

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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EXTRACTS OF KEY EVIDENCE

TAB	DOCUMENT	PAGE
1.	Amended Statement of Claim of Chief Walter Patrick Twinn	1
2.	Affidavit of Paul Bujold, dated August 30, 2011	13
3.	Procedural Court Order, Justice D.R.G. Thomas, dated August 31, 2011, filed September 6, 2011	48
4.	Transcript of Case Management Hearing, held August 31, 2011	53
5.	Affidavit of Paul Bujold, dated September 12, 2011	55
6.	Brief of the Sawridge Trustees for Special Chambers Case Management Meeting on June 30, 2015, filed June 12, 2015	161
7.	Transcript of Case Management Hearing, held June 24, 2015	180
8.	Letter from Dentons to Hutchison Law, dated June 22, 2016	218
9.	Letter from Parlee McLaws to Hutchison law, dated July 6, 2016	222
10.	Transcript from Questioning of Paul Bujold, July 26, 2016	224
11.	Application of the Sawridge Trustees for Advice and Direction, filed August 11, 2016	316
12.	Brief of the Sawridge Trustees on Transfer of Assets, filed August 17, 2016	321
13.	Transcript of Case Management Hearing, held August 24, 2016	380
14.	Consent Order (ATO), Justice D.R.G. Thomas, dated August 24, 2016, filed December 1, 2016	454
15.	Application of the Sawridge Trustees (Statement of Issues and Relief Sought), filed January 9, 2018	457
16.	Consent Order (Issue of Discrimination), Justice D.R.G. Thomas, dated January 19, 2018, filed January 22, 2018	461

17.	Affidavit of Records of Catherine Twinn, Document TWN003086 - Trustee Meeting Minutes	467
18.	Affidavit of Records of the Sawridge Trustees Document SAW001445	473
19.	Affidavit of Records of the Sawridge Trustees Documents SAW000166 and SAW000240	475
20.	Application by the Sawridge Trustees for Advice and Direction (Returnable September 25, 2018), filed August 11, 2018	477
21.	Annotated Agenda of the Sawridge Trustees for December 18 Case Management Hearing, filed December 11, 2018	513
22.	Transcript of Case Management Hearing, held December 18, 2018	545
23.	Consent Order (Issue of Jurisdiction), Justice D.R.G. Thomas, dated December 18, 2018, filed December 19, 2018	573
24.	Affidavit of Paul Bujold, dated January 9, 2019	577
25.	April 25, 2019 email from J.Jarvis on behalf of Justice Henderson to all counsel	590
26.	Transcript of Case Management Hearing, held April 25, 2019	591
27.	Transcript of Case Management Hearing, held September 4, 2019	603
28.	Transcript of Case Management Hearing, held October 17, 2019	639
29.	Transcript of Case Management Hearing, held October 30, 2019	655
30.	Transcript of Case Management Hearing, held October 31, 2019	736
31.	Brief of the Sawridge Trustees (Application on Transfer of Assets), filed November 1, 2019	748
32.	Transcript of Case Management Hearing, held November 22, 2019	832
33.	Transcript of Case Management Hearing, held November 27, 2019	866
34.	Transcript of Case Management Hearing, held December 20, 2019	881
35.	Transcript of Case Management Hearing, held October 8, 2020	923

Action No.: 1103-14112
E-File No.: EVQ19SAWRIDGE
Appeal No.: _____

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

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

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

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE,
EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for
the 1985 Trust ("Sawridge Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
October 30, 2019

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TABLE OF CONTENTS

Description	Page
October 30, 2019	1
Afternoon Session	
Submissions by Mr. Molstad	2
Submissions by Ms. Twinn	8
Submissions by Ms. Hutchison	15
Submissions by Mr. Faulds	34
Submissions by Mr. Molstad	50
Submissions by Ms. Hutchison	52
Submissions by Mr. Sestito	53
Submissions by Mr. Faulds	53
Submissions by Ms. Osualdini	56
Submissions by Mr. Sestito	70
Submissions by Ms. Osualdini	75
Certificate of Record	78
Certificate of Transcript	79

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

2

3

4 October 30, 2019

Afternoon Session

5

6 The Honourable
7 Mr. Justice Henderson

Court of Queen's Bench
of Alberta

8

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For Sawridge First Nation

15 P. Faulds, Q.C.

For the Office of the Public Trustee

16 J. Hutchison

For the Office of the Public Trustee

17 C. Osualdini

For C. Twinn

18 D. Risling

For C. Twinn

19 (No Counsel)

For S. Twinn

20 R. Lee

Court Clerk

21

22

23 THE COURT CLERK:

Order in court, all rise.

24

25 THE COURT:

Good afternoon. Please be seated.

26

27 MR. FAULDS:

Good afternoon.

28

29 MS. HUTCHISON:

Good afternoon.

30

31 MS. OSUALDINI:

Good afternoon.

32

33 MR. MOLSTAD:

Good afternoon.

34

35 THE COURT:

Okay. Mr. Molstad?

36

37 MR. MOLSTAD:

Yes. Would you like me to introduce the

38 participants here today, Sir?

39

40 THE COURT:

Why don't you do that if for no other reason than

41 the record.

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MR. MOLSTAD: All right. We have the -- representing the Public Trustee, Ms. Hutchison and Mr. Faulds; the Sawridge Trustees, Mr. Sestito and Ms. Martin; Ms. Catherine Twinn is represented by Ms. Osualdini and Mr. Risling. Ms. Sopko and I appear on behalf of the Saw -- Sawridge First Nation. And Ms. Shelby Twinn is also present.

THE COURT: Excellent. Thank you very much.

MR. MOLSTAD: All right. Sir, this is my application on behalf of the Sawridge First Nation, and I'm going to refer briefly to the brief of Sawridge First Nation, the affidavit of Darcy Twinn, and the book of documents for Sawridge First Nation that was just filed recently.

THE COURT: Yes, I --

MR. MOLSTAD: Yeah.

THE COURT: -- I have that, yes.

Submissions by Mr. Molstad

MR. MOLSTAD: Okay, great. First of all, Sir, the position of the Sawridge First Nation in relation to the 1985 Trust has always been to find a reasonable solution for their members. And they want to see a reasonable solution before more substantial funds are expended in relation to legal fees.

In response to the jurisdiction question, this Court directed the participants to respond to the question as to what was and is the effect of the transfer order of August 24th, 2016. The Court also directed the filing of a -- an application to address whether the assets are being held subject to the 1985 Trust or the 1982 Trust. The application is Exhibit H to the affidavit of Councillor Darcy Twinn. The 1982 Trust is Exhibit A to the affidavit of Darcy Twinn, and as you no doubt are aware, having reviewed it, Sir, it provides that the Chief and Council are the Trustees, and the Trust assets are held for the benefit of the members present and future.

One of the documents in the Sawridge Trustees' production is a document entitled "Sawridge Band Resolution," and that was marked as Exhibit D for Identification in the questioning of Councillor Darcy Twinn. It's signed by ten persons. You should know, Sir, that documents in the production from Sawridge Trustees shows that at that time, 1985, there were approximately 37 members of the Sawridge First Nation,

1 notwithstanding that document, purportedly signed by approximately 10.

2
3 We submit that when the Court is called upon to interpret the 1982 Trust and the 1985
4 Trust, it will be required to consider both the Trust agreements and the factual matrix
5 surrounding those Trust agreements. The Sawridge reserve lands, as you no doubt are
6 aware, Sir, were set aside for the Sawridge First Nation pursuant to Treaty Number 8, and
7 it is the Sawridge First Nation and their members, we submit, that are entitled to the
8 benefit of all resources on or under those reserve lands.

9
10 We have provided you with a copy of Section 4 of the *Indian Oil and Gas Act*. It's at tab
11 2 of our brief. It was recently amended, I believe it was in August, and that is found at tab
12 1 of our book of documents, the amended version of Section 4. But we submit that both
13 before and after the amendment to Section 4 it required that royalty money be paid to
14 Canada in trust only for the benefit of Sawridge as the First Nation concerned, just as it
15 was applied to all First Nations across Canada related to production of oil and gas from
16 their reserve lands.

17
18 When the royalty monies are paid to Canada, they're held in the Consolidated Revenue
19 Fund, and interest is paid to the First Nation based on the yields of long-term Government
20 of Canada bonds. And today that's a very low rate because it's close to the rate of interest
21 that we see. Chief Walter Twinn, we submit, was ahead of his time. He found a way
22 back in the '80s to transfer money from their capital account to invest it for the benefit of
23 the members of Sawridge. But clearly it was only for the benefit of the members of
24 Sawridge.

25
26 As we point out in our brief in paragraph 27, royalty monies are capital monies. And
27 Section 64 of the *Indian Act*, which is at tab 3 of our brief -- and I just want to take you to
28 that briefly, if I could, Sir.

29
30 THE COURT: Section...

31
32 MR. MOLSTAD: 64.

33
34 THE COURT: 64? Thank you.

35
36 MR. MOLSTAD: It's at tab 3 --

37
38 THE COURT: Yes, I have it.

39
40 MR. MOLSTAD: -- of our brief. Section 64 provides in
41 subparagraph 1 that with the consent of the Council of a Band, the Minister may authorize

1 and direct the expenditure of capital monies of the Band. So it requires both the consent
2 of the Council and the authorization of the Minister. It then sets out a number of matters
3 where monies -- capital monies may be used for, from A to K. I encourage you to look at
4 that. They basically are different items that are for the benefit of the First Nation.

5
6 THE COURT: Yes.

7
8 MR. MOLSTAD: And then you get to K, which says, for any other
9 purpose that in the opinion of the Minister is for the benefit of the Band. That section
10 created doubt for many years, and, in fact, it's our submission before the Supreme Court
11 of Canada decides the *Ermineskin* decision, which is found at tab 4 -- and I'd refer you to
12 paragraph 151 of that decision. In 2009 there was uncertainty as to whether a First Nation
13 could transfer capital under 64(1)(k) to an independent trust. And obviously the
14 *Ermineskin* decision resolved that in terms of the ability of a First Nation to do that.

15
16 Now, as you know from the affidavit of Councillor Twinn, former Chief Walter Twinn,
17 testified at the Bill C-31 trial, the first time it went to trial before Mr. Justice Muldoon in
18 1993, and his testimony, which is attached to Mr. Darcy Twinn's affidavit, sets out that
19 the 1982 Trust was established because Sawridge First Nation was not considered a legal
20 entity. And that was a problem in early years in terms of First Nations doing business
21 because there were -- there was jurisprudence that essentially pronounced that in some
22 cases a First Nation was not a legal entity. Of course they're recognized of that -- as that
23 today, and there's no issue now. But that reason is found in Exhibit B to the affidavit of
24 Darcy Twinn at page 3957.

25
26 Chief Walter Twinn also testified back in '93 that Sawridge was concerned that Bill C-31
27 would result in automatic addition of a large number of persons as members of Sawridge
28 First Nation. That was the concern. And that's found in Exhibit B, pages 371 -- pardon
29 me, pages 3761, line 8 to 17. Former Chief Walter Twinn also testified that the 1985
30 Trust was created two days before Bill C-31 became law, with the objective that the
31 beneficiaries of the 1985 Trust would be people who were members before the passage of
32 Bill C-31, and people who would become members under Bill C-31 would be excluded as
33 beneficiaries. That's what he testified to in 1993. And that is found in Exhibit B to Mr.
34 Twinn's affidavit, pages 3906 to page 3909.

35
36 Chief Twinn also testified that it was the intention that the assets in the 1985 Trust be
37 placed in the 1986 Trust, and the 1986 Trust has the beneficiaries of Sawridge members.
38 And that reference is found in Exhibit B, pages 3948 to 3949.

39
40 This application is, as you know, pursuant to Rule 2.10. And it is an application to
41 intervene in the applications and to be permitted to make written and oral submissions.

1 Chief Justice Fraser's summary of the two-step approach for reviewing applications to
 2 intervene in *Papaschase* is helpful. They are, one, consider the subject matter, and, two,
 3 determine the proposed intervenor's interest in the subject matter.

4
 5 Our submission is that the subject matter relates to an asset that we say is held only for the
 6 benefit of the members of the Sawridge First Nation. Ms. -- Mr. Faulds, Ms. Hutchison,
 7 and counsel on behalf of Ms. Twinn want to, in our submission, reduce the value to the
 8 members, take it away and attribute it to persons who are not members. And, in our
 9 submission, ultimately you may find that many of them are not entitled to them. You may
 10 find that some are. The subject matter, we submit, is critical to the Sawridge First Nation.

11
 12 With respect to the interest of the Sawridge First Nation, Sawridge is directly affected. It
 13 is the only party representing all of the members and has special expertise concerning the
 14 subject matter. We also submit that in the application directed Sawridge and its members
 15 have an interest that will not be fully protected by the parties. We also note and draw to
 16 your attention that the applicant in these proceedings, the Sawridge Trustees, do not
 17 oppose the application of the Sawridge First Nation.

18
 19 Now, we have provided in our additional material -- and I should explain why it's there
 20 and tell you what it is. At tab 2 is the Public Trustee application for relief as against
 21 Sawridge First Nation for production. Tab 3 is Mr. Justice Thomas's decision dismissing
 22 the application of the Public Trustee in -- in paragraph 26. Tab 4 is the order flowing
 23 from Justice Thomas's decision at tab 3, and that order is dated December 17th, 2015.
 24 Tab 5 is the further application of the Public Trustee for production of documents as
 25 against the Sawridge First Nation. And tab 6 is the decision of Mr. Justice Thomas of
 26 April 28th, '17, in response to that application. And tab 7 is the order which, as you can
 27 see, dismisses the Public Trustee's application for production of records.

28
 29 We provide these to you so that you can see for yourself what we submit was a ridiculous
 30 overreaching position that was previously advanced by the Public Trustee in relation to
 31 production. And, in particular, in terms of the positions of the parties and how they do
 32 change, I would refer you to Sawridge Number 3, which is tab 3 of the book of the
 33 documents that we sent to you recently.

34
 35 THE COURT: Okay. Yes.

36
 37 MR. MOLSTAD: Go to paragraph 14 of that decision.

38
 39 THE COURT: Okay.

40
 41 MR. MOLSTAD: Justice Thomas summarizes the position of the

1 Public Trustee as follows: (as read)

2
3 The Public Trustee's position is that the Sawridge Band is party to this
4 proceeding or is at least so closely linked to the 1985 Sawridge Trustees
5 that the Band should be required to produce documents/information.
6

7 It says that the Court can add Sawridge Band as a party.
8

9 If I can now just briefly deal with information we have received from the Public Trustee.
10 They served their brief on our offices on Friday afternoon at around 4 PM in the
11 afternoon, which was the 25th, which was the date that they were required to serve. That
12 was the first time that we were advised that they intend to argue that there was a lack of a
13 valid Band Council Resolution passed at a duly convened meeting as a factor for the
14 Court to consider. That was contained in their brief.
15

16 We submit, Sir, that it is often the practice of First Nations, and including the Sawridge
17 First Nation, to meet as councillors, decide, and in Sawridge's case, by consensus and to
18 circulate a Band Council Resolution following the meeting later for signature. That's not
19 unusual. In the written submissions filed by the Public Trustee, they argue that the Chief
20 and Council did not pass the BCR authorizing this application. We submit that this is not
21 just directive at the Sawridge First Nation. It is attack -- an attack on my integrity as an
22 officer of the court, and I want to assure the Court as an officer of the court that I am
23 properly instructed to represent the Sawridge First Nation in relation to this application.
24

25 What I can also tell the Court, and this is not evidence, that a BCR was signed by the
26 councillors --
27

28 MS. HUTCHISON: My Lord --

29
30 MR. MOLSTAD: -- after Ms. --

31
32 THE COURT: Just --

33
34 MR. MOLSTAD: -- Twinn's cross-examination.
35

36 THE COURT: Ms. Hutchison has something to say.
37

38 MS. HUTCHISON: My Lord --

39
40 THE COURT: Ordinarily I wouldn't permit an interjection in
41 the middle of an argument, but --

1
2 MS. HUTCHISON: I --
3
4 THE COURT: -- what's the --
5
6 MS. HUTCHISON: I --
7
8 THE COURT: -- problem here?
9
10 MS. HUTCHISON: I apologize, My Lord. We've had some
11 extensive correspondence about the OPGT's position on what Mr. Molstad's referring to,
12 and we have advised Sawridge First Nation that we take the position they're trying to
13 submit new evidence. We object to that strenuously --
14
15 THE COURT: Okay. Well, you'll have your chance to speak. I
16 thought you were going to say something different. But go ahead.
17
18 MR. MOLSTAD: Yeah.
19
20 What I want to further advise the Court in terms of being properly instructed, that we
21 always carry out due diligence to ensure that our instructions from a First Nation are
22 proper, and that's been done in this case. And no one has the right to interrogate our
23 office as with respect to those instructions. I -- I can tell you, and this is not evidence,
24 that a BCR was signed by the councillors after Mr. Twinn's cross-examination, and it was
25 provided to all counsel on October 28th, 2019, which was the month following the day
26 that we received this notice that they were taking this position. And it showed that the
27 Resolution was passed on August 26, 2019. We provided that to our friends. It's not
28 before you as evidence. I submit that the Court should take into consideration that we
29 received this on Friday of last week, and the Band Council Resolution was circulated on
30 Monday of this week.
31
32 MR. FAULDS: My --
33
34 MR. MOLSTAD: We're prepared to -- sorry.
35
36 THE COURT: Now --
37
38 MR. FAULDS: I -- I'm sorry, My Lord. May I -- may I just
39 intervene to say that the OPGT in no way intended to impugn the integrity of Mr.
40 Molstad.
41

1 THE COURT: Good. Okay, thanks. I --
2
3 MR. FAULDS: That was --
4
5 THE COURT: -- I would have -- I would have guessed that.
6
7 MR. FAULDS: -- that -- that -- that was --
8
9 THE COURT: So when you go --
10
11 MR. FAULDS: -- not part of (INDISCERNIBLE).
12
13 THE COURT: -- you're properly instructed. You tell me you're
14 properly instruct -- instructed. I accept that.
15
16 MR. MOLSTAD: Thank you.
17
18 THE COURT: You're an officer of the court, so --
19
20 MR. MOLSTAD: Thank you.
21
22 THE COURT: -- no one is questioning that.
23
24 MR. MOLSTAD: So in conclusion, Sir, in relation to our
25 application for status as an intervenor, we submit that we should be granted that status to
26 make written and oral submissions and also be able to rely upon the affidavits filed in this
27 action, the questioning on the affidavits, the undertakings, and documents produced in the
28 action. Those are our submissions.
29
30 THE COURT: Good. Thank you very much.
31
32 All right. Ms. Twinn, do you want to make your submissions now? You can come on up
33 to the podium if you like and just -- feel free to take your time and relax and take as much
34 time as you like.
35
36 **Submissions by Ms. Twinn**
37
38 MS. TWINN: Okay, good afternoon, Sir.
39
40 THE COURT: Good afternoon.
41

1 MS. TWINN: I guess I'll just introduce myself so you can
2 understand who I am to this. My name is Shelby Twinn. I am the daughter of current
3 Band member Paul Twinn and the granddaughter of the late Chief Walter Twinn. I'm
4 going to also start off with just asking you to bear with me. I'm a little intimidated by this
5 setting.

6
7 THE COURT: Oh, sure, but don't be intimidated. Just -- just
8 relax and just -- you just carry on --

9
10 MS. TWINN: Okay.

11
12 THE COURT: -- and we'll -- we'll give you what time you
13 need, so...

14
15 MS. TWINN: All right. So I guess I am here because I do
16 need to speak up for myself. And I know it is -- I'm not the only one in my situation
17 because the Trustees of the 1985 Trust have not been and are not now protecting my
18 interest as a beneficiary of the 1985 Trust. And they've been proceeding with the end goal
19 of limiting the beneficiaries to the members of the Sawridge First Nation with little or no
20 grandfathering of the current beneficiaries, and that the Sawridge First Nation is here to
21 say that the 1985 Trust -- well, the assets do not belong to the 1985 beneficiaries, that it is
22 only for the 45 Sawridge First Nation Band members which are already benefits from the
23 1986 Trust, while the 1985 beneficiaries have been denied benefits and not for lack of
24 trying.

25
26 And as stated before, the Sawridge First Nation and the Trustees want to limit the current
27 beneficiaries to the current members Sawridge First Nation, subjecting the disintitled
28 beneficiaries to the Sawridge First Nation's abusive and painful membership application
29 system that, in my belief, is corrupt, biased, and unfair. So on October 25th this past, an
30 hour -- hours before APTN Investigates ran a documentary on the Sawridge First Nation
31 membership system, I did receive an e-mail from Mike McKiddie (phonetic) that I do
32 believe -- in regards to my membership application that I had submitted at the end of
33 April of last year, 2018. And I do believe that this e-mail proves that they are not going to
34 let in the people, the disintitled beneficiaries, and that it's not a viable option over our
35 1985 beneficiary status. I have copies of that e-mail if anybody or you wanted a copy. I
36 brought copies.

37
38 And also that I have spoken to other non Band member beneficiaries that I would like to
39 also say that if granted intervenor status, I would be willing to share it with those other
40 people.

41

1 THE COURT: Okay. Good. Thank you. I'm just wondering if
2 one of the other counsel can help you out a little bit in answering a question that I have,
3 and that is just to try to understand your position a little more clearly --
4

5 MS. TWINN: Okay.

6

7 THE COURT: -- in terms of where you are vis-à-vis the Trusts.
8 Now --
9

10 MS. TWINN: Yeah.

11

12 THE COURT: -- you tell me -- and you tell me so I accept for
13 the purpose of this motion, and I see that Justice Thomas in an earlier decision has
14 confirmed that you are a beneficiary of the 1985 Trust.
15

16 MS. TWINN: Yes, yes.

17

18 THE COURT: But you are not a member of the Sawridge First
19 Nations.
20

21 MS. TWINN: No.

22

23 THE COURT: Were you ever a member?
24

25 MS. TWINN: No.

26

27 THE COURT: You did qualify for membership otherwise you
28 wouldn't be a beneficiary under the 1985 Trust.
29

30 MS. TWINN: At -- at a time before --
31

32 THE COURT: No, the other lawyers can help you out.
33

34 MS. HUTCHISON: Do you want me to speak, Shelby?
35

36 MS. TWINN: Oh, sure. Thank you.
37

38 THE COURT: I -- it's -- I'm just struggling trying to --
39

40 MS. TWINN: Yeah, yeah.
41

1 THE COURT: -- understand so what your particular situation
2 is, so --
3
4 MS. TWINN: Yeah.
5
6 MS. HUTCHISON: My Lord, we represent Shelby's sister
7 Kayla (phonetic) --
8
9 MS. TWINN: Yeah.
10
11 THE COURT: Right. Okay.
12
13 MS. HUTCHISON: -- and so definitely has some in --
14
15 THE COURT: She's in the same spot.
16
17 MS. HUTCHISON: She is --
18
19 MS. TWINN: Yes (INDISCERNIBLE).
20
21 MS. HUTCHISON: -- in the identical spot.
22
23 THE COURT: She's -- she has applied as well for membership
24 in the Band?
25
26 MS. HUTCHISON: She has not.
27
28 MS. TWINN: No.
29
30 MS. HUTCHISON: She has not.
31
32 THE COURT: She has not, okay.
33
34 MS. HUTCHISON: But essentially, My Lord, the -- the crux of the
35 matter is that there was a considerable change in the legislative landscape -- landscape
36 when Bill C-31 was passed in 1985. So had Ms. Twinn been born before Bill C-31 was
37 passed, she would have by legislative requirement become a member of Sawridge First
38 Nation. Prior to 1985 Sawridge First Nation wasn't able to determine their membership
39 list. Canada's Registrar at Indian --
40
41 THE COURT: Yes.

