016 order, then -- then how are the assets being held? So the architect of the transfer, the
8 lawyer behind it may have additional information as to the intention and how the matter
9 was structured.

10

11 THE COURT: Yeah, he might have some information.
12 Whether that's admissible or not I guess is another question, but --

13

14 MS. OSUALDINI: But we just draw that -- for now we just draw
15 that to the Court's attention, that there may be an application for *viva voce* evidence.

16

17 THE COURT: Do we have a full day booked for November
18 27th?

19

20 MS. BONORA: No, just an afternoon, Sir.

21

22 THE COURT: Okay.

23

24 MS. BONORA: I wonder if it has to be *viva voce*? I mean, then
25 we have to have some kind of -- we can't just have a surprise witness with not knowing
26 what he's going to say. I wonder if that's absolutely necessary and relevant, whether it can
27 be done by affidavit so that we can have questioning before? And it can be done -- most
28 of the evidence in this whole matter has been done by affidavit evidence. I'm not sure
29 why it would be necessary. It's not going to be a credibility issue, I'm guessing. So if it's
30 informational, it could be done by affidavit.

31

32 THE COURT: Well, we are not going to be having time for
33 *viva voce* evidence if we have half a day booked for November 27th. That just isn't
34 feasible. Is there a problem doing it by way of affidavit?

35

36 MS. OSUALDINI: Sir, the problem is is Mr. Cullity is likely the
37 Trustee's witness, because he was an advisor to the Trustees. So I imagine he'd probably
38 have confidentiality or privilege concerns with providing an affidavit to an -- at this point
39 in time, a non-Trustee. So perhaps the only way for my client to be able to obtain his
40 evidence is to have him directed to give *viva voce* evidence, because the Trustees are
41 certainly able to talk with him and gain information from him. We could perhaps deal

1 with it by way of affidavit if we had consent of the Trustees to allow him to speak freely
2 to our client about -- about what occurred on the transfer.

3

4 THE COURT: Mr. Molstad?

5

6 MR. MOLSTAD: Oh, I don't -- I'm sorry. I was just speaking to
7 my friend --

8

9 THE COURT: M-hm.

10

11 MR. MOLSTAD: -- that the Trustees may want to speak to Mr.
12 Cullity.

13

14 THE COURT: Yeah.

15

16 MS. BONORA: Yeah, this is surprise to us. We're -- I -- so I
17 don't have -- I really can't say. I don't know that the *viva voce* evidence releases him from
18 his obligations to solicitor-client privilege. So I'm not sure what the difference would be,
19 but I certainly can't you give you my decision on that now. I don't think he's a relevant
20 witness to the issue you've addressed at this point, but I can certainly consider it and
21 speak to my friend in terms of what she thinks would be important for him to testify to.

22

23 THE COURT: Well, listen. Why don't -- why don't I leave that
24 issue with you and if you can't sort it out, get right back to me.

25

26 MS. BONORA: Thank you, Sir.

27

28 THE COURT: And we'll find time to see you.

29

30 MS. BONORA: Thank you, Sir.

31

32 MR. FAULDS: In a way, My Lord, the question is whether the
33 -- whether evidence about what the parties thought they were doing in 1985 is now
34 relevant to the interpretation of the order that approved what they did in 1985.

35

36 THE COURT: M-hm. Yeah. I -- yeah, and I hear you, yeah,
37 but if someone wants to put forward evidence, they're entitled to make submissions as to
38 whether or not they should do that, and I'll make a ruling as to whether or not that
39 evidence is admissible.

40

41 But so the best we can do on that is to leave that in the air. If you can sort it out in the

1 next week or two, good. If you can't sort it out, come back and see me at 8:45 one
2 morning and we'll deal with that discrete issue, but in the -- in the interim, we will then
3 deal on November 27th with the single narrow issue and that is what flows from the order
4 of Justice Thomas on August 24th, 2016, and whether, as a result of that order, the Trust
5 assets are held subject to the terms of the 1985 Trust, whether the beneficiaries as
6 described in the 1985 Trust are actually the beneficiaries of these Trust assets, and
7 whether that took away the Trust obligation that existed in the 1982 Trust.

8
9 MS. BONORA: Sir, and I wonder if the -- with respect to the
10 balance of the litigation plan, subject to Mr. Cullity, although he might fit in the litigation
11 plan if he files an affidavit, I wonder if the rest of the litigation plan can, in fact, be dealt
12 with just so we have a plan to get to November 27th, and we know that if parties are
13 going to be failing any other materials, then we have a date for that and a plan to get to
14 November 27th.

15
16 THE COURT: Okay. So are there concerns here? The
17 problem is we don't know if Mr. Molstad is going to be participating and we won't know
18 that probably until some time in early to mid-October. That's the problem.

19
20 MS. HUTCHISON: My Lord, we would suggest the most efficient
21 process would be to get Mr. Molstad's application, to get the Trustee's application that
22 you directed the morning.

23
24 THE COURT: M-hm.

25
26 MS. HUTCHISON: The parties will evaluate that and then prepare
27 an appropriate litigation plan to submit to you.

28
29 THE COURT: So if we look at this narrow issue that we're
30 going to deal with on November 27th, I mean, I can't see that there's going to be more
31 affidavit evidence on that issue. It's a question of looking at what has previously been
32 filed that went before Justice Thomas, and trying to interpret the terms of his order. So I
33 can't see any additional evidence being required here. Am I wrong about that?

34
35 MS. HUTCHISON: My Lord, I think that's unclear, and certainly
36 until we see Sawridge First Nation's affidavit, the Court will be unaware, of course, of the
37 513 application the OPGT had brought on assets, but there was a desire, there was an
38 identified need at that point in time to seek additional evidence around what had occurred
39 in the transfer. It became unnecessary once the matter was dealt with by consent. So I --
40 I'm not confident in being able to say to you today that there is no other evidence, and I
41 don't think we'll know that until we see affidavits.

1
2 THE COURT: Okay. And we -- and we won't see that then
3 until October 4th which is the Trustee's deadline for filing the application. Okay?
4
5 MS. BONORA: So we'll --
6
7 THE COURT: And we still -- we still don't know what's going
8 on with Mr. Molstad on October 4th, in all likelihood.
9
10 MS. BONORA: Correct. We'd like an opportunity to just get the
11 transcript from today before we file the application so we can incorporate --
12
13 THE COURT: Sure.
14
15 MS. BONORA: -- some of the language --
16
17 THE COURT: Yeah.
18
19 MS. BONORA: -- which I think is possible in a week. So if we
20 have ten days to file our application, we'll do that in ten days.
21
22 THE COURT: Okay. So that would take us to mid-September
23 some time?
24
25 MS. BONORA: Correct, yeah. The 13th of September, m-hm.
26
27 THE COURT: Okay. So then we need a time for response
28 which I think is what Ms. Hutchison is concerned about. So --
29
30 MR. FAULDS: It would seem, My Lord, that if we have the
31 Trustee's application by mid-September and we have Mr. Molstad's application by
32 September 27th, then we will know the parameters of what is being sought to be done and
33 whether are not, in the views of the other parties, other evidence may or may not be
34 required. So it would seem after September 27th we'll be in a position to evaluate.
35
36 THE COURT: So just so that we -- there's no risk of this thing
37 going off the rails for November 27th, if Mr. Molstad files his application and if I deal
38 with it in written form and give a decision, say, for example, I approved his participation
39 as an intervenor, for the November 27th application, would you be seeking disclosure for
40 that narrow application? And, if so, can you tell Mr. Molstad what it is you want?
41

1 MR. FAULDS: No, I don't think we'd be seeking disclosure for
2 that.
3
4 THE COURT: Okay. So --
5
6 MR. FAULDS: I think it's disclosure --
7
8 THE COURT: -- that would be for --
9
10 MR. FAULDS: -- flowing from whatever terms of interventions
11 he's granted.
12
13 THE COURT: Okay.
14
15 MR. FAULDS: Yes.
16
17 THE COURT: So we -- if we follow that path, we would -- we
18 would lead to November 27th without any real difficulty.
19
20 MS. HUTCHISON: And, Sir, just to reiterate, as you had said, all
21 the parties will notify you one week after September 27th in respect of the intervenor
22 status of Sawridge First Nation.
23
24 MR. FAULDS: My Lord, I may have misheard the dates. What
25 I intended to convey was we're not seeking disclosure of anything from Mr. Molstad prior
26 to his September 27th intervention application.
27
28 THE COURT: Oh, I thought -- I thought November 27th. That
29 was my question.
30
31 MR. FAULDS: Right. Right, yes. We are seeking -- depending
32 upon what he seeks by way of intervention, we may be seeking disclosure obligations
33 from him for the purpose of the November 27th hearing, but that depends on what he -- on
34 the scope of his intervention application, what it is he's seeking to do and what positions
35 he wants to advance and whether or not those trigger the need for further disclosure. So
36 we won't know whether or not we need to seek disclosure from him until we see his
37 intervention application.
38
39 THE COURT: I -- that's fine, but what you're -- what you're
40 telling me is that November 27th is looking like it's in risk.
41

1 MR. FAULDS: I'm not sure, My Lord, that that -- that that
2 necessarily knows depending upon -- we would see if, in our view, his intervention
3 application triggers a need for disclosure for the purposes of the ultimate hearing, that
4 would be part of our response to his intervention application which would be ruled upon
5 by Your Lordship, and then whatever disclosure would happen in the run-up to the
6 hearing. That -- that's how -- that's all we're trying to -- trying to suggest.