1
2 MS. HUTCHISON: -- affairs did that.
3
4 THE COURT: Yes.
5
6 MS. HUTCHISON: Ms. Twinn was born after Bill C-31 came in --
7
8 THE COURT: Yes.
9
10 MS. HUTCHISON: -- which did -- that legislation did a number of
11 things, but one of the things it did was to empower First Nations who pass a Band
12 membership code properly and had it --
13
14 THE COURT: Okay.
15
16 MS. HUTCHISON: -- approved by the Minister --
17
18 THE COURT: Okay.
19
20 MS. HUTCHISON: -- to begin to determine their own membership.
21 Ms. Twinn was born after that date, and so in order to become a member of Sawridge
22 First Nation post 1985, she must comply and go -- comply with Sawridge First Nation's
23 criteria and go through their membership process. Still, though, at that point in time we
24 have got the 1985 Trust that is preserving the requirements of the *Indian Act* that existed
25 in 1982. And that -- and under that legislation Ms. Twinn is clearly a beneficiary of the
26 Trust.
27
28 THE COURT: Because she qualifies under 19 -- pre 1982
29 rules --
30
31 MS. HUTCHISON: Of the *Indian Act*.
32
33 MS. TWINN: Yes.
34
35 THE COURT: -- to have -- become --
36
37 MS. HUTCHISON: Correct.
38
39 THE COURT: -- a member of the Sawridge First Nation --
40
41 MS. HUTCHISON: Correct.

1
2 THE COURT: -- or Sawridge Band, as it was --
3
4 MS. TWINN: Yes.
5
6 THE COURT: -- but she can no -- she -- she is trying --
7
8 MS. HUTCHISON: She may --
9
10 THE COURT: -- she is trying now --
11
12 MS. HUTCHISON: She's trying.
13
14 MS. TWINN: Yes, I have -- I have applied, yeah.
15
16 MS. HUTCHISON: Yeah.
17
18 THE COURT: But she has to comply with Sawridge internal
19 mechanisms to become a member, whereas before -- pre 1982 she --
20
21 MS. HUTCHISON: It was federal --
22
23 THE COURT: -- would have been --
24
25 MS. HUTCHISON: -- legislation.
26
27 THE COURT: -- the federal -- okay.
28
29 MS. HUTCHISON: Correct.
30
31 THE COURT: And --
32
33 MS. HUTCHISON: Is that of assistance, My Lord?
34
35 THE COURT: I got you. Yes.
36
37 MS. HUTCHISON: Okay, thank you.
38
39 MS. TWINN: Yeah. Thank you. Thank you.
40
41 THE COURT: Is that -- is that all correct?

1
2 MS. TWINN: Yeah.
3
4 THE COURT: As far as your understanding?
5
6 MS. TWINN: Yeah.
7
8 THE COURT: Mr. Molstad has something to add.
9
10 MR. MOLSTAD: I was just going to stand up and say, with the
11 greatest of respect to Ms. Hutchison, Sawridge First Nations does not agree with her
12 interpretation of the legislation. We say that the Sawridge First Nation did have control in
13 relation to the membership before C-31 in terms of Section 13 of the right of Chief and
14 Council to approve those that the Registrar proposed to add. So that's a debate that we'll
15 have down the road in the --
16
17 THE COURT: Well, does --
18
19 MR. MOLSTAD: -- substance of this matter.
20
21 THE COURT: -- does the Sawridge First Nation challenge this
22 person's status as beneficiary under the 1985?
23
24 MR. MOLSTAD: I -- I have no instructions in that regard. I know
25 the Sawridge First Nation --
26
27 THE COURT: Okay.
28
29 MR. MOLSTAD: -- is prepared to talk about grandfathering
30 people. I know that this young woman has applied for membership, and should that
31 membership be granted, that will end the issue.
32
33 THE COURT: Sure. It will all -- all -- it will all evaporate.
34
35 MR. MOLSTAD: Okay.
36
37 THE COURT: Okay. I think --
38
39 MS. TWINN: Okay.
40
41 THE COURT: -- I think I understand your position. Thank you

1 very much --
2
3 MS. TWINN: Okay.
4
5 THE COURT: -- for your presentation.
6
7 MS. TWINN: Okay. Thank you.
8
9 THE COURT: Thank you.
10
11 Okay. Who is responding?
12
13 MS. HUTCHISON: My Lord, if it's acceptable to you, the OPGT
14 will start --
15
16 THE COURT: Sure.
17
18 MS. HUTCHISON: -- off, and then I believe Ms. Osualdini has a
19 number of things to cover with you as well.
20
21 MR. SESTITO: And the Trustee would like to speak as well.
22
23 THE COURT: Okay.
24
25 MR. SESTITO: Yeah.
26
27 MS. HUTCHISON: Did -- are you -- did you want to speak now and
28 I'd follow?
29
30 MR. SESTITO: No, no, I just meant --
31
32 MS. HUTCHISON: Oh.
33
34 MR. SESTITO: -- response.
35
36 **Submissions by Ms. Hutchison**
37
38 MS. HUTCHISON: Understood.
39
40 Good afternoon, My Lord. I don't think it's news to you, having read the submissions, that
41 the OPGT is before you opposing the application for intervention by the Sawridge First

1 Nation. And we recognize, My Lord, that under different circumstances and different
2 facts these applications might tend to be treated as rather uncontentious and
3 run-of-the-mill. But those aren't the facts before you, My Lord.

4
5 The issues that the SFN wishes to raise before you by way of intervention go far beyond
6 run-of-the-mill and seriously jeopardize the interests of the minors that the OPGT has
7 been appointed to represent. Protecting the vested interests of an existing interest of the
8 current minor beneficiaries of the 1985 Trust goes to the heart of the OPGT -- OPGT's
9 role in this proceeding. And SF -- SFN's proposed positions are a distinct threat to those
10 minors' interests.

11
12 THE COURT: But isn't it for me to decide whether there's any
13 substance to what the Band may put forward? I mean, they can argue whatever they want,
14 and if it doesn't make sense, I'm not going to buy into it.

15
16 MS. HUTCHISON: And -- and it --

17
18 THE COURT: If it does make sense, then I want to hear about
19 it.

20
21 MS. HUTCHISON: And indeed --

22
23 THE COURT: Aren't -- aren't we all -- don't we all benefit by
24 having on an important issue like this benefit of different perspectives? That's how we
25 come to the best decisions, usually.

26
27 MS. HUTCHISON: With respect, My Lord, when the submissions
28 that are to be presented are so flawed and so contrary to the past positions of the Sawridge
29 First Nation, we would ask the Court to seriously consider their value.

30
31 THE COURT: Okay.

32
33 MS. HUTCHISON: And given that there's also a real impact on the
34 proceedings in -- in terms of their involvement, it's very relevant to examine those factors.
35 And I know Mr. Faulds will be covering some of that with you in more detail. I'm --

36
37 THE COURT: Sure. But what --

38
39 MS. HUTCHISON: -- focusing on the evidence.

40
41 THE COURT: -- we're -- we're -- we're talking about motions

1 that will be argued in a day. We're not talking about a six-week trial.

2

3 MS. HUTCHISON: Well, My Lord --

4

5 THE COURT: Right?

6

7 MS. HUTCHISON: -- one of the examples today being the question
8 of how the OPGT's ability to even cross-examine on evidence, that was going to be put
9 forward. And we start to get involved in these rather involved discussions about how
10 things will move forward. There is a great deal of time and energy being spent on trying
11 to deal with Sawridge First Nation's involvement in the matter. But I -- I think where I'd
12 like to focus here at this point, My Lord, is the --

13

14 THE COURT: Right.

15

16 MS. HUTCHISON: -- significance of the threat.

17

18 THE COURT: I will stay quiet, and you can make your
19 submissions.

20

21 MS. HUTCHISON: I -- I'd actually love to answer the -- any
22 questions you have, My Lord, during my submissions or after.

23

24 THE COURT: Okay.

25

26 MS. HUTCHISON: The significance of this threat is not small, My
27 Lord. In Sawridge First Nation the Court actually commented on this -- Saw -- Sawridge
28 First Nation -- or, sorry, Sawridge 1 commented on an estimate that the 23 minors
29 impacted by the OPGT's representation were probably entitled to approximately 1.1
30 million dollars as an interest. And that was paragraph 24 in Sawridge 1. We don't know
31 if those figures are exactly the same today. But it gives you a sense of the magnitude and
32 the financial value of the -- of the interest that Sawridge First Nation wishes to intervene
33 to impact.

34

35 In terms of the -- a practical example of how this all impacts the minors that the -- that the
36 OPGT represents, Ms. Twinn actually was very helpful in providing some materials. And
37 if you turn to Exhibit G of the affidavit of Shelby Twinn, and it's -- it's quite a ways into
38 that -- into that exhibit, My Lord. It's part of Dentons -- Dentons letter.

39

40 THE COURT: Okay. Tab what?

41

1 MS. HUTCHISON: Tab G of --
2
3 THE COURT: G?
4
5 MS. HUTCHISON: -- Shelby Twinn's affidavit.
6
7 THE COURT: Yes, yes.
8
9 MS. HUTCHISON: And it's an attachment to a June 1st, 2006 --
10 2015, I apologize --
11
12 THE COURT: Yes.
13
14 MS. HUTCHISON: -- letter from Dentons to -- to the OPGT. Do
15 you have that, Sir?
16
17 THE COURT: June 1st, 2015?
18
19 MS. HUTCHISON: Yes.
20
21 THE COURT: Yes, I have it, yes.
22
23 MS. HUTCHISON: So the first few pages are with-prejudice
24 communication, and then --
25
26 THE COURT: Yes.
27
28 MS. HUTCHISON: -- if you go past the signature page, you'll find
29 two tables.
30
31 THE COURT: Yes, I have them, yes.
32
33 MS. HUTCHISON: And as you'll see, that's a table of minor
34 beneficiaries identified by the Sawridge Trustees as at August 31st, 2011, and up --
35
36 THE COURT: Yes.
37
38 MS. HUTCHISON: -- dated to 2015.
39
40 THE COURT: Yes.
41

1 MS. HUTCHISON: And certainly, My Lord, we're not suggesting to
2 you that all of these names and individuals are identical today. But that was the
3 discussion at the time, and it's a good object lesson in terms of what we're talking about
4 on impact. It's Sawridge First Nation's position on the '82 to '85 transfer and the existence
5 of the '85 Trust is accepted, if you turn to table 2, those 4 minor beneficiaries out of the 24
6 minor beneficiaries named are the only minors that were -- continued to have any rights in
7 the Trust. The other 20 would completely lose their interest, their 1.1 million dollar
8 interest in the trust.
9

10 THE COURT: All right.

11

12 MS. HUTCHISON: So that's the magnitude of the interests and the
13 magnitude of the impact that Sawridge First Nation is purported to raise in this matter,
14 My Lord.
15

16 THE COURT: All right. But that -- that --

17

18 MS. HUTCHISON: The OPGT's --

19

20 THE COURT: -- but -- but -- but the point -- the point is that
21 there will be consequences that flow from whatever decision comes out of this.
22

23 MS. HUTCHISON: Clearly.

24

25 THE COURT: And you advocate for an outcome that preserves
26 the interests of the minors, which is your function. You're going to do that.
27

28 MS. HUTCHISON: Clearly.

29

30 THE COURT: Others may argue for an outcome, the
31 consequences of which will not be welcomed by the children. But it -- it's a question --
32 what -- what is the proper legal outcome --
33

34 MS. HUTCHISON: Yeah.

35

36 THE COURT: -- that's the question. And the consequences
37 that flow from that will flow, to me.
38

39 MS. HUTCHISON: My Lord, we're dealing with an application for
40 intervention.
41

1 THE COURT: Right.
2

3 MS. HUTCHISON: None of the parties have any interest or any
4 desire to go in the direction. They don't want to follow the soccer ball that Sawridge First
5 Nation is kicking downfield. It's nothing that the parties are seeking from you. It is -- it is
6 now an outsider to this proceeding, an entity that has strenuously -- strenuously resisted
7 any involvement in this proceeding, who is now coming to you to ask that we head in this
8 new direction. And we're simply here, My Lord, for obviously a variety of other reasons,
9 but our point at the moment is to make sure the Court is aware of the impacts of what
10 Sawridge First Nation's --
11

12 THE COURT: Listen, I --
13

14 MS. HUTCHISON: -- proposal --
15

16 THE COURT: -- I understood from --
17

18 MS. HUTCHISON: Yeah.
19

20 THE COURT: -- Mr. Faulds' comments last week or the week
21 before, whenever it was we met last, there are serious consequences. I understand that.
22

23 MS. HUTCHISON: Thank you, My Lord. So --
24

25 THE COURT: And when I tried to explain to him at the time,
26 just as I've tried to explain to you now, is I understand there are consequences, but I need
27 to come to the right conclusion.
28

29 MS. HUTCHISON: And, My Lord, we recognize the Court has
30 discretion in intervention applications. But the applications must still be determined in
31 accordance with governing principles of intervention.
32

33 THE COURT: Exactly.
34

35 MS. HUTCHISON: So going back to those principles, My Lord --
36

37 THE COURT: Good.
38

39 MS. HUTCHISON: -- the OPGT is also here to talk to you about the
40 concerns about the timing of SFN's application --
41

1 THE COURT: Yes.

2

3 MS. HUTCHISON: -- the SFN's past position on the issues they seek
4 to now address before you in the intervention and the significant flaws and weaknesses in
5 the SFN's positions which clearly inform the utility of involving them as an intervenor on
6 this particular application.

7

8 Paragraph 3 of our submission lists all of those concerns on behalf of the OPGT. I will
9 defer to Mr. Faulds to take you through some of the legal submissions on those points. I'd
10 like to spend a bit of time drawing the Court's attention to some of the key evidence that
11 should be uppermost in your consideration as --

12

13 THE COURT: Okay.

14

15 MS. HUTCHISON: -- you're dealing with this matter.

16

17 Including the evidence before you that demonstrates the Sawridge First Nation's proposed
18 positions in this intervention application are directly contrary to the available evidence
19 about the purpose and intentions of the Sawridge First Nation's members, the Sawridge
20 First Nation's Chief and Council, the 1982 Trustees and the 1985 Trustees at the time of
21 the 1982 to '85 transfer -- asset transfer, the evidence that the Sawridge First Nations
22 stated positions at the time of and directly related to the 2016 asset transfer order are
23 directly contrary to the positions they now seek to advance. And the positions -- the
24 evidence before you as to the positions of the Sawridge First Nation's advisors, positions,
25 My Lord, that were later vindicated by the Supreme Court of Canada in *Ermineskin*.

26

27 In terms of the evidence before you, My Lord, on the original purpose and intent of the
28 asset transfer, we would submit that that evidence uniformly demonstrates the Sawridge
29 First Nation and its Trusts and Trustees made a clear and direct decision to create a
30 disconnect or a divergence between Band membership and trust beneficiary status. That
31 was not accidental, My Lord. That was not an unintended consequence. It was the entire
32 focus of the transaction that they structured. And in that regard, My Lord, I'd refer you to
33 Exhibit B, C, and D of the exhibits of the questioning from Darcy Twinn's -- Darcy
34 Twinn's questioning, which are found at, I believe, tab P of our -- of our submissions.

35

36 And in particular, My Lord, looking at Exhibit C, which is a resolution of the Trustees in
37 1985, we direct the Court's attention to paragraph 3 and paragraph 5. Those preambles to
38 the Trustees' resolution speak quite directly to the concept that there is an interest in
39 protecting the assets of the Sawridge First Nation against incoming members who will
40 become Sawridge First Nation members under Bill C-31.

41

1 So far from being inconsistent with what was in the nation's best interests, My Lord, the
2 asset transfer was carefully designed by Sawridge First Nation to protect those very
3 interests, that the intention was to separate membership and beneficiary status was
4 confirmed by Chief Walter Twinn in his evidence before the Federal Court, and by Paul
5 Bujold, as was Sawridge First Nation's commitment to ensure that the asset transfer
6 occurred.

7
8 And I'm going to take you to a few important excerpts, My Lord, the first being Exhibit B
9 from the affidavit of Darcy Twinn. And that is a transcript of Walter Twinn's testimony
10 before the Federal Court of Canada in the constitutional challenge. And the relevant
11 portion -- or the portion we'd like to direct you to, My Lord, begins at page 03908.

12
13 THE COURT: Okay. So this is at tab...

14
15 MS. HUTCHISON: Tab B of Darcy Twinn's affidavit.

16
17 THE COURT: Tab B, okay.

18
19 MS. HUTCHISON: Or Exhibit B, My Lord.

20
21 THE COURT: Yes, okay. And page numbers -- okay, there
22 they are. Page number, you say...

23
24 MS. HUTCHISON: 3 -- 39 -- well, the top of the page is 3907.

25
26 THE COURT: Yes, I have it.

27
28 MS. HUTCHISON: The passage we're referring you to is 3908,
29 line --

30
31 THE COURT: Okay --

32
33 MS. HUTCHISON: -- 1.

34
35 THE COURT: -- good.

36
37 MS. HUTCHISON: (as read):

38
39 The object of that was to exclude people who might become members of
40 the Sawridge Band under Bill C-31 as --
41

1 THE COURT: Yes.

2

3 MS. HUTCHISON: (as read):

4

5 -- beneficiaries.

6

7 THE COURT: Yes.

8

9 MS. HUTCHISON: (as read):

10

11 A. Yes, to a certain extent.

12

13 And then over at the very bottom of the page, line 14, (as read)

14

15 Q. But I just want to know, when this agreement was being prepared,
16 what your objective was. And your first objective, was it people who
17 might become Band members under Bill C-31 wouldn't be
18 beneficiaries?

19 A. M-hm.

20 Q. That's correct. That was Objective Number One?

21 A. Right.

22

23 So that is straight from the mouth of the architect of --

24

25 THE COURT: Yes.

26

27 MS. HUTCHISON: -- of this transfer. And entirely we submit, My
28 Lord, inconsistent with the current positions of Sawridge First Nation on this matter.

29

30 I would then take the Court to the 216 questioning of Paul Bujold by Mr. Molstad. And
31 that's found at tab F of the OPGT's brief, starting at page 22.

32

33 THE COURT: Yes.

34

35 MS. HUTCHISON: And this questioning, My Lord, by way of
36 background, was a questioning Sawridge First Nation chose to conduct in relation to the
37 OPGT's 2513 document production applications. The OPGT had withdrawn its asset
38 transfer application -- or its asset production -- asset document production application at
39 the beginning of this questioning.

40

41 THE COURT: Yes.

1
2 MS. HUTCHISON: But Sawridge First Nation went into quite some
3 depth with Mr. Bujold around the entire asset transfer history. And the Trustees
4 ultimately relied quite heavily on that evidence in their asset transfer brief. It's a very
5 informative dialogue, My Lord, starting at the top of page 22.
6
7 THE COURT: Yes.
8
9 MS. HUTCHISON: Mr. Molstad asks, (as read)
10
11 Now, in paragraph 1350 --
12
13 THE COURT: This is actually D, not F, right?
14
15 MS. HUTCHISON: This is Exhibit F, I believe, My Lord.
16
17 THE COURT: F doesn't --
18
19 MS. HUTCHISON: Or tab F, I believe.
20
21 THE COURT: Tab F doesn't go to 22 pages, but tab G does.
22 Mr. Molstad is speaking there.
23
24 MS. HUTCHISON: Tab F of the OPGT's brief, My Lord?
25
26 THE COURT: Oh, I've got the affidavit of Darcy Twinn. I'm
27 sorry.
28
29 MS. HUTCHISON: No, I apologize. I switched documents on you.
30
31 THE COURT: Okay.
32
33 MS. HUTCHISON: I apologize, My Lord. We have quite a bit of --
34 quite a bit of paper on the go.
35
36 THE COURT: I see that. Tab F at page 22?
37
38 MS. HUTCHISON: Correct.
39
40 THE COURT: With -- I've gotcha.
41

1 MS. HUTCHISON: Great. Top of the page --

2
3 THE COURT: Okay, gotcha. Oh.

4
5 MS. HUTCHISON: -- (as read):

6
7 Q. Now, on paragraph 13 to 15 of your affidavit this refers to legislation
8 we know previously referred to as Bill C-31. And you're, I assume,
9 familiar with the fact that Sawridge First Nation challenged the
10 constitutionality of the legislation and lit -- litigation where they asserted
11 a right that they as the First Nation had a right to determine membership.

12 A. Yes, I'm aware of that.

13 Q. And it was during that challenge that women that include Ms. Poitras
14 were ordered to be added as members of Sawridge First Nation, and as a
15 result for the way in which the 1985 Trust was structured, she did not
16 become a beneficiary when the Court declared her to be a member of
17 Sawridge First Nation.

18 A. No.

19 Q. Is that correct?

20 A. That's correct.

21
22 We go on to a further dialogue about the purpose of the Trust on page 23, My Lord. (as
23 read):

24
25 Q. And what we know at this time was that the purpose of the 1985
26 Trust when it was structured was to protect the assets of the Trust from
27 those persons who might be forced upon the Sawridge First Nation as
28 members under what was then Bill C-31.

29 A. That's correct.

30
31 And --

32
33 THE COURT: Yes.

34
35 MS. HUTCHISON: -- going a bit farther down, (as read)

36
37 Q. They were trying -- "they" referencing the Sawridge Trustees -- were
38 trying to protect those assets, so their objective was to transfer those
39 assets.

40
41 And Mr. Bujold goes through, then, the evidence or information he has from Maurice

1 Cullity (phonetic) about the structure of the '85 Trust. And I go down to page 24, line 9,
2 then, My Lord.

3
4 THE COURT: Yes.

5
6 MS. HUTCHISON: (as read):

7
8 Q. But in terms of the '85 Trust in those circumstances, both the saw --
9 both the Sawridge First Nation and the Trustees would be motivated to
10 ensure all the assets were transferred.

11 A. That's right. Absolutely.

12 Q. The reason to fulfill the purpose at that time?

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

14
15 Now, Mr. Faulds has quite a bit to say to you about why that affects why Sawridge First
16 Nation should be participating in this intervention application. The key, My Lord, is that
17 the evidence of their -- what they deliberately intended to structure in '85 is quite clear
18 and is directly contrary to what they submit to this Court at this point in time.

19
20 I'm going to fast forward at this point, My Lord, to 2011, at the start of this proceeding.
21 And the Trustees' pleadings were clear at the outset, that they were seeking approval of a
22 regularization of the transfer from 1982 to the 1985 Trust. That was on the table from
23 Day One. The SFN was given notice of that proceeding. They were given full
24 opportunity to participate. In fact, there were, as you -- as you'll be aware from Sawridge
25 3, significant attempts to involve them in the proceeding, and they resisted that
26 strenuously. So Sawridge was fully aware that that relief was on the table and did not
27 seek to intervene, did not oppose the relief sought, and did not contribute -- seek to
28 contribute a unique perspective on the asset transfer.