7
8 MS. BONORA: Sir, just with respect to disclosure, Mr. Faulds
9 has said a couple of things this morning that I think are important to clarify. Mr. Faulds
10 said Sawridge First Nation was the engineer of the transfer, but that -- we have to
11 remember that Sawridge First Nation is a different entity. It was the 1982 Trustees that
12 engineered the transfer, and the 1985 Trustees received that transfer of assets. So it's in
13 the Trust concept and construct that this transfer occurred, and it would be Trust
14 documents which we believe have all been produced, because we produced not only
15 significant affidavits, but an Affidavit of Records in respect of this. And so I caution -- I
16 just want it on record that we are cautioning the parties about going behind the Trust to
17 the Sawridge First Nation, because this is a Trust issue.

18
19 MS. HUTCHISON: My Lord, with respect, and clearly this morning
20 is not to argue about production and scope of production, but the evidence that did
21 become very clear in the last discussion around asset -- asset transfer and production of
22 documents is that the former solicitor for the Trust, Mr. Fennell, put his entire file in the
23 hands of the Sawridge First Nation, the Sawridge companies, not the Trust. And so we've
24 really -- the OPGT is very hopeful, in fact, that we're not about to reopen discovery, but
25 the reality is we've put production and discovery of the asset transfer issue to bed with the
26 consent order, without fully exploring it, and so I simply have to disagree a bit with our
27 friend.

28
29 We also know that Sawridge First Nation was very involved in that 1982 to 1985 Trust
30 transfer. It's not quite as simple as it just being a Trust process, Sir.

31
32 MR. FAULDS: May I just add, My Lord, that we heard and
33 appreciate your comment that this may well be an issue for which evidence is not
34 relevant, and the -- and or not required, and so we understand that. If, for example, the
35 Sawridge First Nation were to bring forward an intervention application in which it
36 sought, say, to set aside the consent order, then -- then, you know, new -- that that may
37 trigger, you know, requirements for further evidence, disclosure and so forth. If, on the
38 other hand, they seek simply to add additional argument or argue from their perspective
39 on the interpretation consequences of the consent order, that's a -- that's a very different
40 thing. That's why I -- that's why I simply kind of wanted to reserve the position that
41 depending on what we see in their intervention application, you know, it may be that there

1 -- that there's some kind of disclosure required.
2

3 THE COURT: Okay. Well, when Mr. Molstad files his
4 materials, we will know, but -- so, Mr. Molstad, it looks to me like when you file your
5 materials, you're going to need to apply for intervention status and explain in a little more
6 detail exactly what it is you are seeking, particularly --
7

8 MR. MOLSTAD: Absolutely. Yeah, we will be doing that, Sir.
9

10 THE COURT: Particularly, I'm hearing Mr. Faulds say, do you
11 have any intention of attempting to set aside the order of Justice Thomas? So if you -- if
12 that's your intention, say so clearly so that Mr. Faulds can then respond.
13

14 MR. MOLSTAD: We will do that, Sir.
15

16 THE COURT: Okay, good. Good. So do we know -- now
17 know we're going leading to November 27th? I would really like to keep that date and do
18 something to move this thing along. It's time. This action is now ripe and needs to --
19 needs to get forward.
20

21 MS. BONORA: Sir, I think we have a number of dates from you
22 and I think the parties have said they'd like some time to consider the applications. So
23 perhaps if -- with your indulgence, if we have trouble scheduling, we can come back at
24 8:45 again.
25

26 THE COURT: Okay. Yeah, just --
27

28 MS. BONORA: After we have -- deal with these first dates that
29 you've set.
30

31 THE COURT: Please do that, yeah. We will --
32

33 MS. BONORA: Thank you.
34

35 THE COURT: We will make time for you sometime someplace
36 somewhere.
37

38 MS. BONORA: Thank you so much, Sir.
39

40 THE COURT: Okay.
41

1 MS. BONORA:

Thank you for hearing us this morning.

2

3 THE COURT:

Nothing else? No? Okay. Thank you very

4 much.

5

6 THE COURT CLERK:

Order in court.

7

8

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10 PROCEEDINGS CONCLUDED

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I, Morag O'Sullivan, certify that this recording is the record made of the evidence in the proceedings in the Court of Queen's Bench held in courtroom 315 at Edmonton, Alberta, on the 4th day of September, 2019; that I, Morag O'Sullivan, was the court official in charge of the sound-recording machine during the proceedings.