29
30 We all became, I think, clearer on the reason that Sawridge First Nation was not
31 concerned about this issue in 2016, when the asset transfer order came forward. And they
32 express their extremely strong support for the Trustee's proposed form of asset consent
33 order. And -- and here, My Lord, it's key to note that we would submit Mr. Twinn's
34 affidavit almost implies that Sawridge First Nation was not involved in the 2016 asset
35 transfer consent order, and the evidence is rather clear that they were extremely involved.
36 They may not have signed the order, but they were absolutely involved in negotiating the
37 terms of the order. They were absolutely involved in approving the terms of the order --

38
39 THE COURT: Yes.

40
41 MS. HUTCHISON: -- as amongst discussions with the parties. And

1 I'd like to take the Court to a few items of evidence that are relevant to that. In particular,
2 the OPGT's submissions at tab P, which are the exhibits from Darcy Twinn's
3 questioning --

4

5 THE COURT: Yes.

6

7 MS. HUTCHISON: -- Exhibit E, F, and G. And I'm just going to
8 read from Exhibit G, My Lord. It's the middle paragraph --

9

10 THE COURT: Okay.

11

12 MS. HUTCHISON: -- of a letter --

13

14 THE COURT: Yes.

15

16 MS. HUTCHISON: -- from Parlee McLaws --

17

18 THE COURT: Yes.

19

20 MS. HUTCHISON: -- to Hutchison Law that says, (as read)

21

22 It is the position of the Sawridge First Nation that this settlement offer --
23 that's referring to the asset transfer consent order --

24

25 THE COURT: Yes.

26

27 MS. HUTCHISON: -- (as read):

28

29 -- is reasonable and resolves any possible concerns with respect to the
30 approval --

31

32 THE COURT: Yes.

33

34 MS. HUTCHISON: -- (as read):

35

36 -- of the transfer of assets from the '82 Trust to the '85 Trust.

37

38 They go on in that letter, My Lord, to threaten the OPGT with cost consequences if the
39 OPGT does not accept the asset transfer consent order. So hard to suggest that there's
40 any -- any room for ambiguity about the position that was being taken on that particular
41 asset transfer consent order. If there was any, My Lord, we'd refer you to page 39 of the --

1 of tab I.

2

3 THE COURT: Well, just hold on a minute, please, if you don't
4 mind.

5

6 MS. HUTCHISON: Yeah.

7

8 THE COURT: Okay. I'm sorry, where were we?

9

10 MS. HUTCHISON: Tab I of the OPGT submissions, My Lord.

11

12 THE COURT: Okay, yes.

13

14 MS. HUTCHISON: Page 39 of the case management conference
15 from August 24th, 2016.

16

17 THE COURT: Yes.

18

19 MS. HUTCHISON: And these are the submissions made on behalf
20 of the Sawridge First Nation. I think that my friend -- by Mr. Molstad, I believe, yes -- I
21 think what my friend Ms. Bonora made mention of this in her brief. The purpose of the
22 transfer in '82, '85 in terms of the transfer from Trust was to avoid any claim that others
23 might make in relation to these assets after the in -- enactment of Bill C-31. So Sawridge
24 First Nation would be highly motivated to ensure that those that were acting as Trustees
25 made the transfer of all assets from the 1982 Trust to the 1985 Trust. That was the
26 reason. The reason clearly was one where it was in everyone's best interests to make sure
27 the transfer took place. Dramatically different than the position that is being taken before
28 this Court as --

29

30 THE COURT: Yes.

31

32 MS. HUTCHISON: -- a proposed position as an intervenor --

33

34 THE COURT: Yes.

35

36 MS. HUTCHISON: -- My Lord.

37

38 Moving on, My Lord, then, to what occurred with the asset transfer order. It was granted,
39 and, actually, the -- in the face of a dual cost threat. If -- if the Court refers to Exhibit F of
40 the questioning of Darcy Twinn. The Trustees also threatened the OPGT with cost
41 consequences if they didn't accept the -- the consent order. So the -- the --

1
2 THE COURT: Yes.
3
4 MS. HUTCHISON: -- OPGT consented --
5
6 THE COURT: Yes.
7
8 MS. HUTCHISON: -- and part and parcel of that, My Lord, was the
9 OPGT withdrew its 513 asset document --
10
11 THE COURT: Sure.
12
13 MS. HUTCHISON: -- application on the basis of Sawridge First
14 Nation's agreement with the --
15
16 THE COURT: Yes, right, but --
17
18 MS. HUTCHISON: -- entire consent order.
19
20 THE COURT: -- what you're -- what you're telling me is that
21 everyone was in agreement that this consent order should -- including Mr. Molstad, was
22 in agreement that this consent order should be put before Justice Thomas.
23
24 MS. HUTCHISON: Correct.
25
26 THE COURT: The issue that we're going to be talking about on
27 November 27th is what was the impact of that?
28
29 MS. HUTCHISON: M-hm.
30
31 THE COURT: Can -- in terms of a trust of this nature, can you
32 come to a settlement agreement on something like this? And can -- does the Court have
33 the ability to make that sort of an order?
34
35 MS. HUTCHISON: And -- and, My Lord --
36
37 THE COURT: And if -- and if it does, how far can it go?
38
39 MS. HUTCHISON: M-hm. And I --
40
41 THE COURT: And that's -- and, you know, I feel --

1
2 MS. HUTCHISON: M-hm.
3
4 THE COURT: -- badly because this is an issue that I have
5 raised, and I have raised it, the reasoning, because, in my view, until you have a trust on a
6 solid foundation, talking about making changes to it doesn't make any sense to me. If
7 you -- if you start talking about making changes to a trust that isn't on a solid foundation,
8 then it comes crashing down two years or five years from now. That's not helping anyone
9 out. So you -- you may all have agreed, it may -- it may have been a hard-thought
10 negotiation which resulted in a consent order being placed to Justice Thomas. My
11 question is, what does it mean?
12
13 MS. HUTCHISON: And --
14
15 THE COURT: That's -- that's the question.
16
17 MS. HUTCHISON: And, My Lord, we completely appreciate that
18 we will be arguing that with you -- or before you --
19
20 THE COURT: I know.
21
22 MS. HUTCHISON: -- extensively --
23
24 THE COURT: I'm eager --
25
26 MS. HUTCHISON: -- on November 27th.
27
28 THE COURT: -- I'm eager to hear all about it.
29
30 MS. HUTCHISON: And I -- I'm certain that you are. The question
31 for us today is --
32
33 THE COURT: And I'm hoping --
34
35 MS. HUTCHISON: -- whether --
36
37 THE COURT: -- you can satisfy my concerns easily.
38
39 MS. HUTCHISON: I believe we can, My Lord, but --
40
41 THE COURT: Good. Well, I --

1
2 MS. HUTCHISON: -- I don't believe I'm --
3
4 THE COURT: -- I'm hoping so.
5
6 MS. HUTCHISON: -- I'm permitted to get into that today. The
7 question today --
8
9 THE COURT: Well --
10
11 MS. HUTCHISON: -- is whether or not Sawridge First Nation's --
12
13 THE COURT: Right.
14
15 MS. HUTCHISON: -- participation at the table adds any actual
16 meritorious issue or argument --
17
18 THE COURT: Yes.
19
20 MS. HUTCHISON: -- that the Court should hear.
21
22 THE COURT: Yes.
23
24 MS. HUTCHISON: That's -- that's what we're dealing with today.
25
26 THE COURT: Yes.
27
28 MS. HUTCHISON: And we certainly ask you to -- to consider our
29 submissions in that regard.
30
31 In terms of why we're taking the Court through some of this, My Lord, I'm sure the Court
32 has reviewed the affidavit of Darcy Twinn. But I'll take you specifically to paragraph 10
33 of his affidavit where, as I say, the -- the essential implication of that paragraph is that
34 Sawridge First Nation wasn't a party to the asset transfer order, didn't have an opportunity
35 to speak to it. And so somehow I -- I -- I read that evidence as suggesting Sawridge First
36 Nation should now through the vehicle of intervention be allowed to undo that consent
37 order. So that --
38
39 THE COURT: Yes.
40
41 MS. HUTCHISON: -- that is where our submissions are directed --

1
2 THE COURT: Yes, okay.
3
4 MS. HUTCHISON: -- My Lord. A few very brief comments about
5 the evidence, and I'm going to hand over to Mr. Faulds who will deal with the law with
6 you, My Lord.
7
8 We would ask the Court as you review and weigh the evidence that the Sawridge First
9 Nation has put before you in support of its application to consider a number of factors.
10 Mr. Twinn was a child at the time of the events that he gives -- he provides evidence on.
11 And I'll refer the Court to page 28 to 29 and portions of page 30 of his transcript. He
12 effectively had no personal knowledge of the matters sworn to in his affidavit. Mr.
13 Twinn's evidence was confirmed as being largely based on a selection of documents
14 chosen by legal counsel.
15
16 And I'll refer you to page 12, 13, 14, and page 16 of his cross-examination. When Mr.
17 Twinn swore his affidavit, he was clearly unaware of the full history of the asset transfer
18 and full history of the asset transfer order. And that's at page 16 to 17 of his questioning,
19 and then 31 to 37.
20
21 Mr. Twinn was able to provide some evidence that was extremely useful and is very
22 pertinent to your consideration of the merits of this application, My Lord, including Mr.
23 Twinn gave very specific evidence that Council did not pass a BCR to authorize it to
24 intervene on behalf of the Nation in the jurisdiction applications. And I refer the Court to
25 page 7, line 16 to 27, and page 8, line 1 to 3. And, My Lord, to be clear, the OPGT isn't
26 casting aspersions on SFN's legal counsel in this regard. But if SFN Chief and Council
27 has not passed a BCR to authorize their intervention at a duly convened meeting, they
28 don't actually have a legal right to be before you to see -- to represent the members. And
29 I -- I would refer you to the authorities that we have cited for you in Footnote 27 of our
30 submissions. It's also dealt with in the submissions at paragraph 16(b). It's not --
31
32 THE COURT: But didn't --
33
34 MS. HUTCHISON: -- an unimportant --
35
36 THE COURT: -- Mr. Molstad --
37
38 MS. HUTCHISON: -- point, My Lord.
39
40 THE COURT: -- just finish telling us that there is a resolution
41 being circulated to you on the 28th of October?

1
2 MS. HUTCHISON: It was circulated to us, My Lord, at a point in
3 time when we would no longer cast the evidence in the face --
4

5 THE COURT: Yes.

6
7 MS. HUTCHISON: -- of Mr. Darcy Twinn's clear evidence that
8 there is no BCR --
9

10 THE COURT: Yes.

11
12 MS. HUTCHISON: -- clear evidence that there was no duly
13 convened meeting, My Lord. And I'd refer you --
14

15 THE COURT: Yes.

16
17 MS. HUTCHISON: -- to page 26 and 27 of his questioning. We --
18

19 THE COURT: Okay.

20
21 MS. HUTCHISON: -- we went through all of this with Mr. Twinn.
22

23 THE COURT: All right.

24
25 MS. HUTCHISON: And in terms of Chief and Council offering a
26 unique perspective on the Trust, Mr. Twinn was very consistent throughout his
27 questioning in stating that Chief and Council don't even discuss the Trusts. They in fact
28 seem to actively avoid the Trusts, My Lord. And I'll take you to tab O of the OPGT's
29 submissions, a portion of the transcript of the questioning of Darcy Twinn, page 25, line
30 1: (as read)

31
32 A. No, we don't discuss anything about the Trusts. That's a separate
33 entity. We are Council of the First Nation. We deal with First Nation
34 business. Trust business is Trust business. He takes that elsewhere.
35

36 These irregularities in Sawridge First Nation's application, My Lord, are amplified by the
37 complete lack of consultation with Sawridge First Nation's members, their actual
38 members on this matter, My Lord. And Mr. Twinn confirms at page 9, line 8 to 11, that
39 there has been no consultation with Sawridge First Nation's members about the position
40 they want to take on the Trust transfer, the asset transfer, or the intervention application.
41

1 And, My Lord, that has to be compared with Exhibit D of the Darcy Twinn questioning,
2 which is also -- I think I have taken you to it a number of times, tab P of the OPGT's
3 submissions which was an explicit resolution passed by the Sawridge First Nation's
4 members. At least on the evidence available to us, that's the last word from the very
5 individuals that this intervenor says they want to speak for. And they haven't been
6 consulted on the issues since, My Lord.

7
8 THE COURT: Okay.

9
10 MS. HUTCHISON: And unless the Court has questions for me, I
11 will hand over to Mr. --

12
13 THE COURT: Okay.

14
15 MS. HUTCHISON: -- Mr. Faulds. Thank you.

16
17 THE COURT: Thank you.

18
19 **Submissions by Mr. Faulds**

20
21 MR. FAULDS: My Lord, I wanted to first of all point out that
22 what we really have in front of us are two applications in the sense of an application to
23 intervene in the issue raised by Your Lordship concerning the effect of the asset transfer
24 order --

25
26 THE COURT: Yes.

27
28 MR. FAULDS: -- and an application to intervene in relation to
29 the jurisdiction application --

30
31 THE COURT: Yes.

32
33 MR. FAULDS: -- which was going to be argued on April 25th,
34 but which is now adjourned off to -- to some point in the future. And I think that
35 somewhat different considerations apply to -- to those two matters, or at least some
36 different considerations apply.

37
38 THE COURT: Yes.

39
40 MR. FAULDS: And I'd just like to speak to the jurisdiction
41 application because Your Lordship may recall that one of the first steps that you took in

1 relation to these proceedings was to approve a litigation plan which was submitted to you
2 for the determination of the jurisdiction application --
3
4 THE COURT: Yes.
5
6 MR. FAULDS: -- on April 25th.
7
8 THE COURT: Yes.
9
10 MR. FAULDS: And that jurisdiction -- and that litigation plan
11 included deadlines for applications --
12
13 THE COURT: Yes.
14
15 MR. FAULDS: -- to be made by parties to intervene. And so --
16
17 THE COURT: Yes. It's come and gone, and Mr. Molstad didn't
18 apply.
19
20 MR. FAULDS: This -- right --
21
22 THE COURT: Gotcha, read your material.
23
24 MR. FAULDS: -- right. And -- and -- and so, you know, we --
25 and we haven't been told there -- of anything that's changed in -- in relation to --
26
27 THE COURT: Well, it has --
28
29 MR. FAULDS: -- the material.
30
31 THE COURT: -- it has changed because I've interspersed
32 myself in this litigation and have raised concerns that weren't previously raised.
33
34 MR. FAULDS: That's correct, My Lord. But depending on --
35 but -- but those may have act -- no ultimate bearing upon the --
36
37 THE COURT: May --
38
39 MR. FAULDS: -- jurisdiction application.
40
41 THE COURT: You know what? It -- this may have just been

1 something that I should never have raised. And I may -- I may conclude that you have
2 given me a perfectly good explanation, and we'll drive on.
3
4 MR. FAULDS: Right. But my -- my submission is that absent
5 something arising out of the asset transfer application --
6
7 THE COURT: Yes.
8
9 MR. FAULDS: -- Sawridge First Nation made its choice, didn't
10 see a need to --
11
12 THE COURT: Yes.
13
14 MR. FAULDS: -- intervene --
15
16 THE COURT: Okay.
17
18 MR. FAULDS: -- the jurisdictional application --
19
20 THE COURT: Okay, hear you.
21
22 MR. FAULDS: -- shouldn't have --
23
24 THE COURT: Yes.
25
26 MR. FAULDS: -- be permitted to do that.
27
28 THE COURT: Yes. Yes.
29
30 MR. FAULDS: So I -- I am getting very strong signals, My
31 Lord, about where -- where the -- where the Court is inclined to go --
32
33 THE COURT: Well -- well --
34
35 MR. FAULDS: -- on -- on this.
36
37 THE COURT: -- I don't mean to be impatient, Mr. Faulds, so --
38
39 MR. FAULDS: Right.
40
41 THE COURT: -- you take your time. But, you know,

1 intervenor applications are usually done on a pretty streamlined basis, not usually with
2 binders of materials that take hours to read.

3

4 MR. FAULDS: Right. And -- and one of the reasons for --

5

6 THE COURT: And I'm happy to read them. I mean, that's -- I
7 get paid to do that, so I'm happy to do it. But it strikes me that it's time that we rolled up
8 our sleeves and get down to the meat of the matter here.

9

10 MR. FAULDS: And in -- so let me talk about the asset transfer
11 issue for a moment --

12

13 THE COURT: Sure, yes.

14

15 MR. FAULDS: -- because really the -- the heart of our position
16 is that -- is that the Sawridge First Nation's done a 180-degree U-turn on -- on --

17

18 THE COURT: Yes.

19

20 MR. FAULDS: -- this without any explanation of why and --

21

22 THE COURT: They may have -- they may have seen the light.
23 Who knows? I don't know. I don't know, but, Mr. Faulds, let --

24

25 MR. FAULDS: Yeah.

26

27 THE COURT: -- let me say this: If -- if anyone starts taking
28 ridiculous positions in their submissions, taking up everyone's time and draining even
29 more money out of this Trust, then that is going to be of concern to me --

30

31 MR. FAULDS: Yes.

32

33 THE COURT: -- and there will be consequences if I'm
34 concerned --

35

36 MR. FAULDS: Yes.

37

38 THE COURT: -- about people wasting time and the Trust's
39 money. So --

40

41 MR. FAULDS: Yes.

1
2 THE COURT: -- flip-flopping on positions is usually an
3 indicator that there's a problem. But it may be a situation where people have just taken a
4 different perspective. I don't know. But --
5
6 MR. FAULDS: Right.
7
8 THE COURT: -- I'm going to be pretty in tune with trying to
9 figure out who is taking up my time unnecessarily and who is not.
10
11 MR. FAULDS: Well, My Lord, I -- on that point, I -- you know,
12 Ms. Hutchison has been at pains to explain why this matter is of such significance to
13 the --
14
15 THE COURT: Yes.
16
17 MR. FAULDS: -- to the Public Trustee's office and why we
18 considered that it warranted scrutinizing the intervention application --
19
20 THE COURT: Okay.
21
22 MR. FAULDS: -- in a way that might not otherwise have been
23 the case.
24
25 THE COURT: Yes, okay.
26
27 MR. FAULDS: And in relation to -- to that, just to -- just to
28 conclude a thought which Ms. Hutchison provided to you, she took you to Exhibit G for
29 Identification from the questioning of Darcy Twinn, which is at tab --
30
31 THE COURT: Is that tab P?
32
33 MR. FAULDS: -- P of our brief.
34
35 THE COURT: Yes.
36
37 MR. FAULDS: And we have just, like -- just to -- just to
38 underscore the point which was being made there, if you -- if you turn to the previous
39 exhibit for identification, which is --
40
41 THE COURT: F.

1
2 MR. FAULDS: -- tab F --
3
4 THE COURT: Yes.
5
6 MR. FAULDS: -- or Exhibit F --
7
8 THE COURT: Yes, yes.
9
10 MR. FAULDS: -- for Identification --
11
12 THE COURT: That's the Dentons letter --
13
14 MR. FAULDS: -- that's the Dentons --
15
16 THE COURT: -- June 22nd?
17
18 MR. FAULDS: -- letter.
19
20 THE COURT: Yes.
21
22 MR. FAULDS: In which -- in which the asset transfer order is
23 being proposed.
24
25 THE COURT: Yes.
26
27 MR. FAULDS: And if you turn to a second page of that letter --
28
29 THE COURT: Yes.
30
31 MR. FAULDS: -- you'll see that in the paragraph which begins
32 with the word "the 1985 Trust" --
33
34 THE COURT: Yes.
35
36 MR. FAULDS: -- Ms. Bonora set out the purpose of the asset
37 transfer order. We simply wish to have the Court agree the transfer is approved and the
38 1985 Trust is the entity with which to deal.
39
40 So when Mr. Molstad in his subsequent letter threatened the OPGT with costs if they did
41 not agree, that's what was -- and -- and I -- and I just point to the irony --

1
2 THE COURT: Okay.
3
4 MR. FAULDS: -- of the --
5
6 THE COURT: Okay.
7
8 MR. FAULDS: -- fact that we're now being threatened with
9 costs for posing the intervention to argue the opposite.
10
11 THE COURT: Okay.
12
13 MR. FAULDS: In terms of the -- the issue relating to the Band
14 Council Resolution, which has been brought before you, in our submissions, we noted in
15 footnote, as it -- as it turns out, that Bands make decisions fundamentally in two ways:
16 One of those is by way of Band member meetings, and one of those is by resolutions of
17 the Chief and Council. And the evidence which had flowed from the questioning of
18 Darcy Twinn was that neither of those things had happened. Darcy Twinn stated in
19 evidence that there was no meeting of the Band members to discuss this, and he also
20 stated that, first of all, there had never been a Band Council Resolution passed. And the
21 Resolution isn't a piece of paper. Resolution is a decision. He said there had been no
22 Band Council Resolution to do this. And he also said that there had never been a duly
23 convened meeting of the Sawridge Chief and Council of which intervention had been
24 discussed. And that's important because a duly convened meeting is a --
25
26 THE COURT: Yes.
27
28 MR. FAULDS: -- prerequisite --
29
30 THE COURT: Yes.
31
32 MR. FAULDS: -- to a Band and Council Resolution.
33
34 THE COURT: Yes.
35
36 MR. FAULDS: So, in our submissions, we pointed out that
37 there did not seem to be an authorization for the bringing of this application in the manner
38 that's --
39
40 THE COURT: Yes.
41

1 MR. FAULDS: -- contemplated.
2
3 THE COURT: Mr. Molstad stands in front of me and says that
4 he has instructions to proceed.
5
6 MR. FAULDS: I -- and I have no doubt that he has instructions
7 to pursue --
8
9 THE COURT: Yes.
10
11 MR. FAULDS: -- the -- the -- the underlying question is
12 whether or not the First Nation is in a position to issue those --
13
14 THE COURT: Yes.
15
16 MR. FAULDS: -- instructions. The -- there was absolutely no
17 intention to suggest that Mr. Molstad was acting --
18
19 THE COURT: Yes.
20
21 MR. FAULDS: -- outside the scope of his -- of his proper
22 retainer. It was simply whether or not the Band itself had done --
23
24 THE COURT: Yes.
25
26 MR. FAULDS: -- what it needed to do.
27
28 THE COURT: Yes.
29
30 MR. FAULDS: And that's the point that was -- that -- that was
31 brought forward. And -- and we were a little surprised when a Band Council Resolution
32 document which appeared to contradict what Mr. Twinn had said appeared, you know,
33 before us. So --
34
35 THE COURT: Okay.
36
37 MR. FAULDS: -- that's what -- that's what that issue was about.
38
39 So in terms of the standard test for intervention, there's two fundamental elements --
40
41 THE COURT: Yes.

1
2 MR. FAULDS: -- the first one is a direct interest --
3
4 THE COURT: Yes.
5
6 MR. FAULDS: -- and the second one is a unique perspective --
7 special expertise or a unique perspective. And we have asked the Court to consider
8 whether or not a direct interest actually exists in this point in -- in this application on the
9 part of the Sawridge First Nation given that while it was the architect of this process, its
10 role was essentially spent. And Darcy Twinn went so far as to say that the Chief and
11 Council of the Band do not discuss Trust business at all. They see that as being a matter
12 for the Trustees, and there's evidence upon that point, which is quite clear. And if perhaps
13 I can --
14
15 THE COURT: Yes, Ms. Hutchison referred me to it.
16
17 MR. FAULDS: Yes, yes, I believe we have the --
18
19 THE COURT: Yes.
20
21 MR. FAULDS: -- we have the quote as page 25 of the transcript
22 of lines 1 to 4. And he appears to be drawing a distinct line between First Nation business
23 and Trust business.
24
25 THE COURT: Yes.
26
27 MR. FAULDS: And -- and our -- and, in our submission, that's
28 actually consistent with Trust law --
29
30 THE COURT: Yes.
31
32 MR. FAULDS: -- that the Sawridge First Nation does not have
33 it -- does not have a direct interest.
34
35 The question of the special perspective, well, we have made the point about -- about our
36 views on that.
37
38 So the last point I'd like to -- to -- to refer you to is -- has to do with the production of the
39 records. And our submission is that when an intervenor chooses to participate in
40 proceeding, its ultimate objective is to be helpful to the Court. And in it being helpful
41 with the Court means producing records that it may have in its possession being relevant

1 and -- and being open to inquiries or questions about such materials.

2
3 And, in our view, were the Sawridge First Nation to be added as an intervenor, it would
4 be appropriate to require them to provide an affidavit of records or something equivalent
5 to an affidavit of records.

6
7 THE COURT: Didn't -- didn't you sign off on an order in
8 August of 2016 that said you were satisfied that there was a lack of records, but you were
9 content that you had everything that you could possibly get given the circumstances --

10
11 MR. FAULDS: We were con --

12
13 THE COURT: -- or word -- words to that effect?

14
15 MR. FAULDS: -- we were content with the order that made --
16 that made it unnecessary to pursue the matter further.

17
18 THE COURT: Yes.

19
20 MR. FAULDS: And that's the order which --

21
22 THE COURT: Okay, I -- because it -- it said a bit more than
23 that, but...

24
25 MR. FAULDS: But -- but the -- I -- if your -- if Your Lordship
26 recalls, the origin of that order was there had been a broader application for documents by
27 the Sawridge --

28
29 THE COURT: That's right.

30
31 MR. FAULDS: -- by -- by -- by the OPGT which --

32
33 THE COURT: Yes.

34
35 MR. FAULDS: -- was rejected in Sawridge Number 3. Justice
36 Thomas in --

37
38 THE COURT: Yes.

39
40 MR. FAULDS: -- that decision directed the Public Trustee to
41 bring a Rule 5.13 application. That was a direction from the Court to do that. That had

1 two aspects to it: One was production of documents relating to membership issues, and
2 that --

3

4 THE COURT: Yes.

5

6 MR. FAULDS: -- ultimately got dismissed --

7

8 THE COURT: Yes.

9

10 MR. FAULDS: -- the other was production of documents
11 relating to the asset transfer issue --

12

13 THE COURT: Yes.

14

15 MR. FAULDS: -- when the asset -- when the OPGT agreed to
16 the asset transfer order, it withdrew the Section 513 application concerning that --

17

18 THE COURT: Yes.

19

20 MR. FAULDS: -- because it -- it was --

21

22 THE COURT: Yes.

23

24 MR. FAULDS: -- no longer relevant. And Your Lordship will
25 recall that the order in question preserved out some matters which weren't decided by the
26 order of having to do with, you know, counting of assets, and all those kinds of things --

27

28 THE COURT: Yes.

29

30 MR. FAULDS: -- which would -- which were preserved, and,
31 therefore, the opportunity to pursue issues relating to that remained at a later date. So it
32 was unnecessary at that time for the OPGT to pursue any further documentation relating
33 to the asset transfer order given the terms of that order.

34

35 But now we're back in a position where that order is -- you know, everything's been
36 thrown up in the air about that if -- if the Sawridge First Nation intervenes. And our
37 submission is it -- it would be -- if -- if the Sawridge First Nation is here to assist the
38 Court, then production of whatever records it has and -- and --

39

40 THE COURT: Yes.

41

1 MR. FAULDS: -- allowing --
2
3 THE COURT: Yes.
4
5 MR. FAULDS: -- questions to be asked of concerning that is
6 only appropriate.
7
8 THE COURT: Right. But we -- if we did that, we are not doing
9 this application on November 27th.
10
11 MR. FAULDS: If -- if --
12
13 THE COURT: Is that right? I mean, realistically, how --
14 how -- how could we accommodate that?
15
16 MR. FAULDS: Well, My Lord, people can move mountains
17 when they put their mind to it.
18
19 THE COURT: Yes.
20
21 MR. FAULDS: If you say we have to do it by then and they
22 have to produce something by then and we have to ask our questions by then, you know --
23
24 THE COURT: Yes.
25
26 MR. FAULDS: -- we'll find a way to make it happen.
27
28 THE COURT: Well, right --
29
30 MR. FAULDS: Yeah.
31
32 THE COURT: -- but I'm happy to get these types of briefs two
33 days in advance. When I come to things that have more standing or substantive rights are
34 being affected, I'm in a lot of pretty clear understanding and opportunity to understand
35 what the positions of the parties are. So I -- I don't want those briefs two days ahead of
36 time.
37
38 MR. FAULDS: Right, un -- understood. I -- so, I mean, that --
39 that's a -- that's a conundrum because if the Sawridge First Nation's perspective --
40
41 THE COURT: Yes.

1
2 MR. FAULDS: -- is appropriate and necessary, and if it's there
3 because it's -- it's of assistance and value to the Court, then --
4
5 THE COURT: Yes.
6
7 MR. FAULDS: -- you know, presumably it should be
8 accompanied with, you know, a fulsome and reasonable --
9
10 THE COURT: Sure.
11
12 MR. FAULDS: -- you know, production of -- of --
13
14 THE COURT: But --
15
16 MR. FAULDS: -- materials that are pertinent to the position it
17 wants to advance, in which the -- which the other parties can contest. And -- and I'm --
18 I'm not asking for an adjournment, My Lord. I'm not, but I -- but -- but I --
19
20 THE COURT: Well --
21
22 MR. FAULDS: -- it -- it seems to me that the purpose of the
23 intervention will be defeated if that didn't happen.
24
25 THE COURT: Sure. But, Mr. Faulds, the issue that is going to
26 be argued on the 27th of November is really a legal issue. The facts are important by way
27 of context, but only the law -- a lot of paper here that shows what the context is. And Ms.
28 Hutchison's taken me through what I consider some of the most context this afternoon,
29 but ultimately it's -- it's a legal issue, isn't it? What -- what is the effect of that order?
30 Because it's -- it --
31
32 MR. FAULDS: And there's -- there's probably a lot of -- a -- a
33 lot of legal opinion on that in files of the Sawridge First Nation.
34
35 THE COURT: Oh, well, you're not getting that anyway because
36 that's the subject of privilege --
37
38 MR. FAULDS: Well --
39
40 THE COURT: -- right?
41

- 1 MR. FAULDS: -- well, it could be waived by the Sawridge First
2 Nation.
3
- 4 THE COURT: Yes.
5
- 6 MR. FAULDS: And -- and -- and as we suggested in our brief, it
7 may not be unreasonable to consider --
8
- 9 THE COURT: Yes.
10
- 11 MR. FAULDS: -- that perhaps as -- you know, it -- we're talking
12 about the legal advice received in 1985.
13
- 14 THE COURT: Yes.
15
- 16 MR. FAULDS: So it's not as though we are actually, you
17 know -- you know, in -- intruding into -- into current affairs of the -- of the First Nation.
18 This is -- this is --
19
- 20 THE COURT: Yes.
21
- 22 MR. FAULDS: -- a historical endeavour. The Court is asking
23 what -- what happened back then in 1985, what's the effect of that? Doesn't seem to me
24 that the -- that there's any -- any actual reason why a waiver of privilege as a -- of -- in
25 relation to the advice received at that time was --
26
- 27 THE COURT: Well, I --
28
- 29 MR. FAULDS: -- a conditional (INDISCERNIBLE).
30
- 31 THE COURT: -- won't be asking them to waive privilege.
32
- 33 MR. FAULDS: Well, in -- in that case, it's not going to happen.
34
- 35 THE COURT: Well, I -- you know, I -- I can't. I have no
36 authority to do that.
37
- 38 MR. FAULDS: I -- well, I would suggest, My Lord, that -- that,
39 as we said in our brief, at the minimum we could be asked -- they could be asked to
40 produce a list of documents akin to an affidavit of records, which would -- which -- which
41 could then be reviewed by -- by the parties and --

1
2 THE COURT: Yes, yes.
3
4 MR. FAULDS: -- if -- if there seemed to be questions about
5 some of it, that could be -- about, you know, claims of privilege and whether stuff is or
6 isn't, that could be -- that could be tested. Again, I realize there's a ton involved with that.
7 But, you know, if -- if -- if the -- if the intervention is viewed as necessary and is going to
8 be helpful, it seems that something of that sort would -- which will inform the factual
9 matrix of the legal question of the --
10
11 THE COURT: Oh, apart from legal opinions, what -- what --
12 what do you think you might need that you haven't been able to access?
13
14 MR. FAULDS: Well, for example, there's a discussion between
15 the Sawridge First Nation's legal advisor, Mr. Cullity, and Indian Affairs, as I think it was
16 called at the time --
17
18 THE COURT: Yes.
19
20 MR. FAULDS: -- relating to the issue that my friend, Mr.
21 Molstad, raised. Mr. Molstad raised this question about the role of the Department in
22 relation to monies which were capital monies of the Band which were --
23
24 THE COURT: Yes.
25
26 MR. FAULDS: -- released.
27
28 THE COURT: Yes.
29
30 MR. FAULDS: And there is -- and -- and in the correspondence
31 that occurred between Mr. Cullity and the Department of Indian Affairs, the -- Mr. Cullity
32 says he kept on saying that the Department had no right to make those inquiries, which,
33 again, is somewhat contradictory of where --
34
35 THE COURT: Yes.
36
37 MR. FAULDS: -- the First Nation wants to go now. But -- but
38 the correspondence -- the -- that's -- that's available so far simply cuts off in midstream.
39 There's a -- there was an exchange -- the -- the -- the documents themselves are at tab K
40 of our brief.
41

- 1 THE COURT: Yes.
2
- 3 MR. FAULDS: And there's an exchange which never says how
4 the matter resolved. Now, Mr. Molstad made a point of referring to that, you know, the --
5 the -- the nature of -- of the funds that were being held and the controls which they were
6 subject to --
7
- 8 THE COURT: Yes.
9
- 10 MR. FAULDS: -- refer to federal legislation.
11
- 12 THE COURT: Yes.
13
- 14 MR. FAULDS: This exchange concerns exactly that point. We
15 don't know how it was resolved. It does appear from the evidence of Mr. Darcy Twinn
16 that the Government of Canada ultimately never took any action to interfere in the
17 operation of the 1985 Trust, that we -- that's -- that appears to have been the outcome.
18 But we don't know -- we -- we don't have any sort of documentary confirmation of that --
19
- 20 THE COURT: Yes.
21
- 22 MR. FAULDS: -- fact or of what the -- of what the ultimate
23 positions were. And -- and that appears to be a central point of -- of my friend, Mr.
24 Molstad's, position. And so, for example, a production of the records relating to that
25 exchange, how it was resolved, how that -- how that issue was resolved would be directly
26 pertinent to -- to the -- to the issue which Mr. Molstad wants to advance.
27
- 28 So that's -- that's an example of -- of -- of the kind of record that -- that might be
29 produced. And I don't believe that would be subject to privilege, per se.
30
- 31 THE COURT: Yes.
32
- 33 MR. FAULDS: So that's -- so -- so, I mean, we've -- we've --
34 we've kind of summarized that in our -- in -- in the relief requested in a section of our
35 brief. We have outlined the fact that we -- we take the view that the intervention should
36 not be granted. If it is granted, we take the position that it should be limited to the asset
37 transfer order, and that should -- it should come with some obligations involving
38 cooperation and production of relevant --
39
- 40 THE COURT: Right. It --
41

1 MR. FAULDS: -- documents.
2
3 THE COURT: -- should all be done so that the timeline can be
4 put together for November 27th.
5
6 MR. FAULDS: It's -- yes, it's -- it's tough. But -- but, I mean,
7 we -- we are -- we are where we are by virtue of circumstances --
8
9 THE COURT: Yes.
10
11 MR. FAULDS: -- you know? And we couldn't question Mr.
12 Darcy Twinn on his -- on his affidavit until the 18th of October simply because that was
13 when --
14
15 THE COURT: Yes.
16
17 MR. FAULDS: -- people were available --
18
19 THE COURT: Yes.
20
21 MR. FAULDS: -- you know, that kind of compressed all of the
22 timelines for...
23
24 THE COURT: Okay. Mr. Molstad, what's the story with these
25 documents, the -- I'm -- so --
26
27 **Submissions by Mr. Molstad**
28
29 MR. MOLSTAD: The only reason that we've produced these
30 documents is to show the source of funds.
31
32 THE COURT: Yes.
33
34 MR. MOLSTAD: So I'm not sure what my friend's looking for
35 in --
36
37 THE COURT: Well --
38
39 MR. MOLSTAD: -- terms of our position.
40
41 THE COURT: And he's looking for some exchanges with the

1 federal government --

2

3 MR. MOLSTAD: You know --

4

5 THE COURT: -- in 1985 time frame that --

6

7 MR. MOLSTAD: Yeah, my --

8

9 THE COURT: -- a -- apparently your client --

10

11 MR. MOLSTAD: -- my information from my client is that they
12 provided all of the documentation that they had related to the transfer of the assets from
13 '82 to '85 to the Trustees, and that they --

14

15 THE COURT: Yes.

16

17 MR. MOLSTAD: -- have made those available to my friends. So
18 that's my information. I'm not sure what he's looking for. But, you know, one of the
19 things that you have to keep in mind in terms of the Public Trustee, read their applications
20 that I gave you in that book. Take the time to go through and see how Draconian and
21 ridiculous the positions that they have taken in the past are.

22

23 THE COURT: He's -- he's looking for something much
24 narrower now.

25

26 MR. MOLSTAD: Yeah. No, I understand that. But as I -- as you
27 said, Sir, this is a legal issue. And it's a legal issue that is extremely important. And we're
28 involved because you directed our attention to it. We have only become involved in this
29 matter when something has a -- an extreme effect in terms of the Sawridge First Nation
30 when the Maurice Stoney matter came before the Court when he was applying essentially
31 for membership. We intervened in that and were granted intervenor status. We're back
32 again to ask for intervenor status because you have directed the parties that are
33 participating in this matter to address an extremely important issue that no one has
34 addressed up to this point. And I thank you for at least identifying that issue because it
35 should be addressed, and all of the participants should be able to speak to it in terms of a
36 legal question.

37

38 In terms of what he is looking for, in terms of documents, I -- I have to admit, I have not
39 reviewed every document in the production that the Public Trustee has produced. But I
40 have been told by my client that they gave everything that they had that was not
41 privileged. So that's where we are.

1
2 THE COURT: Okay. So the Trustees have the documents.

3
4 **Submissions by Ms. Hutchison**

5
6 MS. HUTCHISON: My Lord -- I'm sorry, apologies. Quickly on
7 documents, My Lord. I do think it's important that the Court be aware of a couple of
8 documents in our brief. We have got at tab N of the OPGT's submissions, there's a
9 with-prejudice exchange as a result of Ms. Osualdini's original question about access to
10 the evidence of Maurice Cullity. And -- and, frankly, My Lord, the suggestion that there
11 is still privilege over Maurice Cullity's file is extremely questionable. If the Court goes to
12 Mr. Molstad's own questioning of Paul Bujold in 2016, he takes Mr. Bujold through the
13 evidence and information he obtained from Mr. Cullity. If Sawridge First Nation was
14 worried about maintaining privilege over Mr. Cullity's files, if they felt that there was
15 something in those files that shouldn't be divulged, why would they have taken Mr.
16 Bujold directly to the conversations he had? He's not a client of Mr. Cullity's in the way
17 that Sawridge First Nation was.

18
19 And in Ms. Bonora's letter of October 15th, which we have got here at tab N, My Lord,
20 there's a very clear invitation to Sawridge First Nation to speak to whether or not they will
21 waive the privilege over those documents. And Mr. Cullity was the architect of the very
22 transfer that you're concerned about, My Lord. It's the essence of what you want us to
23 speak to about in November.

24
25 THE COURT: Yes.

26
27 MS. HUTCHISON: And for Sawridge First Nation to be before you
28 and say, This was our clear stated purpose in 1985, we are now switching positions, but
29 we will --

30
31 THE COURT: Yes.

32
33 MS. HUTCHISON: -- not share with you the available
34 documentation about why the transfer was structured that way, why the '85 Trust was
35 created that way, but we will question Trustee witnesses in and around that privileged
36 information. My Lord, that's not a helpful intervention. And --

37
38 THE COURT: Yes.

39
40 MS. HUTCHISON: -- although we certainly disagree with the Court
41 about the necessity of the intervention, if it's going to happen, it needs to happen in a way

1 that gives this Court the best chance to make an accurate decision based on full
2 information and evidence about what --

3

4 THE COURT: Yes.

5

6 MS. HUTCHISON: -- really happened, My Lord. Thank you.

7

8 THE COURT: Okay. The Trustees' position, just with respect
9 to documents. I'll -- I want to go to --

10

11 MR. SESTITO: Yeah.

12

13 THE COURT: -- Ms. Twinn's counsel.

14

15 **Submissions by Mr. Sestito**

16

17 MR. SESTITO: Yeah, yes, My Lord. The Trustees have made
18 available earlier in this proceeding -- I can't give you an exact date, but we have made
19 available a binder of material that we were able to find from everything that's been
20 produced in this litigation with respect to the transfer. That would have contained
21 whatever material historically we had received from the First Nation. And in order to
22 create that binder, we simply looked for the time frame and anything that could touch this
23 transfer issue that we had. We made it available to the parties, not -- not by way of a
24 formal affidavit. It's material that has already been produced in this litigation, but we did
25 provide that binder of material to the parties with respect to this transfer issue.

26

27 THE COURT: Okay. Good. Thanks.

28

29 **Submissions by Mr. Faulds**

30

31 MR. FAULDS: And -- and, My Lord, just to be clear, we -- we
32 do not dispute in any sense that the Trustees have provided everything that they have, you
33 know, for the -- we're now talking about what the Sawridge First Nation has.

34

35 THE COURT: Sure. What -- what -- what you're really asking,
36 Mr. Faulds, is if -- if I were to -- to firstly agree that there should be an intervention and
37 secondly agree that there should be some documents produced, we would be asking the
38 Sawridge First Nation to go back 35 years to look for scraps of paper that might or might
39 not exist and do it all within a span of time that would permit it to be delivered to you so
40 briefs could be delivered to me so that we could proceed on November 27th. That --
41 that's a tall order --

1
2 MR. FAULDS: Yeah, I --
3
4 THE COURT: -- but --
5
6 MR. FAULDS: -- I don't disagree.
7
8 THE COURT: -- it --
9
10 MR. FAULDS: I -- I guess the -- the -- the question is, is it -- is
11 it necessary and appropriate thing to happen, and our submission is, yes, it is.
12
13 THE COURT: Well, is it so important to you that we'll put the
14 application off to the spring and give them a reasonable opportunity to gather together the
15 materials only to find out perhaps that they can't find anything? Is -- is -- is that what we
16 want to do? Or is it time to get on with it and do the best we can with what information
17 we have?
18
19 MR. FAULDS: My Lord, yes, it is time to get on with it.
20
21 THE COURT: Good. Let's get --
22
23 MR. FAULDS: No --
24
25 THE COURT: -- on with it, then.
26
27 MR. FAULDS: -- but -- but -- but in saying that, I -- I do have to
28 observe, we -- we didn't have an intervention application until the 26th of September --
29
30 THE COURT: Yes.
31
32 MR. FAULDS: -- I mean, which is only two months before the
33 deadline, you know, on an -- on an issue which was raised by --
34
35 THE COURT: Right. But we set --
36
37 MR. FAULDS: -- the Court in April.
38
39 THE COURT: -- we set the timeline for the filing of that
40 motion, and --
41

1 MR. FAULDS: That's -- that's correct.
2
3 THE COURT: -- timelines have been met.
4
5 MR. FAULDS: That -- that's -- that's correct, and --
6
7 THE COURT: Well, hopefully gearing up to -- I mean, we set
8 those timelines that we would be ready for November 27th. We didn't --
9
10 MR. FAULDS: That was the --
11
12 THE COURT: -- contemplate that there would be this
13 application today. Originally it was going to be a situation where we would determine if
14 it was going to go by consent, and, if not, whether I could just do it by way of --
15
16 MR. FAULDS: Right.
17
18 THE COURT: -- paper.
19
20 MR. FAULDS: Right. Right. Right. And I -- and --
21
22 THE COURT: But here we are today.
23
24 MR. FAULDS: We are. And -- and -- and, My Lord, I -- I'm --
25 I'm compelled to say that -- that this question about document production was raised
26 when we set the -- when we set the schedule. And I -- and -- and I did --
27
28 THE COURT: You did raise it --
29
30 MR. FAULDS: -- advise the Court --
31
32 THE COURT: -- I -- I -- I do remember that, yes.
33
34 MR. FAULDS: -- that -- that -- that it was something that we
35 anticipated --
36
37 THE COURT: Yes.
38
39 MR. FAULDS: -- would likely be required.
40
41 THE COURT: Okay. Good. Thanks.

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Submissions by Ms. Osualdini

MS. OSUALDINI: Thank you, My Lord. For the record, Osualdini, first initial 'C.' We're counsel to Catherine Twinn. Sir, my submissions in terms of the SFN's application for intervention are going to be brief. Simply put, we are supportive of the OPGT's position. We agree that in terms of the test, the SFN does not have a direct interest in the outcome of this application, they are not a beneficiary of the Trust, and they do not bring any special expertise or perspective to this matter, and they've certainly demonstrated that their information is unreliable in terms of these issues.

Now, turning to the issue that's re -- that we've been discussing in terms of the order -- the transfer order, the Court's directed us in November to ask what is the effect of that order? And I would submit to you, My Lord, that is a legal question. What the parties are speaking to now is Step 2, that if the Court says that the effect of that order is not to confirm that the '85 Trust is the Trust with which to deal, now that becomes a factual question.

THE COURT: Well, that's a very good point. And --

MS. OSUALDINI: And --

THE COURT: -- and so to go back to Mr. Faulds' position, maybe we ought to be considering these applications separately, deal with the legal -- lee -- deal with whether or not intervention should be given for the legal issue, depending on the outcome of that, entertain another application if necessary. That might involve something that might require documents like --

MS. OSUALDINI: Right. Because -- and that was going to be my point about Mr. Cullity's files --

THE COURT: Yes.