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2
3 I, Deborah Jane Brower, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
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10 is transcribed in this transcript.

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12 Deborah Jane Brower, Transcriber.
13 Order Number: AL-JO-1003-9075
14 Dated: September 5, 2019

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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
October 18, 2019

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

2

3

4 October 17, 2019

Morning Session

5

6 The Honourable

Court of Queen's Bench

7 Mr. Justice Henderson

of Alberta

8

9 M.S. Sestito

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

10

Twinn, and D. Majeski

11 D.C.E. Bonora

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

12

Twinn, and D. Majeski

13 E. Molstad

For Sawridge First Nation

14 C. Osualdini

For Catherine Twinn

15 R.J. Faulds, Q.C.

For the Office of the Public Trustee

16 (No Counsel)

For S. Twinn

17 N. Varevac

Court Clerk

18

19

20 THE COURT:

Good morning, please be seated.

21

22 MR. SESTITO:

Good morning, My Lord, very brief introduction

23 to the parties here today and then we'll get going. I know your time is limited. My name

24 is Michael Sestito, with my partner, Doris Bonora for the Sawridge Trustees. We have for

25 Catherine Twinn, my friend, Chris Osualdini. We have for the Office of the Public Trustee

26 and Guardian, my friend Mr. John Faulds. We have for the Sawridge First Nation, my

27 friend, Mr. Ed Molstad. And also in the courtroom today, is a self-representant litigant,

28 Ms. Shelby Twinn.

29

30 **Submissions by Mr. Sestito**

31

32 MR. SESTITO:

So by way of quick reminder, My Lord, again I

33 will be brief. The parties appeared before Your Lordship, as you will recall in early

34 September with respect to the procedure surrounding an application scheduled to be heard

35 on November 27, 2019. And that application, you will recall, was to determine the effect

36 of the 2016 consent order which purported to transfer certain assets from the 1982 Trust to

37 the 1985 Trust.

38

39 You will recall in anticipation of that application; we were to understand that the Sawridge

40 First Nation would be applying for intervenor status and then there was some discussion

41 as to how that application could be dealt with. We were hoping it could be dealt with in

1 writing and if not, we will just secure a date to appear before Your Lordship.

2
3 The parties were to advise the Court, on or before October the 4th, whether or not the
4 application could proceed in writing. However, the Public Trustee and Catherine Twinn
5 had elected to cross-examine on the affidavit, due to scheduling issues, that October 4th
6 date -- they weren't able to make that decision.

7
8 And the position of the Trustees, however, is that you know it's a fairly clear application,
9 it could be made in writing. But, in any event, you would have the letter from the Public
10 Trustee indicating that --

11
12 THE COURT: I received the letter, sir.

13
14 MR. SESTITO: Right. So, My Lord, we are here today because
15 the Trustees are quite worried that the November 27th hearing date to determine this
16 narrow issue that you've identified is at the risk of slipping in the schedule and we know
17 how precious Your Lordship's time is. Last night we received another application for
18 intervenor status and that was made by the self-represented party, Ms. Shelby Twinn. Ms.
19 Twinn is a beneficiary of the 1985 Trust and she is also asking for intervenor status.

20
21 We have an issue --

22
23 THE COURT: Is she a member of the Band?

24
25 MR. SESTITO: She is not a member of the Band.

26
27 THE COURT: Okay.

28
29 MR. SESTITO: So, My Lord, she would fall into -- you may
30 recall the participation order that was issued earlier in this litigation, the order which allows
31 beneficiaries to prepare a five-page submission, not inclusive of attachments. But, in any
32 event, she has asked for further standing and she has brought an application purporting to
33 be returnable on October the 30th, which is the date that we have currently reserved for the
34 hearing of the intervenor application for the Sawridge First Nation.

35
36 THE COURT: M-hm --

37
38 MR. SESTITO: The reason that we're here today, My Lord, is
39 that we need your guidance on scheduling and we don't want to, of course, unilaterally
40 impose unrealistic scheduling obligations on Your Lordship with, you know, providing
41 materials to Your Lordship at the eleventh hour.

1
2 We also now, today, need to deal with this separate application for intervenor status. This
3 is all very late breaking, the second application. So what the Trustees would propose is
4 that we treat this separate application for intervenor status in the same manner that we
5 would treat the application for intervenor status of the Sawridge First Nation and that's
6 what we're here to propose to Your Lordship and then we'll invite comments from my
7 friends.