MS. OSUALDINI: -- frankly at this point Mr. Cullity, as far as I'm aware from my client, he's still alive. He's with us. He's a person who could really speak to these issues. And we're speaking about privilege over Mr. Cullity's files because he's both counsel to the Trustees and to the First Nation at the relevant time. And we have never been given an opportunity to challenge whether there is privilege over that file, because we want to have the best information before the Court in the event that we do get to Step 2 in this process.

1 THE COURT: Well, was -- he was acting as counsel for
2 Sawridge First Nation.
3
4 MS. OSUALDINI: And the Trustees.
5
6 THE COURT: And the Trustees?
7
8 MS. OSUALDINI: Yeah, sorry, the -- the letter from Ms. Bonora
9 that was referred to by my --
10
11 THE COURT: If he's --
12
13 MS. OSUALDINI: -- friend --
14
15 THE COURT: -- acting for two clients, both clients are going
16 to have to waive privilege in order for --
17
18 MS. OSUALDINI: Right.
19
20 THE COURT: -- permission to be waived.
21
22 MS. OSUALDINI: Because in Shelby's affidavit we have the letter
23 from the Trustee's counsel taking position on this issue.
24
25 THE COURT: Affidavit of Shelby Twinn?
26
27 MS. OSUALDINI: Yeah, it's the -- oh, sorry, it's the responding
28 brief of the Office of the Public Guardian and Trustee, and it's tab N.
29
30 THE COURT: Okay.
31
32 MS. OSUALDINI: Because at tab N you can see the
33 correspondence that was provided to our office --
34
35 THE COURT: Yes.
36
37 MS. OSUALDINI: -- where the Trustees are saying that, No, they're
38 asserting solicitor-client privilege over Mr. Cullity. Because initially, as I had raised at
39 the prior case management meeting, we were considering calling viva voce evidence, you
40 can hear from the man himself on what happened. The Trustees are objecting to that.
41 And then they also alerted us to the fact that --

1
2 THE COURT: Well, isn't that the end of it, then?
3
4 MS. OSUALDINI: Well, I think we might -- if we get to Step 2,
5 because, frankly, if Step 1 says, No, this order means what we all thought it meant at the
6 time, this all becomes a moot point.
7
8 THE COURT: Okay.
9
10 MS. OSUALDINI: Because we -- as of right now, we have an
11 unchallenged order. Nobody's here suggesting that it was an improperly granted order of
12 the Court. We're simply defining what it means.
13
14 THE COURT: That's right. No, I -- the order was there.
15
16 MS. OSUALDINI: Right.
17
18 THE COURT: It hasn't been taken away.
19
20 MS. OSUALDINI: Right. But I think we need to have a process
21 that in the event we have to get to Step 2 to be challenging these positions on privilege,
22 because it appears that there is information that potentially is relevant. We aren't going to
23 decide that today, but we need to have that process from the Court.
24
25 THE COURT: Okay.
26
27 MS. OSUALDINI: So in terms of the -- of the SFN's intervention
28 application, in terms of direct interest in the outcome, they weren't a signatory to the
29 order, they specifically didn't want to be. Did they bring any special expertise to the legal
30 question of what the order means? I submit not.
31
32 THE COURT: Okay.
33
34 MS. OSUALDINI: But I won't belabour that point. I wanted to
35 focus on the application of Shelby for intervention status. So, Sir, it will probably come
36 to you as no surprise that we're very supportive of Shelby's application for intervention
37 status. My client would like to see the beneficiaries have a voice before the Court given
38 that the outcome of these matters could be very prejudicial to their address.
39
40 I would draw to the Court's attention that the necessity for beneficiary participation in
41 these proceedings was recognized by the Court of Appeal in their December 2017

1 decision. The Court will likely recall that this was an appeal by Shelby and others
2 seeking party status in these proceedings. While the Court of Appeal did not grant party
3 status, they did recognize that a procedure should be implemented for beneficiaries and/or
4 potential beneficiaries to participate in this litigation either individually or as
5 representatives of a particular category of beneficiary. And this decision you can find at
6 tab 3 of Shelby's written submissions, at paragraph 22.

7
8 And I would submit, Sir, that this is the foundational basis for Shelby's intervention. The
9 Court of Appeal has directed that beneficiary participation must be considered, albeit not
10 in party form. And we'd also --

11
12 THE COURT: Yes, they made it clear that adding all
13 beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither
14 necessary nor advisable.

15
16 MS. OSUALDINI: As parties. But they did -- they were very clear,
17 though, in paragraph 22 to state a second issue is what procedure will be implemented for
18 beneficiaries to participate --

19
20 THE COURT: Sure.

21
22 MS. OSUALDINI: -- so they did --

23
24 THE COURT: Wasn't that what the participation order was all
25 about, though?

26
27 MS. OSUALDINI: Right. But now, as we've all discussed, the
28 landscape has shifted --

29
30 THE COURT: Yes.

31
32 MS. OSUALDINI: -- I think I've heard many counsel today
33 acknowledge the fact that it shifted. And I think it shifted in terms of that participation
34 order as well.

35
36 THE COURT: Yes.

37
38 MS. OSUALDINI: So the issue of how beneficiaries are to
39 participate is live and well and recognized by the Court of Appeal. And I would submit to
40 you, Sir, that the Court of Appeal also left open the possibility for advance indemnity
41 funding for these beneficiaries --

1
2 THE COURT: Yes.
3
4 MS. OSUALDINI: -- that that -- that is left open by this decision.
5
6 THE COURT: Okay.
7
8 MS. OSUALDINI: So, Sir, Shelby is seeking to define her
9 participatory rights through an intervenor role on these jurisdictional applications. As
10 we've said, the landscape has changed since January. The issues before the Court now,
11 especially if we start getting to Step 2 of this process we have talked about, these are the
12 potential to form final relief. Earlier you said we're not heading to a six-week trial. Well,
13 in -- in some ways we are because we're heading into a landscape that could lead to final
14 relief. So this is the time -- this is a very, very crucial time for these beneficiaries. And if
15 the relief sought by the Sawridge First Nation, if they get intervenor status and -- and what
16 they're seeking is granted, that is fatal to Shelby's interest in this Trust.
17
18 The common-law test for --
19
20 THE COURT: Well, it's -- if -- if they get stat -- okay, well --
21
22 MS. OSUALDINI: No, Sir, not if they get intervenor status but if
23 they get the relief that they're seeking to obtain through that status --
24
25 THE COURT: Right, but it's --
26
27 MS. OSUALDINI: -- it becomes fatal to Shelby's interest.
28
29 THE COURT: They -- they're not -- Sawridge First Nation is
30 not looking for relief.
31
32 MS. OSUALDINI: No, they are.
33
34 THE COURT: They're -- they are providing their argument
35 with respect to the issue I have raised.
36
37 MS. OSUALDINI: I think my friend is going to pass me that, but,
38 no, Sir, in their application for intervention in terms of the jurisdictional question that we
39 are supposed to be arguing in April --
40
41 THE COURT: Yes.

1
2 MS. OSUALDINI: -- they're actually seeking specific relief of the
3 Court. They are seeking that the Court is -- the Court -- Court's jurisdiction is restricted
4 to finding that the beneficiaries are the Band's or the First Nation members. And my
5 friend has kindly passed to me the application of the Sawridge First Nation --
6
7 THE COURT: Right, but --
8
9 MS. OSUALDINI: -- for intervention --
10
11 THE COURT: -- but --
12
13 MS. OSUALDINI: -- and -- and I refer you to paragraph 1(a)(5)
14 where they are seeking specific relief.
15
16 THE COURT: Okay.
17
18 MS. OSUALDINI: My -- my point, Sir, to the Court, though, is this:
19 What -- what is coming down in these applications that are building have the potential to
20 be fatal to Shelby's interest. And that -- and that's the point I'm trying to make.
21
22 THE COURT: Well, her and many others as the --
23
24 MS. OSUALDINI: And many others.
25
26 THE COURT: -- as the schedule have -- has provided. But
27 looks to me like the Office of the Public Trustee has those people firmly in mind in terms
28 of their submissions.
29
30 MS. OSUALDINI: Well, those are the minors, Sir. The adults have
31 been lost, I would --
32
33 THE COURT: But --
34
35 MS. OSUALDINI: -- I would argue --
36
37 THE COURT: -- but --
38
39 MS. OSUALDINI: -- in this process.
40
41 THE COURT: -- it -- it's the same issue, though, isn't it?

1
2 MS. OSUALDINI: Well, Sir, as -- as we're seeing, perhaps there's
3 multiple perspectives to this problem --
4
5 THE COURT: Yes.
6
7 MS. OSUALDINI: -- I certainly -- my client certainly doesn't
8 profess to know them all.
9
10 THE COURT: Yes.
11
12 MS. OSUALDINI: And there could be different view points, and --
13
14 THE COURT: Yes.
15
16 MS. OSUALDINI: -- frankly, there could be different ways to solve
17 this problem. I think actually in that Court of Appeal decision Deborah Serafinchon was
18 an individual seeking party status. She is the daughter of the late Chief Walter Twinn.
19 And she was offering -- trying to offer another perspective to this. She doesn't qualify as
20 an '85 beneficiary, but if the Court is going to amend this definition, there's different ways
21 to do it. So I think a lot of the adult beneficiaries --
22
23 THE COURT: Yes.
24
25 MS. OSUALDINI: -- or potential beneficiaries which are
26 recognized by the participation order --
27
28 THE COURT: Yes.
29
30 MS. OSUALDINI: -- could bring different views to this Court.
31
32 So turning to the common-law test for intervenor status, it allows the Court to grant an
33 intervenor status to those who would be specifically affected by the outcome of the
34 decision. I don't think that there's any duty that Shelby will be specifically affected by the
35 outcome. And, as I've said, could be seriously po -- or prejudiced by it.
36
37 I note that in the Trustees' response to Shelby's application they suggest that the
38 participation order issued in January could be amended to allow oral submissions with
39 leave of the Court. And I would just -- I would just note that the participation order only
40 pertains to the jurisdiction application that was supposed to be argued in April. The --
41

1 THE COURT: Yes.

2

3 MS. OSUALDINI: -- application by Shelby before the Court today
4 is seeking intervenor status on that issue and also on the transfer issue --

5

6 THE COURT: Yes.

7

8 MS. OSUALDINI: -- and she's wanting the same ability as the other
9 parties to make written and oral submissions. So I would submit to the Court the time to
10 decide her ability to make oral submissions is now and not at a future date as suggested by
11 the Trustees.

12

13 Sir, there have been submissions or at the very least suggestions from the Trustees that
14 they represent Shelby's interests and thus Shelby's participation is unnecessary. With
15 respect, if the Trustees are representing Shelby's interests and the interests of other non
16 SFN members who happen to all -- who happen to be '85 beneficiaries, then those persons
17 are in serious trouble. The Trustees have made it clear from the outset of this litigation
18 that their goal is to amend the definition to only include First Nation members. That is
19 found in the affidavit of Paul Bujold filed September 13th, 2011, at paragraph 33. They
20 have pulled no punches in what the objective is.

21

22 On a couple of occasions in this litigation, which have been referred to by my friends in
23 their submissions, the Trustees have made proposals to resolve this litigation and with the
24 hope that it would, and each of those proposals would have the effect of Shelby losing her
25 rights. For instance, they filed an application on June 12th, 2015. That was referred to by
26 Ms. Hutchison seeking to amend the definition and grandfathering rights for a select few
27 of minor -- a -- affected minor beneficiaries. And those beneficiaries did not include
28 Shelby. And that is found -- that proposal and application is found at tab G of Shelby's
29 affidavit.

30

31 Then once again in 2016 the Trustees presented a distribution proposal to the Court that
32 requested once again the definition -- or proposed the definition be changed to
33 membership in the First Nation and pro -- offered that any minor beneficiaries affected
34 could simply apply for membership in the First Nation. We can see from Shelby how
35 effective that that solution really is.

36

37 And, in fact, these Trustees have quite candidly admitted in the course of these
38 proceedings that they accept that their preferred outcome to this litigation would lead to,
39 and I quote, "collateral damage," and I quote, "winners and losers" amongst the current
40 beneficiary group. And that's found in the transcript of questioning of Paul Bujold. That's
41 referenced in Shelby's affidavit to the cite, and that's on the court file.

1
2 And, further, these Trustees admitted in that same questioning that they haven't taken
3 steps to fully identify the existing 1985 beneficiary group. So I'd submit to you, Sir, that it
4 is very hard to represent the interests of a group that you don't even know who they are.

5
6 So in sum, Sir, these Trustees do not represent Shelby's interest, and we fully agree with
7 her on that front.

8
9 And I suspect that you might hear from my friends that Catherine Twinn is advancing
10 those interests. And while it is true that Catherine is acting as -- she has party status and
11 it's understood that she's acting as though she were a Trustee even show she has now
12 resigned, and she believes that -- she believes these putting forward positions that are
13 protective of the existing beneficiary class, I would make two points to the Court on this:
14 First, Catherine is self-funded in this litigation. She is not being indemnified by the assets
15 of the Trust. And that is contrary to the Trustees of this Trust that have access to Trust
16 assets to fund their -- their legal positions. And, Sir, no doubt her ability to participate in
17 these proceedings is affected by that. And I think that's, you know, become more
18 apparent. You might have noticed in the questioning of Darcy Twinn, she was
19 self-represented on that questioning and did her own questioning. Access to legal funding
20 is an issue. It's very expensive.

21
22 And, secondly, my client doesn't presuppose that she's aware of all of the interests and
23 positions that the beneficiaries may put forward. I'd submit that as part of advocating for
24 beneficiary interests, it's a necessary corollary to allow beneficiaries to come before the
25 Court and present views when they wish to do so. We should not be stopping them from
26 doing that. Because -- and I give you an example of this, Sir. This isn't a situation where
27 the Trustees of the Trust are -- have brought litigation to seek a -- a debt claim against an
28 unrelated party. In that sort of context we don't need all the beneficiaries at the table,
29 talking about how they, you know -- their views on the -- on the collection of the debt.
30 This is very different. This is advice and direction of the Court on an issue that could take
31 away their beneficial status. And in a situation like this, beneficiaries should be able to
32 come to the Court and put their views to the Court and not have to rely on representatives
33 to speak for them, and especially in a situation where those representatives are trying to
34 take away their status.

35
36 And, Sir, just quickly to point out in terms of the transfer order, I do note that Shelby was
37 represented by Nancy Golding of BLG when that order was entered in August. So I -- she
38 may have a position to put forward on her understanding of that order that would be
39 relevant for Step 1 of this process.

40
41 And, Sir, you have made some suggestion that the OPGT might be covering the interests

1 of Shelby. And I just --

2

3 THE COURT:

Not -- not covering her interest but representing

4 people who --

5

6 MS. OSUALDINI:

Similar.

7

8 THE COURT:

-- share the same interest.

9

10 MS. OSUALDINI:

Sure. And I just -- just to be clear on that, the

11 OPGT's mandate was very restricted by, I believe it was, Sawridge Number 3. And I

12 think that would be very dangerous to infer or to deny Shelby access to the Court based on

13 party who has a very restricted status or restricted scope in this litigation.

14

15 THE COURT:

But they tell me they're acting for Shelby's

16 sister --

17

18 MS. OSUALDINI:

Right.

19

20 THE COURT:

-- who is in the identical position that Shelby's

21 in. And they're fighting hard for the sister.

22

23 MS. OSUALDINI:

Right. But the positions they may advance only

24 have the minors in mind. Because, for instance, we can see how this could conflict with

25 the settlement proposal that was put forward by the Trustees, where they say to the

26 OPGT, We'll grandfather your people if you agree to our definition. That's how people

27 like Shelby could -- should -- could be affected.

28

29 THE COURT:

That's why you can't do settlements of trusts,

30 right? That's the reason --

31

32 MS. OSUALDINI:

That's very true.

33

34 THE COURT:

-- we're here.

35

36 MS. OSUALDINI:

Very true, Sir.

37

38 THE COURT:

You -- you can't -- this isn't like a debt claim

39 where you can go out and make whatever deal you want with the other side. You -- you

40 can't do that with a --

41

1 MS. OSUALDINI: Right.
2
3 THE COURT: -- trust.
4
5 MS. OSUALDINI: But -- and to speak to that point, Sir, in order for
6 the Court to make a deal for us, if you will, all the voices --
7
8 THE COURT: Well, I don't know if I can make a deal for you
9 either --
10
11 MS. OSUALDINI: Right. But in order to --
12
13 THE COURT: -- which -- which really --
14
15 MS. OSUALDINI: -- make a decision --
16
17 THE COURT: -- leads to the bigger -- the bigger issue is, are
18 you in the right forum? Is -- is the -- is there -- is the real proper way to solve this -- I -- I
19 am using a improper term, but mess, is -- is the way to solve this legislative as opposed to
20 a series of never-ending legal proceedings?
21
22 MS. OSUALDINI: I'm not -- I'm not sure I follow, Sir.
23
24 THE COURT: The legislature can cure problems that the
25 Courts cannot.
26
27 MS. OSUALDINI: M-hm.
28
29 THE COURT: And I'm just wondering what -- as I look at this,
30 every time I turn a corner, there are more issues that put road blocks up in front of me.
31 Just I'm speaking off the top of my head now. But I just wonder whether you're in --
32 you're in the right place.
33
34 MS. OSUALDINI: I suspect, Sir, you're -- you're getting more into
35 the jurisdictional questions given that there's a bit of a legislative confinement --
36
37 THE COURT: Well, the --
38
39 MS. OSUALDINI: -- and the --
40
41 THE COURT: -- legislature can do lots of things that --

1
2 MS. OSUALDINI: Right.
3
4 THE COURT: -- the Courts can't.
5
6 MS. OSUALDINI: Right.
7
8 THE COURT: Courts are restricted in terms of what we can do.
9
10 MS. OSUALDINI: Understood, Sir.
11
12 THE COURT: Well...
13
14 MS. OSUALDINI: So, Sir, I don't get the sense really that it's
15 Shelby's participation in making oral or written submissions that's really the -- the
16 controversial point on her application. My sense of reading the parties' submissions is
17 that it's her funding from the Trust. That -- that's really the more controversial point.
18
19 And we read Shelby's submissions, and we concur with her that there is a very significant
20 power imbalance that is happening right now in these proceedings. The Trustees and the
21 Sawridge First Nation are well-funded participants. They have access to far more
22 resources than Shelby Twinn has. I don't think anyone's going to debate that. The minor
23 beneficiaries are represented by the Office of the Public Guardian and Trustee, which is
24 also indemnified through Sawridge Number 1 and the confirmation by the Court of
25 Appeal.
26
27 THE COURT: Yes.
28
29 MS. OSUALDINI: As I'm sure you'd agree, Sir, this is very
30 complex, and it's very expensive litigation. And I would submit to you, Sir, that it is
31 unfair to Shelby and other adult beneficiaries who may find themselves in her shoes who
32 wish to join this litigation and are left to navigate it alone.
33
34 I submit, Sir, that the Court should ensure that the ability of Shelby and anyone who may
35 join a class of beneficiary with her is able to participate on equal footing as the other
36 parties. Effective participation requires legal counsel in this process. Shelby points to
37 case law to support that what the advice and direction of the Court is sought in relation to
38 a trust, which is what's happening here, the parties' legal fees are typically paid from the
39 trust fund. And we would submit that is the case here. Her beneficiary status is being
40 sought to be taken away from her. She has a direct interest. She, I would argue, has a
41 right to participate, and those are costs which should come out of the trust fund. And we

1 would submit that that needs to be in the form of advance funding, because otherwise, as
2 you can see, Shelby's going to be trying to navigate this alone. And that is far too much to
3 place on her. She needs legal counsel.
4

5 And as I said earlier, Sir, I believe that the Court of Appeal left this very issue open for
6 determination and case management, and it has -- the door has not been closed. And I
7 would submit, Sir, that this -- this is especially so in light of the apprehension of conflict
8 that is existing in this situation. Not only do we have the Chief of the First Nation on one
9 hand seeking to end the 1985 Trust one way or the other; he's also acting as a Trustee of
10 that Trust who is apparent -- who's tasked with upholding and defending the Trust. We
11 have that conflict of interest. But, in addition, three of the five Trustees are Band
12 members. My client, for that matter, is a Band member, and certainly the councillors that
13 Mr. Molstad represent are Band members. And they would all -- they would all
14 personally benefit if the definition is changed to Band membership, because then it's only
15 them and 4 -- 44 -- there's 45 Band members, people that would be able to share in the
16 wealth of this Trust. So they all actually have personal interests in seeing that outcome.
17

18 So I'd submit in light of that context and the app -- the apprehension of conflict that exists
19 here, that is a heightened reason why the Court should advance -- advance -- should
20 award advance funding and indemnity funding to Shelby Twinn.
21

22 THE COURT: So if I were to do that, when would we argue the
23 asset transfer issue? When do you think we would do that?
24

25 MS. OSUALDINI: Oh, in terms of when Shelby could obtain legal
26 counsel?
27

28 THE COURT: Yes.
29

30 MS. OSUALDINI: I don't want to speak on behalf of Shelby,
31 because I -- I don't know the answer, but I'm --
32

33 THE COURT: My --
34

35 MS. OSUALDINI: -- I'm thinking that it's probably quite quickly.
36

37 THE COURT: My guess is November wouldn't be happening.
38

39 MR. SESTITO: My -- My Lord, on this point I -- and this would
40 have been the outset of my submissions, and I don't mean to interrupt my friend, but the
41 Trustees are going to be taking a position that this notion of advance costs was not part of

1 the initial application. We received notice in the written submissions that were filed, and
2 if we're going to seriously consider the issue of advance costs, the Trustees would like to
3 supplement with written submissions on this very significant issue to the Trust that has
4 been before the Court multiple times with respect to this specific litigant. The wording of
5 the application is that the 1985 Trustees be required to pay legal fees associated with the
6 representation out of the funds. We took that to mean that costs that she was asking for,
7 solicitor/client costs at the end, the issue of advance costs and not come up until her
8 written submissions. And so we would like the opportunity -- that is a significant remedy,
9 and it is a remedy that has been discussed by multiple parties in this litigation with
10 extensive written materials. If the Court is seriously considering that, we would like the
11 opportunity to supplement on that point. And I just rise because we were in the middle of
12 discussing that, so --

13
14 MS. OSUALDINI: Sure.

15
16 MR. SESTITO: -- I'd like to say that.

17
18 MS. OSUALDINI: And, Sir, I'd just submit to the Court, I'm not
19 sure if you have a copy of Shelby's application before you.

20
21 THE COURT: Yes, it's here someplace. I'm not sure where I --

22
23 MS. OSUALDINI: Yeah. It's at paragraph 1(b) where she seeks
24 to -- that the 1985 Trustees be required to pay the legal fees associated with her
25 representation out of the 1985 Trust funds, and then in a separate paragraph asked for
26 costs of this application on a full indemnity basis. Sir, this is actually frankly all the more
27 reason why Shelby needs indemnity and a lawyer --

28
29 THE COURT: Yes.

30
31 MS. OSUALDINI: -- because if we're going to critique her
32 pleadings, this is why she needs a lawyer.

33
34 MR. SESTITO: I -- I'm sorry, My Lord, the -- the issue of
35 advance costs is a significant issue. It has been raised by this litigant before. This is not
36 simply an issue over -- over wording. This is a significant issue that -- that we really need
37 additional submissions on.