8
9 We have made this proposal last evening, so I appreciate we haven't gotten everyone's
10 position yet. Our proposal is this: There is a cross-examination on affidavit that is
11 currently scheduled for October the 18th, so this Friday. We would propose that assuming
12 that there are no issues that arise from that cross-examination, that the application material
13 responding to the Sawridge First Nations application for intervenor status, but then
14 received by -- or prepared by the parties on or before October 25th.

15
16 UNIDENTIFIED SPEAKER: 23rd --

17
18 MR. SESTITO: Well, we had originally proposed October 23rd,
19 our friends have said that wouldn't give them enough time to prepare a brief. They would
20 like the 25th. We will leave it to Your Lordship, as to which of those dates is more
21 reasonable. It is -- we then would propose that on or before -- or that at that point in time,
22 the parties opposing the intervenor application would provide notice as to, whether or not,
23 this can be done in writing. If it is done in writing, then we would propose that the Sawridge
24 First Nation have a right of reply on October 29th. If it is to go ahead by way of oral
25 hearing the Sawridge First Nation will not have a right of reply, they will reply during the
26 oral hearing, which is on the 30th. And again, these are tight timelines that the parties are
27 asking for here.

28
29 We would then -- now let's talk about the new application that is now before the Court.
30 We would propose it be dealt with in the same manner. We have an application, not an
31 affidavit. We would propose that the affidavit be filed and provided to the parties, this
32 Friday, so October the 18th and then anyone that wants to oppose that intervenor
33 application, they would do so in the same manner. They would reply by either October the
34 23rd or the 25th as directed by Your Lordship and then the -- if we elect to oppose in
35 writing, or if the application be dealt with in writing, then again the self-representant
36 litigant would have the same rights as the First Nation to respond on October the 29th.

37
38 The other issue, My Lord, is that we have this cross-examination that's coming up and My
39 Lord, I'm not convinced that the cross-examination will not result in yet further
40 interlocutory matters that will need to be dealt with. My proposal is this: In the event that
41 the hearing of these intervenor applications cannot occur on October the 30th for whatever

1 reason, we propose simply combining intervenor application with the main event on
2 November the 27th. The parties can address in their briefs the issue of standing of the
3 parties and then in the alternative, any submissions that the parties make, Your Lordship
4 can decide, whether to ignore any submissions. This saves the date of November the 27th.
5

6 We -- I mean I don't want to appear as a broken record here, but we're very worried about
7 that date slipping and that the assets of the Trust which we are all here fighting over will
8 be continually depleted if we cannot get this issue dealt with on November 27th and I mean
9 I appreciate there's issues of standing. There are other issues to deal with. I don't think
10 that there's any reason that Your Lordship can't hear those at the same time and if you
11 decide, for whatever reason, that Sawridge or the new self-represented party, they don't
12 have status, you simply can ignore the arguments that they would present any response to
13 those, we trust Your Lordship's ability to do that, of course.
14

15 The other colour here that I do wish to present, although I don't want to belabour it, is that
16 with respect to the self-represented party there was a decision of your brother Justice
17 Thomas and then a Court of Appeal decision with respect to her status as a party in the
18 litigation. As a result of -- and going on through the litigation we have had a participation
19 order and though she was not a formal party, any beneficiary is afforded a right to
20 participate by providing submissions. We believe that her interests would be well
21 represented, but in the interests of just getting this matter heard on the 27th, if she wants to
22 bring this application and have her opportunity to make a pitch for more involvement, we
23 think we can slot that all in.
24

25 And I apologize, My Lord, I don't have a form of litigation plan to hand up to you, but
26 these are -- these are the dates, these are the combinations that we're proposing. There is -
27 - Ms. Hutchinson's, but the wrinkle that I'm proposing to Ms. Hutchinson's plan is that we
28 believe that in the event that the 30th cannot happen, that we would like the issue to be
29 dealt with -- we would like the issue to be dealt with at the same time on the 27th.
30

31 My friend, my colleague is here, so I may have the application to hand up actually -- the
32 litigation plan to hand up. So my apologies for the haphazard way that we're doing this
33 this morning, My Lord. This is the -- these are the dates that we have proposed.
34

35 THE COURT CLERK: Do you want me to staple this?

36
37 MR. SESTITO: Sure, that would be great. Thank you very much
38 madam clerk. So that's -- that's what we're proposing. To flag to Your Lordship's attention,
39 if we proceed in having an oral hearing on the 30th and if we don't combine this matter in
40 the application on the 27th, Your Lordship would have as is currently proposed, just a few
41 days -- you would receive the submissions of parties opposing intervenor status on the --

1 we have written on the 25th. We had originally proposed the 23rd, give you a couple of
2 extra days with the material. That's a Friday, you would then be hearing this issue the
3 following Wednesday. That would only give you a limited amount of time with this
4 material if we go ahead.

5
6 And it's -- and then -- so you'd only have a limited amount of time with the material. The
7 other issue, of course, is that if the Sawridge First Nation or the self-represented litigant is
8 granted standing we would need that decision from you relatively quickly because their
9 brief would be then due on November the 15th and we would hope that we could ask for
10 the decision within a week. Again, it is asking a lot of the Court, which is why we wanted
11 to appear before you and see what you felt reasonable in the circumstances.

12
13 I'll sit down.

14
15 **Submissions by Mr. Molstad**

16
17 MR. MOLSTAD: My I speak, Mr. Justice Henderson?

18
19 THE COURT: Absolutely.

20
21 MR. MOLSTAD: As the applicant on behalf of the intervenor, I
22 agree with my friend's submissions except that we served our application, the affidavit in
23 support and our brief on September 26th and we submit that October 23rd, rather than the
24 25th is the appropriate time for my friends to respond. That's the one issue.

25
26 I would also advise that hearing the matter together, an application to intervene and the
27 application on the merits, is not unprecedented in this matter. Mr. Justice Thomas, in
28 relation to the application that Sawridge First Nation advanced to intervene in the Stoney
29 application, decided that he would hear both together at the same time. So he decided
30 whether we ought to intervene, he decided in our favour and then he went on to consider
31 the submissions that we made at that time.

32
33 THE COURT: Okay. Mr. Faulds?

34
35 **Submissions by Mr. Faulds**

36
37 MR. FAULDS: Thank you, My Lord. I hate to be the
38 troublemaker in this -- in this circumstance, but I would like to address the second part of
39 what Mr. Sestito said, namely if we can't get everything together in order to deal with this
40 on the 30th, what should happen.

41

1 The Public Trustee is of the view that it is important that the question of the role of the
2 Sawridge First Nation in these proceedings be determined before we launch into
3 substantive arguments about anything and there are a number of reasons why I suggest that.
4

5 THE COURT: Okay. You know, I hear you and I'm very
6 sympathetic to your position, I'll tell you that, I'll let Mr. Molstad and Mr. Sestito raise the
7 issue again, but I mean my preliminary take on this is, let's get the -- let's get the parties in
8 place who are going to argue the substantive issues and then we'll deal with the substantive
9 issues once everyone has a chance to know that they're going to participate and put together
10 materials that will be meaningful for me.
11

12 I mean that -- maybe Mr. Justice Thomas can juggle more balls than I can, but I like to do
13 things in a linear fashion. So one step at a time, unless you had anything further to say on
14 that Mr. Molstad?
15

16 MR. MOLSTAD: No, I'm not opposed to that, Sir.
17

18 THE COURT: Okay. That's what we'll do then.
19

20 MR. MOLSTAD: It's just in terms of timing, that's the only issue I
21 had.
22

23 THE COURT: Yes, we'll work on the timing, you don't worry
24 on it.
25

26 MR. FAULDS: So in relation to what my friend suggested, my
27 submission was going to be, My Lord, that if two matters have to be heard together, we're
28 going to have to have a further hearing in any event, to deal with the basic jurisdiction
29 application. If you'll recall, we started out with the jurisdiction application, this question
30 about the asset transcript came up and we decided, okay, let's do the asset transfer issue
31 first and then jurisdictional question.
32

33 If there are to be two things heard together, it would seem to me that it would be the asset
34 transfer and the jurisdictional questions, which are two substantive issues that arise, that
35 could be dealt with.
36

37 And that would mean that if we cannot get this matter resolved before Your Lordship --
38 the intervention issues resolved before Your Lordship by the 30th, we still have the 27th
39 to do that and then we could do the asset transfer and the jurisdiction issues together at the
40 date to be set in the new year.
41

1 I just -- I also just wanted to make the point that I think it will be of assistance to the Court
2 to have this question of who the parties are, what the underlying issues and what the nature
3 of the dispute is sorted out before Your Lordship has to then delve into the substantive
4 questions.

5
6 THE COURT: Okay. Well, I'm not hearing any serious
7 opposition to that and from my perspective it is preferable to sort out who is going to be
8 making submissions in relation to what I describe as the substantive issues. So let's get
9 this intervenor position sorted out.

10
11 Are you able to do your cross-examination and get your brief done by the 25th?

12
13 MR. FAULDS: That was our initial proposal, My Lord, it was
14 conditional upon there being no issues arising out of the -- out of the questioning.