38
39 THE COURT: Okay.

40
41 MS. OSUALDINI: Well --

1
2 THE COURT: Thank you.
3
4 MS. OSUALDINI: And -- and, Sir, I suppose if that's going to be
5 the case, then November would not be happening --
6
7 THE COURT: Yes, yes.
8
9 MS. OSUALDINI: -- by the time we do that.
10
11 MR. SESTITO: So, to be clear, we can do this in writing and
12 work around Your Lordship's schedule.
13
14 MS. OSUALDINI: Those are my submissions, Sir.
15
16 THE COURT: Okay. Thank you very much.
17
18 Anything arising from any of that? I guess we haven't heard from the Trustees.
19
20 **Submissions by Mr. Sestito**
21
22 MR. SESTITO: I -- I'm -- I'm sorry, My Lord, I'm sure you're not
23 eager to hear too much from me. And so I will be --
24
25 THE COURT: No, I'm prepared to hear whatever you'd like to
26 say.
27
28 MR. SESTITO: I appreciate that, My Lord. I -- I will -- mindful
29 of the time. My Lord, I -- I will be brief, and I may be making a few references to the
30 brief of the Office of the Public Trustee and Guardian --
31
32 THE COURT: Okay.
33
34 MR. SESTITO: -- the brief of Shelby Twinn and then the brief
35 of the Sawridge Trustees. I will not refer you to anything else except for those three
36 briefs.
37
38 THE COURT: Okay.
39
40 MR. SESTITO: And I will be --
41

- 1 THE COURT: I will have them --
2
- 3 MR. SESTITO: -- brief.
4
- 5 THE COURT: -- I'm ready.
6
- 7 MR. SESTITO: So, My Lord, with respect to the brief of the
8 OPGT, we just --
9
- 10 THE COURT: Yes.
11
- 12 MR. SESTITO: -- have one comment. If you go to paragraph 32
13 of their brief --
14
- 15 THE COURT: Yes.
16
- 17 MR. SESTITO: -- and this also dovetails with the submissions
18 of my friend, Ms. Osualdini, and -- and Ms. Twinn herself -- Ms. Shelby Twinn herself.
19 Just to be clear on the record, the -- the OPGT states in paragraph 32, second sentence, (as
20 read)
21
- 22 The OPGT notes that this, being the SFN's argument, is the preferred
23 remedy already sought by the 1985 Trustees and their application filed
24 January 9, 2018, and then the brief on behalf of the 1985 Trustees on
25 March 29, 2019 argued in favour of this outcome.
26
- 27 My Lord, there's a lot of history on this file. And I think you and I both came onto the file
28 around the same time, so I don't wish to belabour any of the past submissions. But just to
29 be clear for everyone here, the Trustees clarified for the record that an amendment to the
30 definition would be an incomplete remedy, as grandfathering would remain an issue.
31 And, furthermore, the Trustees have never advocated that the assets of the 1985 Trust
32 ought to be governed by the 1982 Trust deed. We need to be clear on that point. It was
33 an -- it was an important point raised by Your Lordship, the Trustees have not advocated
34 that we are in favour of that outcome. And, again, at the end of the day --
35
- 36 THE COURT: So you and the Public Trustee will adopt a
37 similar position, then --
38
- 39 MR. SESTITO: Well, I -- I suspect --
40
- 41 THE COURT: -- on that point.

1
2 MR. SESTITO: -- I suspect, My Lord, and you will have our --
3 our brief by the end of the week, we're hoping, but I suspect that the Trustees' position
4 will be rather neutral. We are in a bit of an awkward position since you're talking about
5 this essential issue, that, yes, we will not be arguing that the assets themselves are not
6 held in the 1985 Trust. We obviously cannot make that specific argument on the record.

7
8 THE COURT: Well, they are there.

9
10 MS. OSUALDINI: M-hm.

11
12 MR. SESTITO: That -- that's right.

13
14 THE COURT: As a matter of fact, they are there.

15
16 MR. SESTITO: That's right. That's right, My Lord.

17
18 THE COURT: What are the -- what terms are they being held
19 under?

20
21 MR. SESTITO: And -- and --

22
23 THE COURT: That's the question.

24
25 MR. SESTITO: -- and I appreciate that, My Lord. And I -- I
26 suspect on that we will not -- we will not have much to add that hasn't already been
27 presented in our submissions. There are plenty of other voices at the table on that --

28
29 THE COURT: Yes.

30
31 MR. SESTITO: -- on that point.

32
33 In any event, My Lord, with -- with respect to the application of Shelby Twinn, the
34 Trustees have said that we do not oppose her participation in general terms. My friend
35 points out that the participation order may be technically geared towards the hearing of
36 the jurisdiction application. I -- I had interpreted these issues as arising out of that
37 application, and we had through our litigation plans and through our planning of
38 submissions contemplated that the same rights would apply to the beneficiaries for the
39 hearing of -- of this issue on November the 27th. Indeed, it was our contemplation when
40 this interlocutory application was to be heard that we would also give the same right to
41 the beneficiaries for their five-page submission. If Ms. Twinn is looking for an added

1 voice at the table, that she wishes to make oral argument, we believe that that is
2 reasonable. We -- and -- but we again caution you, My Lord. You've -- you've seen in
3 this litigation what has happened when we raise a new issue. We -- we tend to -- we tend
4 to go off course a lot. We need to remain focused in this litigation. There have been
5 additional parties applying for intervention many times over the course. In fact,
6 Ms. Twinn partic -- Ms. Twinn's participation in this action were the subject of two -- two
7 items, one Sawridge 5, and one, the participation order which she was a signatory to and
8 which she had a legal counsel pro -- prepare in the negotiating of.

9
10 So I just -- I make -- I make that point, My Lord. I certainly did not read the participation
11 order as not applying to these new steps that would come through. If we need another
12 order to satisfy everyone at the table, I'm fine with that. I don't think that that would be
13 necessary. I would think that counsel could just agree that they would have those
14 participatory rights as extending from that order.

15
16 My Lord, one -- one other point, and this is where I know you have got a lot of material,
17 and I just want to flag for you in our brief at paragraph 14 -- I don't need to read it into the
18 record, but I flag to you, we quote paragraph 18 of the Alberta Court of Appeal's decision
19 in Sawridge 5. And that is with respect to the fact that beneficiary -- that Ms. Twinn is
20 represented by the Trustees in this matter. It is a matter of law that she is represented by
21 the Trustees in this matter. Her interests are also canvassed by Catherine Twinn, and as
22 you saw my friend was very competent in her submissions on her behalf.

23
24 With respect to the Public Trustee, it is acknowledged that Ms. Twinn is not, as you -- as
25 you've pointed out, although she is not a minor, her in -- her sister is represented by the
26 Public Trustee and has --

27
28 THE COURT: Yes.

29
30 MR. SESTITO: -- I would submit, identical interests.

31
32 THE COURT: Yes.

33
34 MR. SESTITO: If we move, then, to paragraph 16, My Lord, of
35 Ms. Twinn's submissions, and this is something that has come up a few times, she quotes
36 in this paragraph, paragraph 22, of the appeal in Sawridge 5. And I just want to take you
37 briefly to that -- to that reference, which is tab 2 of our brief, if you have it handy.

38
39 THE COURT: Right.

40
41 MR. SESTITO: Or, I'm sorry, My Lord, tab 3 of our brief.

1
2 During the -- and I'll just read from the case. During the oral hearing this issue, and a
3 number of others arose that have not yet been the subject of an application or direction of
4 a case management judge -- oh, I'm sorry, My Lord, my apologies. Sorry, I -- move down
5 in the paragraph, a second issue.

6
7 THE COURT: It's tab --

8
9 MR. SESTITO: It's -- yes, same paragraph --

10
11 THE COURT: -- tab 3.

12
13 MR. SESTITO: -- paragraph 22 --

14
15 THE COURT: Yes.

16
17 MR. SESTITO: -- tab 3.

18
19 THE COURT: Yes.

20
21 MR. SESTITO: A second issue is what --

22
23 THE COURT: Yes, okay.

24
25 MR. SESTITO: -- procedure will be implemented for
26 beneficiaries and other beneficiaries to participate in the Trust litigation either
27 individually or as representatives of a particular category of beneficiary. And at the end --

28
29 THE COURT: Yes.

30
31 MR. SESTITO: -- after listing a few issues, the Court of Appeal
32 says, We strongly recommend that they be dealt with forthwith. It was the direction of
33 the -- or the comments of the Court of Appeal that led to subsequent discussions that were
34 the genesis of the participation order. We have -- I have my friend's interpretation of that
35 order. But, again, I would have thought that Ms. Twinn's involvement in the negotiation
36 of the participation order had indicated that she was satisfied with those participatory
37 rights. The theme of the day is that the landscape has changed. Fair enough. I still think
38 that the mechanism of doing that is through the participation order itself.

39
40 Finally, My Lord, Ms. Twinn's affidavit and written submissions both contain collateral
41 attacks on the Sawridge First Nation membership process. Your Lordship has our

1 submissions on that point. Again, you have a lot of material, so I just direct your attention
2 to this Court's comments in Sawridge 3, that the issue of membership falls under the
3 exclusive jurisdiction of the Federal Courts.
4

5 On that point, I -- if you have any other questions on it, I would refer you to my friend,
6 Mr. Molstad, who would be in a better position to speak to the proper forum for dealing
7 with issues of -- of a First Nations membership process. So, My Lord, we have a
8 participation order, a decision from the Court of Appeal dealing with Ms. Twinn's
9 participation. If we allow full-party standing for Ms. Twinn, we are inviting a slippery
10 slope of further diversions from the central matter at hand. The Trustees are alive to the
11 issue that people like Ms. Twinn need to be addressed and are on the record that
12 grandfathering is an issue. We -- we -- we -- we are alive to that point. The Trustees
13 propose that the participation order allow for oral submissions on application as a
14 reasonable compromise that will allow Ms. Twinn to participate, to provide her
15 commentary, and at the same time to keep the litigation focused.
16

17 Unless you have any questions, My Lord -- and, again, I -- I would repeat my -- my ask,
18 that if advance costs are to be seriously considered in this case, that we be allowed to
19 supplement with written submissions on that point.
20

21 THE COURT: Okay.

22
23 MR. SESTITO: I will note, My Lord, that advance costs was
24 before this Court in Sawridge 5, Mr. Justice Thomas's -- doesn't address it specifically but
25 does address the notion of costs itself for the participating beneficiaries. You'll have his
26 comments on that, and they're set out in our brief.
27

28 THE COURT: You don't have anything further, do you, Mr.
29 Molstad?
30

31 MR. MOLSTAD: Pardon me?
32

33 THE COURT: You don't have anything further, do you?
34

35 MR. MOLSTAD: No, I don't, Sir.
36

37 THE COURT: Excellent. Thank you very much.
38

39 Anyone else have anything to say?
40

41 **Submissions by Ms. Osualdini**

1
2 MS. OSUALDINI: My Lord, I just wanted to make a very brief --
3
4 THE COURT: Sure.
5
6 MS. OSUALDINI: -- point given that my friend raised the issues --
7
8 THE COURT: Yes.
9
10 MS. OSUALDINI: -- of discussing membership in the SFN. I
11 wanted to point out to the Court that what my friend did not reference is -- was Justice
12 Thomas's original decision in Sawridge Number 1, where the -- it's at paragraphs 53
13 through 55 of that decision. Justice Thomas talks about the fact that the proposed new
14 definition for beneficiary is the membership in the First Nation. And it's not that we're
15 seeking to effect the membership process, but we're putting that definition up as the
16 proposed new definition and thus the quality of that process --
17
18 THE COURT: Yes.
19
20 MS. OSUALDINI: -- needs to be examined. So I think that's an
21 important distinction to be aware of, and that also the -- the decision of Justice Thomas in
22 Sawridge Number 5, it was a -- in the context of a case management decision on
23 document production. And I think it's still a live issue, is -- if we are going to argue that
24 that's -- should be the new definition, which is what the SFN is seeking to do in the -- in
25 its intervenor role, we need to be able to examine the quality of that definition.
26
27 MR. MOLSTAD: I would just encourage you to read Sawridge 3
28 and the order made by Mr. Justice Thomas which is part of our (INDISCERNIBLE).
29
30 THE COURT: Okay. All right. I will -- so I will give you a
31 decision tomorrow morning at 10:30 or 10:45.
32
33 MR. FAULDS: Do you require that we attend, Sir? Do you
34 require that we attend?
35
36 THE COURT: No. You can send agents. I'm --
37
38 MR. FAULDS: Okay.
39
40 THE COURT: -- quite content with that.
41

1 MR. FAULDS: All right.

2

3 THE COURT: Is that -- is that going to be suitable for
4 everyone? I've got a summary conviction appeal I'm doing at 10, take about 45 minutes.
5 I should be free after that.

6

7 Shelby, you're good with that? Okay. Good. Tomorrow morning.

8

9 MR. MOLSTAD: Thank you very much, Sir.

10

11 THE COURT: Thank you.

12

13 MR. FAULDS: Thank you, My Lord.

14

15 THE COURT CLERK: Order in court.

16

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19 PROCEEDINGS ADJOURNED UNTIL 10:30 AM, OCTOBER 31, 2019

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I, Rachel Lee, certify that this recording is a record made in the proceeding in the Court of Queen's Bench, held in Courtroom 513 at Edmonton, Alberta, on the 30th of October 2019, and that I, Rachel Lee, was the court official in charge of the recording machine during the proceedings.

1 **Certificate of Transcript**

2
3 I, Jill Williams, 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
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8
9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

11
12 Jill Williams, Transcriber
13 Order Number: AL-JO-1004-3071
14 Dated: November 2, 2019

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Action No.: 1103-14112
E-File No.: EVQ19SAWRIDGE
Appeal No.: _____

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

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

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

ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE,
EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for
the 1985 Trust ("Sawridge Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
October 31, 2019

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TABLE OF CONTENTS

Description		Page
October 31, 2019	Morning Session	1
Reasons for Judgment		1
Certificate of Record		9
Certificate of Transcript		10

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

2

3

4 October 31, 2019

Morning Session

5

6 The Honourable
7 Mr. Justice Henderson

Court of Queen's Bench
of Alberta

8

9 D. Bonora

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

10

11 K. Martin

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

12

13 E. Sopko

For Sawridge First Nation

14 P. Faulds, Q.C.

For the Office of the Public Trustee

15 J. Hutchison

For the Office of the Public Trustee

16 (No Counsel)

For S. Twinn

17 A. Tetz

Court Clerk

18

19

20 THE COURT CLERK:

Order in court.

21

22 THE COURT:

Good morning.

23

24 MR. FAULDS:

Good morning, Sir.

25

26 MS. BONORA:

Good morning.

27

28 **Reasons for Judgment**

29

30 THE COURT:

All right. I'm ready to give my decision with

31 respect to the intervenor applications.

32

33 Case management of this litigation has been ongoing for many years, firstly by Justice
34 Thomas and more recently for the last year or so by myself. In very general terms, the
35 litigation relates to the 1985 Sawridge Trust and the application of the Trustees of that
36 Trust for advice and directions in relation to proposed amendments to the definition of the
37 term "beneficiaries" in the 1985 Trust.

38

39 The issue that is currently before the Court and which is scheduled for argument on
40 November 27th, 2019, arises from the concern I raised with counsel approximately six
41 months ago. To address that concern, the Trustees have brought an application to have

1 me consider and determine the effect of the consent order made by Justice Thomas on
2 August 24th, 2016. The consent order provided in part that, (as read)

3
4 The transfer of assets which occurred in 1985 from the Sawridge Band
5 Trust, the 1982 Trust, to the Sawridge Band Inter Vivos Settlement, the
6 1985 Trust, is approved nunc pro tunc.

7
8 The issue on this application has been described as the asset transfer issue. It relates to
9 whether the 2016 consent order approved a variation of the 1982 Trust so as to permit the
10 assets of the Trust be transferred to the 1985 Trust to be held for the beneficiaries as
11 defined in the 1985 Trust, or whether despite the transfer of assets, they continue to be
12 held for the beneficiaries of the 1982 Trust or whether some other outcome arises from
13 the August 2016 consent order.

14
15 The other significant issue before the Court and which will be argued in the coming
16 months is referred to as the jurisdictional issue. That is whether the Court has jurisdiction
17 to modify or vary the definition of the term "beneficiaries" in the 1985 Trust so as to
18 eliminate some or all of the discriminatory aspects of that definition.

19
20 There are two motions before me today that were argued yesterday. Both applications are
21 to intervene on the asset transfer issue as well as the jurisdictional issue. The first motion
22 is brought by the Sawridge First Nation by application filed September 26, 2019. This
23 application is supported by the affidavit of Darcy Twin, sworn September 24, 2019, and
24 filed September 26, 2019. Mr. Twin was cross-examined on that affidavit on October
25 18th, 2019. The second motion is brought by Shelby Twinn by application filed October
26 16th, 2019. Her application is supported by her affidavit filed and sworn October 23rd,
27 2019.

28
29 So by way of general principles, Rule 2.10 authorizes the Court to grant a person
30 intervenor status in an action. That Rule provides as follows: On application the Court
31 may grant status to a person to intervene in an action subject to any terms and conditions
32 and with the rights and privileges specified by the Court.

33
34 The test for intervention is whether the proposed intervenor is specifically affected by the
35 decision or the proposed intervenor has some special expertise or insight to bring to bear
36 on the issue. That was described by the Court of Appeal in *Papaschase Indian Band v.*
37 *Canada* in 2005. More recently Mr. Justice O'Ferrall in the *Piikani Nation v. Kostic* in
38 2017 described the second prong of the test slightly differently. He said, (as read)

39
40 In addition to establishing an interest, the proposed intervenor must
41 demonstrate an ability to provide special expertise or fresh perspective.

1
2 The question therefore before me is whether one or both of the applicants in this case
3 meet that test. I will deal firstly with the Sawridge First Nation. The 1985 Trustees, or
4 the applicants in the main motions before the Court in relation to the asset transfer issue
5 and the jurisdictional issue, do not oppose the participation of the Sawridge First Nation
6 and point out that it is "self-evident" that the First Nation should be permitted to
7 participate. The Public Trustee and Catherine Twinn, on the other hand, take a very
8 different position and oppose the status of the Sawridge First Nation as an intervenor.
9 The opposition is on the basis that, firstly, Sawridge First Nation has no direct interest in
10 the proceedings; secondly, Sawridge First Nation would be uncooperative as intervenor;
11 thirdly, Sawridge First Nation cannot or will not contribute any additional evidence in
12 relation to the asset transfer issue; fourth, the position to be taken by Sawridge First
13 Nation on the asset transfer issue lacks "an air of reality"; fifthly, the position to be taken
14 by Sawridge First Nation on the asset transfer issue will widen the issues between the
15 parties; sixth, the Sawridge First Nation has already elected not to participate in the
16 jurisdictional issue; and seventhly, the proposed position on the jurisdictional issue is
17 unnecessary.

18
19 In oral submissions the office of the Public Trustee alerted me to a number of relevant
20 factors in support of their opposition to the motion. I won't go into great detail, but I want
21 to summarize some of the positions taken. The position is that the Sawridge First Nation
22 will take -- that the position they will take on motions if they're granted intervenor status
23 may have a negative impact on some of the persons whose interests they represent. The
24 consequence potentially is that some persons may lose their right to participate or receive
25 benefits from the Trust assets. The Public Trustee also argues that the position of the
26 Sawridge First Nation will simply not be helpful to the Court.

27
28 More significantly, the Public Trustee argues that the position of the Sawridge First
29 Nation in relation to the asset transfer issue is directly opposite of the position that they
30 took in the negotiations leading to the presentation of the consent order in August of
31 2016. The Public Trustee argues that the Sawridge First Nation was a participant in the
32 settlement negotiations that led to the consent order. Public Trustee also argues that the
33 Sawridge First Nation position is inconsistent with the position that it took in 1985 when
34 it was the architect of the scheme that was designed to avoid the assets being subject to
35 the 1982 Trust terms. That is a position which is directly opposite of the position which
36 the Sawridge First Nation now intends to advocate in the motions before me.

37
38 Public Trustee also argues that the Sawridge First Nation has not been cooperative in the
39 litigation to date, particularly with respect to producing documents or waiving
40 solicitor/client privilege over lawyers' files, which may give some better insight into what
41 transpired at the time of the asset transfer in 1985.

1
2 The Public Trustee points out that as part of the litigation plan I approved in December of
3 2018 (filed on January 16th, 2019), those non parties who sought to participate in the
4 jurisdictional issue were to provide notice of such intention by January 31st, 2019.
5 Sawridge First Nation was given an opportunity to do so but declined. The Public Trustee
6 argues that the Sawridge First Nation has now given up its right to participate.

7
8 Ultimately the Public Trustee strenuously argues that the Sawridge First Nation should
9 not be permitted to participate in the upcoming motions. The position is supported by
10 Catherine Twinn, who is a party to this application.

11
12 The question is, should I exercise my discretion to permit Sawridge First Nation to
13 become an intervenor on these two applications? There are three preliminary points that
14 need to be addressed before a determination of the main issue. The first question is
15 whether or not the Sawridge First Nation has standing to bring this application. The
16 Public Trustee argues that no standing exists because the Band did not obtain first a Band
17 council resolution approving the present application. In response to that position, Mr.
18 Molstad appeared before me yesterday on behalf of the Sawridge First Nation and
19 represented to me that he, being an officer of the court, had proper instructions to proceed
20 with the application. I accept his representation. In any event, Mr. Molstad points out
21 that there is in fact a Band council resolution that was provided to the other parties.

22
23 The second preliminary issue that I want to briefly speak to is that the Sawridge First
24 Nation has been an intervenor on other applications in this litigation. Even though they
25 are not directly involved as a party in the litigation, they have monitored and participated
26 in this litigation throughout. I took a look at the history of the written decisions that have
27 been filed in relation to this litigation. I note that the Sawridge First Nation has
28 participated in decisions which are known as Sawridge Number 1, Sawridge Number 3,
29 Sawridge Number 4, and Sawridge Number 6 through 11, and in 6 through 11 they
30 appeared as intervenors. So Sawridge First Nation is clearly not a stranger to this
31 litigation. Notwithstanding the fact that they are not a party to the litigation, they have
32 been an active participant in the litigation.

33
34 The third preliminary point that I want to raise is just to very briefly provide some context
35 for why we are here. This relates to differences in the definitions of "beneficiary" as
36 between the 1982 Sawridge Trust and the 1985 Trust. The 1982 Sawridge Trust defines
37 "beneficiaries" as "all members, present and future, of the Band." The 1985 Sawridge
38 Trust defines "beneficiaries" much differently. This is not the time or the place to provide
39 a definitive interpretation of the term "beneficiaries" in the 1985 Trust. However, broadly
40 speaking, beneficiaries in the 1985 Trust are restricted only to those persons who
41 qualified as members of the Band in accordance with the provisions of the *Indian Act* as it

1 existed on or before April 15th, 1982, and excepting, of course, those who have joined
2 other Indian Bands or those who have voluntarily ceased to be a member of the Band.

3
4 It is important to understand that under the 1985 definition, not all members of the Band
5 are beneficiaries, and some persons are beneficiaries even if they are not members of the
6 Band. So what we see is a significant difference between the definitions between the two
7 Trusts, that gives rise to many of the issues that need to be sorted out in this litigation.

8
9 I will then move on to the test that has to be met in order to become an intervenor. The
10 first prong of the test is whether or not the proposed intervenor is specifically affected by
11 the decision. The Sawridge First Nation is the governing body that represents the
12 members of the First Nation. It represents all of the members of the First Nation whether
13 or not they have been qualified as members on the basis of the provisions of the *Indian*
14 *Act* as it existed in 1982 or whether they qualify on some other basis. If they are members
15 of the Band, the Sawridge First Nation represents them.

16
17 Furthermore, the Trustees of the 1982 Trust are indeed the chief and council of the
18 Sawridge First Nation. Therefore, on the surface the Sawridge First Nation is clearly not
19 a stranger to the issues in the asset transfer issue or in relation to the jurisdictional issue.
20 The First Nation will be affected by the outcome of the litigation. Their members are the
21 beneficiaries of the 1982 Trust, but only some of their members are beneficiaries of the
22 1985 Trust. The outcome of the litigation will affect the membership of the Sawridge
23 First Nation.

24
25 But, more importantly, the second prong of the test is critical here. Sawridge First Nation
26 is taking a position on the applications that is different than the positions taken by the
27 other parties. For example, they take the position that the transfer of the assets from the
28 1982 Trust to the 1985 Trust may be valid but the 1985 Trustees hold for the benefit of
29 the 1982 beneficiaries. This is a position that is taken by no one else in the litigation.
30 The position taken by the Sawridge First Nation may be right, or, for many of the reasons
31 articulated in the argument yesterday, they may not be in a legitimate position to succeed
32 in advancing that argument. But I am satisfied that the Court will benefit from different
33 perspectives being taken on this critical issue.

34
35 This is very much the same situation as was faced by Justice Watson in *Gift Lake Metis*
36 *Settlement v. Alberta*, 2018 ABCA 173, where Justice Watson granted intervenor status to
37 a party on the basis that they represented a voice that would not be replicated by other
38 parties. This is exactly the same situation in the present case.

39
40 Now, the position put forward by the Public Trustee in terms of pointing out
41 inconsistencies in the way in which the Sawridge First Nation dealt with firstly the

1 agreement to the 2016 consent order or the 1985 Trust transfer may well be entirely valid,
2 may well be properly founded, and may well indeed have a significant impact on the
3 outcome of the asset transfer issue or the jurisdictional issue. But those are issues that are
4 relevant to those motions. They are not, in my view, something that would foreclose the
5 possibility of the Sawridge First Nation participating as an intervenor in those motions. I
6 am satisfied having a different perspective on these issues will be helpful in coming to the
7 correct decision in relation to the matter.

8
9 Therefore, I am satisfied that the Sawridge First Nation should properly be made an
10 intervenor and permitted to file briefs of law, put forward evidence, and make oral
11 submissions with respect to the two major issues that are currently before the Court; that
12 would be the asset transfer issue and the jurisdictional issue.

13
14 The Public Trustee argued that if I were to grant the intervenor application, I should
15 impose conditions specifically with respect to the production of documents. I did hear
16 yesterday Mr. Molstad tell me that all of the documents have been turned over to the
17 Trustees, apart from the documents over which privilege has been maintained. In my
18 view, nothing but delay and additional expense would be incurred if I were to impose
19 conditions with respect to the production of additional documents. We should simply
20 proceed to deal with the important issues that need to be dealt with, and that is what we
21 will do.

22
23 I will turn now to the application of Shelby Twinn. Ms. Twinn deposes in her affidavit
24 that she is a beneficiary of the 1985 Trust. She is not a member of the Sawridge First
25 Nation, although she has applied to become a member. Her application goes back to
26 April of 2018, but it has not yet been approved. I gather it hasn't been rejected, but it has
27 not been approved. She claims that the membership process is corrupt, biased, and unfair,
28 and I make no comment with respect to that. This Court does not have jurisdiction to deal
29 with the membership process in the First Nation. Obviously there are remedies that are
30 available elsewhere that Ms. Twinn can take to pursue those concerns, and I am sure that
31 she will do that if she feels sufficiently aggrieved by it.

32
33 I note that Ms. Twinn has previously applied to become a party to the litigation with
34 funding to be provided from the Trust. The case management judge dismissed the
35 application. On appeal, the Court of Appeal at paragraph 20 indicated that, (as read)

36
37 Adding all of the beneficiaries and potential beneficiaries as full parties
38 to the Trust litigation is neither advisable nor necessary.

39
40 The Court of Appeal upheld the decision of the case management judge to deny
41 Ms. Twinn the right to be a party to the litigation.

1
2 It is also important to note some of the other comments made by the Court of Appeal in
3 that decision. At paragraph 18 the Court said, (as read)
4

5 It is unclear what interest the individual appellants, including
6 Ms. Twinn, have that is not represented by parties already before the
7 Court or what position they would bring to the litigation necessary to
8 permit the issues to be completely and effectively resolved.
9

10 Exactly the same can be said of Ms. Twinn's application to be added as an intervenor.
11 Ms. Twinn, like all potential beneficiaries, does have a right to participate in the
12 applications pursuant to a participation order I granted on December 17th, 2018. In fact,
13 she has exercised that right and filed a brief in contemplation of the jurisdictional
14 application which was to be argued in April. The participation order does not specifically
15 address the asset transfer application, but there is no logical reason for it not also to apply
16 to that application because it is intimately connected with the jurisdictional application.
17

18 Having said all of that, however, I am satisfied that at least with respect to the asset
19 transfer issue, Ms. Twinn is in a position where she is specifically affected by the
20 decision. For example, if I were to find that the August 2016 consent order only approved
21 the transfer of assets from 1982 to 1985 but that the 1985 Trustees hold the assets for the
22 1982 beneficiaries, then Ms. Twinn would be affected. She would not be affected in the
23 sense that her status as a 1985 beneficiary would be impacted, but the reality is that her
24 interest as a beneficiary of 1985 Trust would be diminished dramatically or eliminated
25 completely because the 1985 Trust may have limited or no assets associated with it. So I
26 am satisfied that Ms. Twinn does have a very clear and direct interest specifically with
27 respect to the asset transfer issue.
28

29 And on this basis I am prepared to give Ms. Twinn intervenor status so that she may file a
30 brief of argument, she may tender evidence, and she may appear and make oral
31 submissions.
32

33 However, the second leg of her application is to be awarded advanced funding. With
34 respect to the litigation, she is not a lawyer. She says that she needs a lawyer to help her
35 make the submissions, and on the surface I can see that that has merit. However, when I
36 look at the totality of the circumstances here, I am not satisfied that she should get
37 funding to hire a lawyer to advance her position. And I say that because her position, I
38 am satisfied, is the same and identical to the positions that are already being put before
39 me. Essentially the Public Trustee takes the same position as Ms. Twinn would in
40 relation to the asset transfer issue. Furthermore, the Public Trustee represents Shelby
41 Twinn's sibling. Both are 1985 beneficiaries, but neither are First Nations members.

1 Public Trustee is advocating for the sister. The position is identical with respect to
2 Ms. Twinn. The 1985 Trustees will also likely take the same position as Shelby Twinn on
3 the asset transfer issue. Furthermore, I note that the 1985 Trustees owe all beneficiaries,
4 including Ms. Twinn, a fiduciary obligation. So they have an obligation to her.

5
6 Furthermore, and perhaps most importantly, there is, in my view, no need to add to the
7 cost burden to the Trust in relation to this litigation. This Trust has already incurred
8 substantial legal fees in relation to this litigation, and there is no need to add to that.
9 Being conservative in the approach toward funding from the Trust for legal fees was
10 approved by the decision denying Ms. Twinn the right to participate as a party. The Court
11 of Appeal endorsed the cautious approach to increasing the cost burden on the
12 beneficiaries and the Trust.

13
14 So for all of those reasons, I am satisfied that Ms. Twinn should be entitled to be an
15 intervenor but that she should not be entitled to receive funding to hire a lawyer to
16 facilitate the presentation of her position.

17
18 Anything further we need to deal with today?

19
20 MS. BONORA: Not from us, Sir. Thank you.

21
22 THE COURT: Okay. Good. Thank you very much. We are
23 adjourned until November 27th. Thank you.

24
25 THE COURT CLERK: Order in court.

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29 PROCEEDINGS ADJOURNED UNTIL NOVEMBER 27, 2019
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1 **Certificate of Record**

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Jill Williams, Transcriber
Order Number: AL-JO-1004-3074
Dated: November 2, 2019



Clerk's stamp:

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

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

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

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

DOCUMENT **BRIEF OF THE SAWRIDGE TRUSTEES**

**APPLICATION ON TRANSFER ISSUE AS DIRECTED BY
THE COURT RETURNABLE NOVEMBER 27, 2019**

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Counsel for Catherine Twinn

1. On April 25, 2019, this Honourable Court identified concerns regarding the transfer (the “**Transfer**”) of assets (the “**Assets**”) from the 1982 Sawridge Trust (“**1982 Trust**”) to the 1985 Sawridge Trust (“**1985 Trust**”). Specifically, this Honourable Court has questioned
 - (a) the meaning and consequences that flow from the August 24, 2016 order of the Honourable Justice DRG Thomas (the “**Consent Order**”) approving the Transfer *nunc pro tunc*; and
 - (b) specifically whether the Assets are being held subject to the terms and conditions of the 1985 Trust or those of the 1982 Trust.
2. By request, the Trustees of the 1985 Trust (“**Trustees**”) provided this Honourable Court with a copy of the Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust filed August 17, 2016¹ and supporting documents previously provided to Justice Thomas in advance of granting the Consent Order.
3. At this time, the Trustees are not aware of the definitive position of the Sawridge First Nation or other parties to these proceedings and so reserve a right of reply. Subject to this right of reply, the Trustees have nothing material to add to the previously filed Brief.
4. This Honourable Court has suggested that if the Assets are subject to the 1982 Trust, the issue of the discriminatory definition of beneficiary in the 1985 Trust (“**1985 Definition**”) is, at least in part, remedied. While the imposition of the 1982 Trust terms may be such a remedy, given their obligations as established in the 1985 Trust deed, the Trustees as fiduciaries of the 1985 Trust cannot advocate that the 1982 Trust applies to the Assets. The Trustees do, however, admit that if the definition of beneficiary contained in the 1982 Trust applies to the Assets, the litigation in respect of the discriminatory nature of the 1985 Trust would be at an end but as set out below one issue remains.
5. Should this Honourable Court make a determination that the Assets, while situated in the 1985 Trust, are subject to the terms of the 1982 Trust, the Trustees seek advice and direction with respect to whether grandfathering of the 1985 Trust beneficiaries who are not members of the Sawridge First Nation could be accomplished and if so, the appropriate method and procedure for the same.
6. The Trustees submit that if the trust to trust transfer from the 1982 Trust to the 1985 Trust is possible and permissible then the Trustees are at liberty to transfer the assets of the 1985 Trust to the Sawridge Band Trust created in 1986. This solution also cures the discrimination in the 1985 Trust. There is evidence of intention from the Chief that the trusts of 1985 and 1986 would be combined.²
7. Another issue raised by the Court is the issue of service of the application for the consent order for the transfer. The Trustees drafted an application for the transfer issue and such application was posted on the website which was created for the purpose of service of all filed documents in

¹ Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust dated August 17, 2016 and filed August 17, 2016 [TAB A]

² Testimony of Chief Walter Twinn – Federal Court of Canada Court File No. T-66-86, October 29, 1993 Volume 25 [TAB B]

this action.³ No other special service was created with the exception of serving the application on the known parties (OPGT and Catherine Twinn) and on counsel for Shelby Twinn, Patrick Twinn and Deborah Serafinchon and Sawridge First Nation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st DAY OF NOVEMBER, 2019.

Dentons Canada LLP

PER: _____

DORIS BONORA
MICHAEL SESTITO
Solicitors for the Sawridge Trustees

³ Procedural Order of Justice D.R.G. Thomas rendered August 31, 2011 and filed September 6, 2011 and Application for Advice and Direction in Respect of the Transfer of Assets filed by the Sawridge Trustees on August 11, 2016
[TAB C]

LIST OF EVIDENCE

TAB NO.	DESCRIPTION
TAB A	Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust dated August 17, 2016 and filed August 17, 2016
TAB B	Testimony of Chief Walter Twinn – Federal Court of Canada Court File No. T-66-86, October 29, 1993 Volume 25
TAB C	Procedural Order of Justice D.R.G. Thomas rendered August 31, 2011 and filed September 6, 2011; and Application for Advice and Direction in Respect of the Transfer of Assets filed by the Sawridge Trustees on August 11, 2016

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

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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23128527_1|NATDOCS

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Sherwood Park AB T8H 2A3

Attention: Janet L. Hutchison

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

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

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

TABLE OF CONTENTS

INTRODUCTION2

PART I – STATEMENT OF FACTS.....2

PART II - ISSUES.....5

PART III - SUBMISSIONS5

PART IV – REMEDY SOUGHT7

LIST OF AUTHORITIES AND ATTACHMENTS8

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.

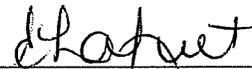
19. The Trustees, OPGT and Catherine Twinn have had appropriate opportunity to consider the documentation available and to seek any further documentation they may have found informative. Based on the clarifications provided by the Trustees, including the assurances that the relief sought in this application 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:  _____

for: 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

Tab A 01

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
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FILING THIS DOCUMENT

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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

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;

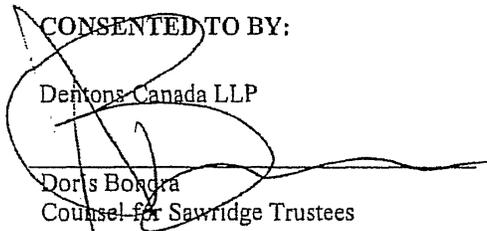
IT IS HEREBY ORDERED THAT:

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

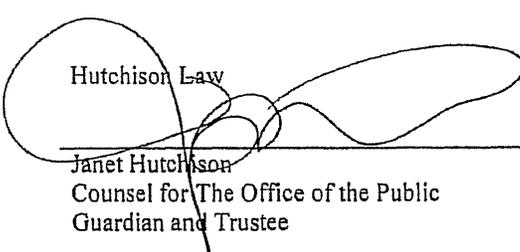
Reynolds Mirth Richards & Farmer LLP


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 Bongra
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

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

Tab A 02

Doris M. McKenna

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Friday, May 13, 2016 4:57 PM
To: 'Janet Hutchison' (jhutchison@jhlaw.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

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大友 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.

Tab A 03



*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 Fox*³ and *In re Joicey*⁴ 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 January, 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 convincers 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.

*632

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.

*633

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.

*634

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 *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 appendant 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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Tab A 04

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

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3

INDEX OF UNDERTAKINGS

(Undertakings are provided for your assistance.
 Counsel's records may differ. Please check to
 ensure that all undertakings have been listed
 according to your records.)

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	Advise what the value of the Trust was in 2015, as well as the value of the Trust today.	39

2

INDEX

<u>QUESTIONING OF PAUL BUJOLD</u>		
Questioned by Mr. E. H. Molstad	5	
Questioned by Ms. D. C. E. Bonora:	78	

4

INDEX OF EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
1	Letter dated June 17th, 2016, from Hutchison Law	11
2	Letter from Parlee McLaws addressed to Ms. Hutchison setting out the schedule agreed to between the Office of the Public Trustee and Sawridge First Nation	12
3	Email from Hutchison Law dated July 7th, 2016, with a letter attached to it	13
4	Letter without enclosures from Parlee McLaws to Hutchison Law, Ms. Hutchison, on behalf of the Public Trustee	14
5	Email from Ms. Bonora attaching a draft of the clarification on the transfer issued for review and comments	28
6	Letter from Mr. Poretto to Ms. Hutchison and McLennan Ross dated July 26, 2016, enclosing a proposed consent order	29
7	Order of Mr. Justice Thomas, signed by all counsel in the proceedings	73
8	Copy of letter sent to the Public Trustee dated July 27, 2016	77

5

1 PAUL BUJOLD, SWORN AT 9:37 A.M.,
 2 QUESTIONED BY MR E. H. MOLSTAD:
 3 Q MR. MOLSTAD: So I -- first of all, I
 4 thought I'd just explain why we're here. The --
 5 Mr. Bujold, the questioning today is in relation to
 6 your affidavits and the evidence that the Public
 7 Trustee has tendered and purports to rely upon in
 8 their applications, pursuant to rule 5.13,
 9 compelling the Sawridge First Nation to produce
 10 documents, and Sawridge First Nation is named as a
 11 respondent in these two applications, and I, of
 12 course, represent Sawridge First Nation.
 13 MR. MOLSTAD: And I understand,
 14 Ms. Hutchison, that you want to make a statement
 15 for the record?
 16 MS. HUTCHISON: Yes. Thank you very much,
 17 Mr. Molstad. Just wanted to make note of the fact
 18 that as of this morning, there has been an
 19 agreement on the trustees' clarification on assets
 20 consent order, and in light of that consent order
 21 being finalized, and -- and assuming, I should say,
 22 that it is finalized, the Public Trustee's
 23 instructions are to withdraw their rule 5.13
 24 application on assets, so that will change the
 25 scope of the 5.13 applications before the Court.
 26 And, Mr. Molstad, the other --
 27 the other point we just wanted to put on the

6

1 record, we're not entirely clear about what the
 2 proposed scope of the questioning is today. Rather
 3 than waste anyone's time and resources on multiple
 4 objections or interruptions, we're -- we're going
 5 to attend and listen, and we'll review the
 6 transcript after the fact. Please don't take our
 7 silence as an acceptance that the evidence is
 8 relevant or even admissible, but we'll address
 9 those issues to the Court, as opposed to raising
 10 individual objections to the questions.
 11 MR. MOLSTAD: That's fine. Likewise, the
 12 evidence that you have tendered is, in our
 13 respectful submission, in many respects,
 14 inadmissible, but unfortunately, from our
 15 perspective, much of it is incorrect, and so we
 16 will have to put questions to this witness to
 17 correct that evidence, but I understand your
 18 position.
 19 In terms of the comments you
 20 made about the consent order, as I understand it,
 21 and I want to be clear, I understood you to say
 22 that assuming the consent order is agreed to and
 23 ultimately filed, which Sawridge First Nation has
 24 no control over, you will then withdraw your
 25 application; is that correct?
 26 MS. HUTCHISON: Mr. Molstad, to be clear, my
 27 understanding is that we haven't secured consent

7

1 from Trustee Twinn at this point in time. So if it
 2 were a situation where the consent order could not
 3 go forward because of Trustee Twinn's lack of
 4 consent, it could affect what the OPGT does with
 5 the 5.13 assets application. Although, frankly, I
 6 would hope that the other parties would proceed to
 7 present that order to the Court and ask it for
 8 endorsement, in which case the OPGT would still be
 9 withdrawing its 5.13 application. I'm hopeful that
 10 with or without Trustee Twinn's consent, that order
 11 that everyone's worked quite hard to prepare, would
 12 be presented to the Court. So as long as there's
 13 no issue that the consent order on asset
 14 clarification is presented to the Court on August
 15 21st -- or 24th for approval, the assets
 16 application -- the 5.13 assets application will be
 17 withdrawn.
 18 I -- and perhaps we can ask --
 19 I realize we're all dealing with this sort of on
 20 short notice this morning. Ms. Bonora, would you
 21 agree that we would present that order to the Court
 22 regardless of Trustee Twinn's consent?
 23 MS. BONORA: Yes. I -- we're very happy to
 24 have your consent, and -- on that order, and we
 25 would be prepared to go ahead and join forces to
 26 say that should go ahead, even if Catherine Twinn
 27 objected, we'd leave her to make her objections, if

8

1 she decided to do that.
 2 MS. HUTCHISON: Okay. So, Mr. Molstad, on
 3 that basis, we are withdrawing our 5.13 assets
 4 application. Everyone in this room is agreed on
 5 the assets clarification.
 6 MR. MOLSTAD: So --
 7 MS. HUTCHISON: And I will -- I will confirm
 8 that in a letter to counsel and the Court once I'm
 9 not sitting at this boardroom table.
 10 MR. MOLSTAD: Yeah. And -- and when you say
 11 you're withdrawing the 5.13 application, in
 12 relation to the asset transfer?
 13 MS. HUTCHISON: To the asset transfer.
 14 MR. MOLSTAD: Yeah.
 15 MS. HUTCHISON: And as you're aware, the
 16 5.13 application on membership is going forward on
 17 the basis outlined in our correspondence to you,
 18 essentially, a reporting to the Court.
 19 MR. MOLSTAD: Yeah, we'll deal with that.
 20 MS. HUTCHISON: And I will now be quiet,
 21 Mr. Molstad.
 22 MR. MOLSTAD: Okay.
 23 MS. HUTCHISON: This is your transcript, so...
 24 MR. MOLSTAD: All right.
 25 Q MR. MOLSTAD: All right. Mr. Bujold, my
 26 questioning of you today, I will refer to the 1982
 27 Sawridge First Nation Trust as the 1982 Trust, and

9

1 you'll understand what I'm referring to?

2 A Yes, I will.

3 Q And I'll refer to the 1985 Sawridge First Nation

4 Trust as the 1985 Trust, and you'll understand what

5 I'm referring to?

6 A Yes, I will.

7 Q And I will refer to the 1986 Sawridge First Nation

8 Trust as the 1986 Trust --

9 A Okay.

10 Q -- and you'll understand what I'm referring to?

11 A I will.

12 Q And in terms of the trustees of the 1985 Trust and

13 the 1986 Trust, I will refer to them as the

14 Sawridge trustees, and that -- you'll understand

15 what I'm referring to?

16 A I will.

17 Q And today we're going to ask you questions in

18 relation to two affidavits and also evidence that's

19 been tendered by the Public Trustee. The

20 affidavits that we're going to be asking questions

21 in relation to are your affidavit that was sworn on

22 August 30th, 2011, and filed September 6th, 2011.

23 Do you have that in front of you?

24 A Yes, I do.

25 MR. MOLSTAD: Excuse me just for one moment,

26 please.

27 MS. BONORA: Yeah.

10

1 MR. MOLSTAD: Okay.

2 Q MR. MOLSTAD: And this affidavit that was

3 sworn on August 30th, 2011, was sworn by you, sir;

4 is that correct?

5 A That's -- that's right, sir.

6 COURT REPORTER: Sorry?

7 A That's right, yes.

8 Q MR. MOLSTAD: And the other affidavit that I

9 will question on is the affidavit sworn on

10 September 12th, 2011, filed September 13th, 2011,

11 and this affidavit you have before you, and it was

12 sworn by you?

13 A I do, yes.

14 Q Yeah. Now, your counsel has provided you with

15 copies of the correspondence in relation to these

16 proceedings, as I understand it --

17 A Yes.

18 Q -- that have been exchanged between counsel?

19 A Yes.

20 Q And -- now, I'm showing you -- I'm showing you a

21 letter dated June 17th, 2016, from Hutchison Law

22 addressed to four counsel in relation to these

23 proceedings. You received a copy of this?

24 A I did.

25 MR. MOLSTAD: We would ask that this be

26 marked as an exhibit, please.