15
16 THE COURT: Well, you know, I don't want to make this more
17 complex than it is, but this is an intervenor application. This is not -- there aren't any
18 substantive rights being affected here. We're giving people an opportunity possibly to
19 participate. Remember we're not dealing with the trial; we're dealing with essentially
20 something that is going to be determined largely on written submissions. The oral
21 submissions might be helpful to supplement a little bit, but there isn't a situation where
22 we've got three weeks of trial time and adding another party is going to expand that into
23 four weeks or five weeks. We've got a narrow window on an issue that's going to be
24 determined largely in writing.

25
26 MR. FAULDS: And I don't --

27
28 THE COURT: So let's not make the intervenor issue more
29 complex that it needs to be. Maybe I'm naïve but it doesn't seem that complex to me.

30
31 MR. FAULDS: But, My Lord, I do want to maybe just -- I had a
32 number of points I was going to make and in the interest of time, I just want to make one.
33 The relief that the Sawridge First Nation will advocate for in the event they are granted
34 intervenor status, is relief not sought by any party before the Court.

35
36 That relief would result, if they were to be successful, in a beneficiary definition limited to
37 members of the Sawridge First Nation. That is a matter of grave concern to the Office of
38 the Public Trustee, by -- I did a rough count through the records that we have relating to
39 beneficiaries and there are potentially as many as 30 beneficiaries, who are not members
40 of the Sawridge First Nation. We have one in court, Ms. Shelby Twinn --

41

1 THE COURT: Sure --
2

3 MR. FAULDS: -- is in exactly that position. So --
4

5 THE COURT: Are you speaking for the class of people of which
6 she is a member?
7

8 MR. FAULDS: That's correct and the majority of those persons
9 are minors and therefore they are persons for whom the OPGT has responsibility.
10

11 THE COURT: Okay.
12

13 MR. FAULDS: So the OPGT has to take the question raised by -
14 - that the Sawridge First Nation wants raised extremely seriously and the first question is,
15 are they entitled to do that?
16

17 THE COURT: Sure, but the issue, at least the main issue that
18 Mr. Molstad addresses in his brief is an issue with respect to the particular position that the
19 Sawridge Band has in relation to the issue that I asked the parties to deal with. And that's
20 certainly something that I will take into account in deciding, whether or not, he should be
21 given intervenor status.
22

23 And the reality is, Mr. Faulds, that all of us, everyone of us here, should be seeking the
24 proper result and I need guidance from all of you, maybe even Mr. Molstad, so that I can
25 arrive at the proper result and the consequences that flow from that, will flow from that.
26 But, what as a matter of law, is the right outcome? That's where I'm headed.
27

28 And I need guidance from counsel as to where that should be. So when I say it isn't that
29 complicated, on the intervenor -- the other side is complicated, the substantive side is
30 complicated. But the intervenor side is not, in my mind. So I'm happy to hear you at length
31 in your written submissions and more briefly in your oral submissions.
32

33 MR. FAULDS: Yes, yes.
34

35 THE COURT: If we need to get to that --
36

37 MR. FAULDS: Yes --
38

39 THE COURT: -- and I will take all of that into account. As will
40 -- Ms. Twinn is entitled to bring an application before the Court. If she brings an
41 application it will be heard. I can give direction with respect to when it will be heard, but

1 it will be heard.

2

3 MR. FAULDS: In that regard, My Lord, the application I believe
4 was filed as was pointed out, this has been a late breaking situation.

5

6 THE COURT: Yes.

7

8 MR. FAULDS: Yes, it was filed yesterday.

9

10 THE COURT: Okay. Good. Well, there's an application before
11 the Court and I'm obliged to hear it. So I will.

12

13 MR. FAULDS: Thank you and I can't speak for Ms. Twinn
14 directly, given that she brought this own application on her behalf.

15

16 THE COURT: No, that's fine.

17

18 MR. FAULDS: Perhaps she should be given the chance to
19 address the Court.

20

21 THE COURT: Okay. But, just in terms of the Public Trustee
22 position you're going to do cross-examination on Friday?

23

24 MR. FAULDS: Tomorrow morning, yes.

25

26 THE COURT: Okay. You're not anticipating problems, but you
27 can have your brief done by the following Friday?

28

29 MR. FAULDS: Provided there are no problems, that's correct. If
30 there are problems, which the OPGT, you know, considers significant to the considerations
31 which always arise in intervention applications, then we may have to see whether we can
32 see Your Lordship again.

33

34 But, as matter stand, the litigation plan which was proposed by Ms. Hutchison yesterday
35 which is essentially incorporated into my friend's proposal, his concern -- those are the
36 dates that we were -- that we were suggesting to the Court and they would allow the
37 intervention if it would be dealt with on the 30th and then let us get onto the 27th.

38

39 If there are problems, then my suggestion is not that we do the things together, but that we
40 use the 27th for the intervention and then the next day for doing the substantive issues.

41

1 THE COURT: Okay. Ms. Twinn, you would like to bring an
2 application? I have your material before me, it's just an application. The application says
3 that you intend to file an affidavit?
4

5 **Discussion**
6

7 MS. TWINN: Yes.
8

9 THE COURT: When you are going to have that affidavit filed?
10

11 MS. TWINN: I don't exactly have a date, I want to get it done
12 fairly soon, but --
13

14 THE COURT: Well, it is going to be soon if you want to apply.
15

16 MS. TWINN: Yes, yeah very soon. I --
17

18 THE COURT: Your application is said to be returnable on what
19 date? The 30th.
20

21 MS. TWINN: The 30th.
22

23 THE COURT: Okay. So you need to have your affidavit well in
24 advance of that.
25

26 MS. TWINN: Yes, yes so --
27

28 THE COURT: You pick a date that you can get it filed by. Can
29 you do it by Monday?
30

31 MS. TWINN: Can I --
32

33 THE COURT: That would be the 21st.
34

35 MS. TWINN: The 21st -- the 23rd?
36

37 THE COURT: 23rd? Fine, your affidavit will be filed by the
38 23rd. Is it your intention to make written submissions?
39

40 MS. TWINN: Yes.
41

1 THE COURT: Okay. When will those be ready? Friday, the
2 25th?
3
4 MS. TWINN: Okay.
5
6 THE COURT: Friday, the 25th?
7
8 MS. TWINN: Yeah.
9
10 THE COURT: Okay. Good. So your affidavit is going to be
11 filed on Wednesday, October 23rd and your written submissions on Friday, October 25th
12 and subject to hiccups that might arise in the cross-examination on affidavit, the Public
13 Trustee materials will be filed by the 25th and Catherine Twinn's position is the same or
14 different?
15
16 MS. OSUALDINI: No it's consistent with the OPGT.
17
18 THE COURT: Okay. So both of your materials then will be
19 filed on the 25th unless there's a hiccup. And if there is, you'll have to -- you'll have to see
20 me sometime early next week, I don't know how you're going to organize that, but we'll
21 find a lunch hour or something that we can squeeze to get that done.
22
23 And Mr. Molstad, it wasn't your plan to file additional materials, was it?
24
25 MR. MOLSTAD: Not if it's to be argued in person.
26
27 THE COURT: I think we're going to do it in person in any event
28 because Ms. Twinn, I think in fairness, would probably be --
29
30 MR. MOLSTAD: That's fine, I don't need any written reply then.
31
32 THE COURT: Okay. Good. So we have half a day scheduled
33 on the 30th, which isn't a lot of time, we you have to be succinct.
34
35 MR. MOLSTAD: We will be.
36
37 THE COURT: And I'm away the following week and you need
38 the decision right away, so I'm going to give you the decision, either that day or the next
39 day, because as I'm saying I'm leaving that Friday and won't be back until the 12th, at which
40 time I start a jury trial. So the 12th of November, which will carry on right until the 27th.
41 So I have zero time between Friday the 1st of November and the date we've got scheduled.

1 So I've got to give you a decision, I'll just it orally, either by October 30th, 31st or
2 November 1st, one of those days and I'll decide the date once I hear the submissions.

3
4 All right. Anything else we need to sort out?

5
6 MR. SESTITO: I wonder, Sir, if with simply crossing out the
7 second paragraph of item 6 of the litigation plan which contemplates the two stream
8 process and then changing the date for Shelby Twinn to file her affidavit from -- on item 2
9 from the 18th to the 23rd, if that litigation plan is presented to you, if it would merit your
10 execution.

11
12 THE COURT: Mr. Faulds, is there any issues on that? It looks
13 like what I've decided so ...

14
15 MR. FAULDS: I think that's consistent with what we discussed.

16
17 THE COURT: Mr. Molstad, any --

18
19 MR. MOLSTAD: No, no submissions.

20
21 THE COURT: Good, okay so you'll clean that up and send in
22 and --

23
24 MR. SESTITO: Yes, My Lord, we'll do that.

25
26 THE COURT: -- we'll be in business. Okay. Anything else we
27 can do this morning?

28
29 MS. OSUALDINI: Thank you for hearing us, Sir.

30
31 MR. SESTITO: Thank you, My Lord.

32
33 MR. FAULDS: Thank you, My Lord.

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37 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 511 at Edmonton, Alberta, on the 17th day of October, 2019 and that I, Natalija Varevac, was the court official in charge of the sound recording machine during these proceedings.

1 **Certificate of Transcript**

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I, Su Zaherie, certify that

- (a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record and
- (b) the Certificate of record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: AL-JO-1004-2108
Dated: October 21, 2019