27

11

1 EXHIBIT 1:

2 Letter dated June 17th, 2016, from

3 Hutchison Law

4 Q MR. MOLSTAD: So if you could just take a

5 look at Exhibit 1. Do you have Exhibit 1 in front

6 of you, sir?

7 A I do.

8 Q On page 2 of this letter, you'll see at the top of

9 the page, Ms. Hutchison indicates that in relation

10 to the 5.13 application regarding the membership,

11 the -- the OPGT, which refers to the Public

12 Trustee, will be filing a brief written submission

13 on that application and then goes on to say that

14 the OPGT, which is the Public Trustee, will not be

15 seeking to file affidavit evidence in relation to

16 that application and anticipates its submissions

17 will be relatively brief, similar in length to the

18 Sawridge First Nation's submissions.

19 That's the position that was

20 communicated both to yourself and the Sawridge

21 First Nation at that time; is that correct?

22 A That's correct.

23 Q And if you look at the bottom of the second page of

24 Exhibit 1, they -- you'll see in the third-last

25 paragraph, they summarize what they intend to do in

26 relation to the 5.13 assets application, and in the

27 last paragraph, they indicate that the Public

12

1 Trustee will not be filing affidavit evidence in

2 support of this submission. And, also, they

3 indicate that they will not be seeking to conclude

4 Paul Bujold's questioning prior to the August 24th,

5 2016, hearing, and go on to explain why they take

6 that position.

7 This also was a position that

8 was put to both the Sawridge trustees and Sawridge

9 First Nation; correct?

10 A That's correct, yes.

11 Q Now, the next document I want to take -- take you

12 to is -- is an email to your counsel, which I'm

13 showing you now, sir. It's this one. Sorry. And

14 it's a -- it attaches a letter from Parlee McLaws

15 addressed to Ms. Hutchison setting out the schedule

16 agreed to between the Office of the Public Trustee

17 and Sawridge First Nation. You received a copy of

18 this, sir, did you?

19 A I did.

20 MR. MOLSTAD: I'd like to mark that as the

21 next exhibit.

22 EXHIBIT 2:

23 Letter from Parlee McLaws addressed to

24 Ms. Hutchison setting out the schedule

25 agreed to between the Office of the

26 Public Trustee and Sawridge First Nation

27 Q MR. MOLSTAD: The next document is an email,

13

1 sorry, which I'm showing you, which is from
 2 Ms. Hutchison's office dated July 7th, 2016, and a
 3 letter attached to it. You received a copy of this
 4 through your counsel; is that correct?
 5 A I did.
 6 MR. MOLSTAD: Can we mark that as the next
 7 exhibit, please?
 8 EXHIBIT 3:
 9 Email from Hutchison Law dated July 7th,
 10 2016, with a letter attached to it
 11 Q MR. MOLSTAD: Now, Exhibit 3, which is the
 12 email and the letter, includes a description of the
 13 evidence that the Public Trustee will rely upon in
 14 relation to the 5.13 membership application and the
 15 5.13 assets application; is that correct?
 16 A Yes, it does.
 17 Q And part of this evidence is in relation to both
 18 applications, answers to undertakings of yourself,
 19 and, specifically, some are certain undertakings.
 20 Do you see that?
 21 A Yes.
 22 Q And as I understand it, the Public Trustee has not
 23 questioned you at this point in time in relation to
 24 any of these undertakings that you've provided; is
 25 that correct?
 26 A That's correct.
 27 Q Now, the next document is a letter without the

14

1 enclosures, it should be now, from our offices to
 2 Hutchison Law, Ms. Hutchison, on behalf of the
 3 Public Trustee. It does not have the enclosures in
 4 it. This letter was received -- a copy of it
 5 received by you through your counsel; is that
 6 correct?
 7 A That's correct.
 8 MR. MOLSTAD: Can we mark that as the next
 9 exhibit, please? Thank you.
 10 EXHIBIT 4:
 11 Letter without enclosures from Parlee
 12 McLaws to Hutchison Law, Ms. Hutchison,
 13 on behalf of the Public Trustee
 14 Q MR. MOLSTAD: The -- the next document is
 15 a -- an email, but it unfortunately attaches what I
 16 consider to be confidential information, and I'm
 17 just going to ask you some questions about it,
 18 rather than mark it, because of that, Mr. Bujold.
 19 It's an email from Ms. Bonora to Janet Hutchison,
 20 counsel for the Public Trustee, and -- and it
 21 encloses the list -- an updated list of the minors,
 22 and what it provided the Public Trustee with at
 23 that time was a list of the minors with the changes
 24 since 2011, and that would have been as at
 25 April 5th, 2016; correct?
 26 A That's correct.
 27 Q And it is also noted that eight of the minors

15

1 listed had become adults, and -- and of the eight
 2 that are listed, two would become adults that year;
 3 correct?
 4 A That's correct.
 5 Q It also indicated there were five new minors;
 6 correct?
 7 A That's correct.
 8 Q And you indicate in this email that you are only
 9 providing this list to you and Mr. Molstad, as the
 10 minors' personal information is provided, and thus
 11 it's not appropriate to share with all the parties;
 12 correct?
 13 A That's correct, yes.
 14 Q You state in this email as well that it -- it's
 15 your experience with the Public Trustee that the
 16 Public Trustee will not continue to act for a minor
 17 once they become an adult, and you state that you
 18 assume that that is true in your case, especially
 19 given the December 17th, 2016, directions. And you
 20 ask that the Public Trustee confirm that it will
 21 only be representing the minors on the list in
 22 accordance with that decision and not representing
 23 the adults. That's what you've asked her to
 24 advise; correct?
 25 A That's right.
 26 Q Did you receive a response to that?
 27 A Not that I know of.

16

1 Q Okay. I'll just get that back, then, from you.
 2 I'm not going to -- or you can keep that. It's
 3 your document.
 4 So I want to take you now to
 5 the affidavit that was sworn by yourself
 6 August 30th, 2011, and filed September 6, 2011. Do
 7 you have that in front of you?
 8 A I do.
 9 Q I'd like to direct your attention to paragraphs 10,
 10 11, and 12 of this affidavit, where you describe a
 11 considerable amount of information in relation to
 12 beneficiaries and potential beneficiaries. Do you
 13 see that?
 14 A I do.
 15 Q Now, did you -- I understand you requested the
 16 assistance from the Sawridge First Nation in
 17 compiling these lists?
 18 A I did.
 19 Q And can you also confirm that the Sawridge First
 20 Nation cooperated with you fully and provided you
 21 with the information --
 22 A It did.
 23 Q -- you'd requested?
 24 A It did, yes.
 25 Q Other than with respect to legislation regarding
 26 protection and privacy, did the Sawridge First
 27 Nation ever refuse to provide you with any

17	<p>1 information requested?</p> <p>2 A No, they didn't.</p> <p>3 Q Okay. I'll just now turn you to the next</p> <p>4 affidavit, the affidavit of yourself sworn</p> <p>5 September 12th, 2011, and filed September 13th,</p> <p>6 2011. Do you have that in front of you?</p> <p>7 A I do.</p> <p>8 Q In paragraph 1, you state that you're the chief</p> <p>9 executive officer of the Sawridge Trust. You're</p> <p>10 speaking of the 1985 Trust and the 1986 Trust; is</p> <p>11 that correct?</p> <p>12 A That's correct.</p> <p>13 Q And when did you first become chief executive</p> <p>14 officer?</p> <p>15 A In September 2009.</p> <p>16 Q Okay. And in paragraph 3, it -- it states who the</p> <p>17 trustees were of the '85 Trust at that time.</p> <p>18 Who -- who are the trustees of the '85 -- 1985</p> <p>19 Trust today?</p> <p>20 A Bertha L'Hirondelle, Catherine Twinn, Roland Twinn,</p> <p>21 Justin Twin, and Margaret Ward.</p> <p>22 Q Okay. And is Margaret Ward sometimes referred to</p> <p>23 as Peggy Ward?</p> <p>24 A She is.</p> <p>25 Q And in paragraph 4 and 5 of your affidavit, it's</p> <p>26 indicated that the trustees would like to make</p> <p>27 distributions in relation -- or from the 1985 Trust</p>	19	<p>1 of the documents and all of the information with</p> <p>2 respect to the transfer of the assets from the 1982</p> <p>3 Trust to the 1985 Trust, and that -- in other</p> <p>4 words, you've exhausted your efforts in that</p> <p>5 respect?</p> <p>6 A That's correct.</p> <p>7 Q And all of the documents that you've gathered</p> <p>8 demonstrate that all of the assets of the 1982</p> <p>9 Trust were transferred to the 1985 Trust, and</p> <p>10 that's why you seek the Court's order approving</p> <p>11 that transfer?</p> <p>12 A That's correct.</p> <p>13 Q In paragraph 9 of your affidavit, you make</p> <p>14 reference to Ronald Ewaniuk, CA. Do you know when</p> <p>15 Mr. Ewaniuk first became involved with the 1985</p> <p>16 Trust and the 1986 Trust?</p> <p>17 A I am not sure exactly of the date. I -- I could</p> <p>18 research the documents that I've got to see if I</p> <p>19 can find that.</p> <p>20 Q Yeah. Was it -- you know, he was involved for</p> <p>21 quite some time, though, wasn't he?</p> <p>22 A Yes, he was. He was involved in different</p> <p>23 capacities, so in the early days, he was involved</p> <p>24 as a partner -- as a senior partner of Deloitte --</p> <p>25 Q Okay.</p> <p>26 A -- Touche.</p> <p>27 Q Yeah.</p>
18	<p>1 for the benefit of beneficiaries, and concerns have</p> <p>2 been raised on these two matters: One, regarding</p> <p>3 the definition of beneficiaries contained in the</p> <p>4 1985 Trust; and, secondly, the transfer of assets</p> <p>5 into the 1985 Trust.</p> <p>6 And as I understand it, the</p> <p>7 Sawridge trustees are seeking to expand the</p> <p>8 definition of beneficiaries of the 1985 Trust to</p> <p>9 include all members of the Sawridge First Nation?</p> <p>10 A That's correct.</p> <p>11 Q And -- and the purpose of that objective on the</p> <p>12 part of the Sawridge trustees is to eliminate</p> <p>13 discrimination?</p> <p>14 A That's correct.</p> <p>15 Q And, in fact, based upon the definition of the</p> <p>16 beneficiaries of the 1985 Trust, persons who were</p> <p>17 declared by the Court to be members pursuant to</p> <p>18 formally Bill C-31, have been excluded as</p> <p>19 beneficiaries of the 1985 Trust?</p> <p>20 A That's correct because they're women who were</p> <p>21 enfranchised --</p> <p>22 Q Right.</p> <p>23 A -- through marriage.</p> <p>24 Q And in terms of the investigation that you've done</p> <p>25 in reviewing the records and gathering the</p> <p>26 documents that you've gathered, I understand that</p> <p>27 you have satisfied yourself that you have seen all</p>	20	<p>1 A And later, he was involved as a -- as a consultant.</p> <p>2 Q And when you contacted him and made an effort to</p> <p>3 get what information he had, would it be correct to</p> <p>4 state that it was his information that all of the</p> <p>5 assets of the -- in the 1982 Trust were transferred</p> <p>6 to the 1985 Trust?</p> <p>7 A Yes.</p> <p>8 Q And that was the information of the Sawridge First</p> <p>9 Nation that was provided to you?</p> <p>10 A That's right.</p> <p>11 Q Paragraph 10 of your affidavit sworn</p> <p>12 September 12th, 2011, refers to Exhibit B, and if</p> <p>13 you just go to Exhibit B in the affidavit.</p> <p>14 MS. HUTCHISON: Sorry, Mr. Molstad. Exhibit B</p> <p>15 or D?</p> <p>16 MR. MOLSTAD: B. B as in Bob. Yeah.</p> <p>17 MS. HUTCHISON: Thank you.</p> <p>18 Q MR. MOLSTAD: And you found Exhibit B there?</p> <p>19 A Yes, I did.</p> <p>20 Q The -- you'll see that in -- that this is a -- a</p> <p>21 record of the meeting of the trustees and settlers</p> <p>22 of the Sawridge Band Trust, and that -- in</p> <p>23 paragraph 3, it -- it's -- they include a -- a</p> <p>24 resolution that the Sawridge trustees then</p> <p>25 instructed the solicitors to prepare the necessary</p> <p>26 documentation to transfer all property presently</p> <p>27 held by themselves to the Trust and to present the</p>

21

1 documentation for review and approval. I just want
 2 to point out that it does describe all property,
 3 and from your investigation, is it your information
 4 that that happened?
 5 A Yes, it is.
 6 Q Do you have any information to suggest it did not
 7 happen?
 8 A None at all.
 9 Q Yeah. Paragraph 11 and 12 of your affidavit refers
 10 to Exhibit D, and I'd like to take you to Exhibit D
 11 of your affidavit. Are you there?
 12 A I am.
 13 Q Yeah. The second page of Exhibit D -- and this is
 14 a -- an agreement between the trustees of the
 15 old -- or I assume this is the '82 Trust. Is that
 16 your information, in the 1985 Trust?
 17 A It is, yes.
 18 Q Yeah. And on page 2, it -- it describes that each
 19 of the old trustees hereby transfers all of his
 20 legal interest in each of the properties listed in
 21 Appendix A attached hereto to the new trustees as
 22 joint tenants to be held by the new trustees on the
 23 terms and conditions set out in the Sawridge Band
 24 Trust and is part of the said Trust.
 25 Is it your information that
 26 that, in fact, happened?
 27 A Yes, it is.

22

1 Q Now, in paragraph 13 to 15 of your affidavit, this
 2 refers to the legislation that we know previously
 3 referred to as Bill C-31, and you're, I assume,
 4 familiar with the fact that the Sawridge First
 5 Nation challenged the constitutionality of the
 6 legislation in litigation where they asserted a
 7 right that they, as a First Nation, had the right
 8 to determine their membership?
 9 A Yes, I am aware of that.
 10 Q And it was during that challenge that the women
 11 that include, for example, Ms. Poytras were ordered
 12 to be added as members of the Sawridge First
 13 Nation, and as a result of the way in which the
 14 1985 Trust was structured, she did not become a
 15 beneficiary when the Court declared her to be a
 16 member of the Sawridge First Nation?
 17 A No.
 18 Q Is that correct?
 19 A That's correct.
 20 Q Yeah. So if I go to paragraph 19, it refers to
 21 Exhibit H. Can I just get you to look at that?
 22 Now, this is a -- a --
 23 Exhibit H is the resolution of the trustees, again,
 24 transferring all of the assets of the 1982 Trust to
 25 the 1985 Trust. Do you agree with that?
 26 A Yes, I do.
 27 Q And -- and that -- that, as you've already

23

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

24

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.

<p style="text-align: center;">25</p> <p>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.</p>	<p style="text-align: center;">27</p> <p>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</p>
<p style="text-align: center;">26</p> <p>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?</p>	<p style="text-align: center;">28</p> <p>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</p>

29

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

30

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.

31

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 Twinn, Councillor Tracey
 12 Poitras-Collins, and councillor -- who's the third
 13 one?
 14 Q Is it Darcy Twinn?
 15 A Yes, Darcy. Sorry. My mind was blanking.
 16 Q Yeah. And when you say Councillor Tracey, it's
 17 Councillor Tracey Poitras-Collins, is it?
 18 A Poitras-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

32

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.

<p style="text-align: center;">33</p> <p>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)</p> <p>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?</p> <p>18 A Yes. 19 That is and continues to be your belief today?</p> <p>20 A It is.</p> <p>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?</p>	<p style="text-align: center;">35</p> <p>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?</p> <p>5 A That's correct.</p> <p>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?</p> <p>12 A That's correct.</p> <p>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?</p> <p>16 A Yes.</p> <p>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</p>
<p style="text-align: center;">34</p> <p>1 A That's correct.</p> <p>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?</p> <p>6 A Yes, it does.</p> <p>7 Q And do you recall some of the other problems that 8 will be created by that?</p> <p>9 A Well, it discriminates, also, against anyone who's 10 enfranchised, although that clause no longer exists 11 in the <i>Indian Act</i>.</p> <p>12 Q Yeah.</p> <p>13 A It -- it discriminates against anyone who's 14 illegitimate, and that's all I can think of at the 15 moment.</p> <p>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?</p> <p>23 A That's correct, yes.</p> <p>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</p>	<p style="text-align: center;">36</p> <p>1 transfer of assets from the 1982 2 Trust to the 1985 Trust. Also, 3 inquire if Ms. Twinn has any 4 documentation of that particular 5 meeting.</p> <p>6 And that undertaking was followed through, and 7 you -- Sawridge trustees requested that 8 Ms. Catherine Twinn advise you of her response, and 9 as I understand it, Ms. Catherine Twinn's response 10 to that was that she had no memory of the meeting 11 and no documents in her possession?</p> <p>12 A That's correct.</p> <p>13 Q If I could get you to turn over to page 181 of the 14 transcript of your questioning on your affidavit, 15 beginning at line 13, and I'm just going to read to 16 you some of this evidence: (As read)</p> <p>17 Q MS. HUTCHISON: Mr. Bujold, 18 just looking at Exhibit A of your 19 August 30th, 2011, affidavit, so 20 that is the 1982 Declaration of 21 Trust, and I am looking at 22 paragraph 10 of that instrument.</p> <p>23 A Which one?</p> <p>24 Q Paragraph 10, on page 5. 25 So I just want to be 26 clear in some of the discussions 27 that we have had around the</p>

37

1 transfer of assets from the --
 2 from the '82 Trust to the '85
 3 Trust. I take it that you have,
 4 at this point, made every inquiry
 5 that you have been able to to try
 6 and locate any documentation that
 7 would have been kept pursuant to
 8 this paragraph?
 9 A Yes.
 10 Q You have. Okay. And you have
 11 provided us with copies of
 12 anything that in any way relates
 13 to -- or you will be by way of
 14 undertaking -- anything that
 15 relates to the transfer of the
 16 assets in the 1982 Trust to the
 17 1985 Trust?
 18 A Yes.
 19 And that information is accurate today, is it?
 20 A Yes, it is.
 21 Q Okay. I'm finished with that transcript.
 22 Now, the affidavit of
 23 Ms. Catherine Twinn sworn September 23rd, 2015, and
 24 filed September 30th, 2015, has been served on the
 25 Sawridge First Nation in support of the Public
 26 Trustee's applications. And have you read this
 27 affidavit?

38

1 A Yes, I have.
 2 Q Okay. And -- and I think we've already confirmed
 3 that this is the same Ms. Catherine Twinn that
 4 acted for the Sawridge First Nation as one of their
 5 legal counsel when the Sawridge First Nation
 6 challenged the constitutionality of the legislation
 7 formally referred to as Bill C-31?
 8 A That's correct.
 9 Q And in paragraph 3 of Ms. Twinn's affidavit, she
 10 states that the Trust will have a collective asset
 11 value of approximately 213 million by 2015. It --
 12 was that the value in 2015?
 13 A Not that I know of. I have no idea where she got
 14 that number.
 15 Q What was the value in 2015?
 16 A I'd have to get that information for you, but it
 17 was closer to 120 million, combined.
 18 Q A hundred and...
 19 A Hundred and twenty.
 20 Q Million, combined. Yeah.
 21 A And that's not accurate. I'd -- I'd need to -- if
 22 you want accurate figures, I'd need to get that.
 23 Q Yeah. Perhaps if you don't mind, you could
 24 undertake to --
 25 A I can get that.
 26 Q -- tell us what the value is --
 27 A Yes.

39

1 Q -- in --
 2 A Do you want it -- do you want the values as of
 3 2015?
 4 Q And the value today too.
 5 A Okay.
 6 MR. HEIDECKER: So December 31st, 2015, and
 7 today?
 8 Q MR. MOLSTAD: Is that a hard task --
 9 A No. No.
 10 Q -- or is that -- no? Okay.
 11 MR. HEIDECKER: Just for clarification.
 12 MR. MOLSTAD: Yeah. Yeah.
 13 UNDERTAKING NO. 1:
 14 Advise what the value of the Trust was in
 15 2015, as well as the value of the Trust
 16 today.
 17 Q MR. MOLSTAD: In paragraph 5 of Ms. Twinn's
 18 affidavit, she refers to family groups as being
 19 part of the First Nation. Obviously Sawridge First
 20 Nation is a relatively small First Nation. Do you
 21 know -- well, first of all, does Sawridge First
 22 Nation provide you information about who are
 23 members of their First Nation in order to
 24 administrate the Trust?
 25 A Yes, they do.
 26 Q Yeah. And do you know how many members of the
 27 Sawridge First Nation today are minors?

40

1 A One.
 2 Q And paragraph 6 of this affidavit sets out that --
 3 that the trustees have taken the position that
 4 membership in the Band is definitive of the
 5 beneficiary status. Would it be more accurate to
 6 state that the position of the Sawridge trustee is
 7 based upon the declaration of the Trust?
 8 A Yes, it is. Yes.
 9 Q And you, I assume, as trustees, have received
 10 advice through experts that the definition of the
 11 beneficiaries under the 1985 Trust is
 12 discriminatory; is that correct?
 13 A Yes. From multiple sources.
 14 Q Yeah. And would you agree that there is no process
 15 that is necessary to determine the 1985
 16 beneficiaries if the definition is changed to
 17 members?
 18 A Until we know what the definition is that the Court
 19 will approve, there's no way of defining who the --
 20 the beneficiaries are.
 21 Q Right. But if the Court doesn't change the
 22 definition of beneficiaries, you have what it is.
 23 A Then we'll have to use the provisions of the 1970s
 24 Indian Act.
 25 Q Right. In paragraph 9 of Ms. Twinn's affidavit,
 26 she speaks about who the current trustees were when
 27 she swore this affidavit September 23rd, 2015, but

<p style="text-align: center;">41</p> <p>1 even at that time, as I understand it, Mr. Justin 2 Twin had ceased to be an elected official or 3 councillor on February 20th, 2015; is that correct? 4 A That's correct. 5 Q And Ms. Bertha L'Hirondelle ceased to be an elected 6 elder on February 20th, 2015? 7 A That's correct. 8 Q In paragraph 10 of Ms. Twinn's affidavit, the 9 reference to determine the age of the membership, I 10 assume that you were aware that for many years 11 there was a -- a process for application for 12 membership that went to a membership committee 13 first? 14 A Yes, I am. 15 Q And after the membership committee, it then went to 16 chief and council? 17 A That's right. 18 Q And after chief and council, if anyone was 19 dissatisfied, they could lodge an appeal to the 20 Sawridge First Nation electors? 21 A That's correct. 22 Q Yeah. And this membership committee, I think, was 23 disbanded last year? 24 A Yes, as far as I know. 25 Q And now it just goes to chief and council? 26 A That's right. 27 Q But Catherine -- Ms. Catherine Twinn served on this</p>	<p style="text-align: center;">43</p> <p>1 she talks about what happened at the next meeting, 2 there was, in fact, at that meeting, discussion 3 about appointment of Justin Twin as a trustee; is 4 that correct? 5 A That's correct. 6 Q And the motions that were actually presented were 7 drafted, in fact, at the meeting that took place; 8 is that correct? 9 A That's correct. 10 Q And as I understand it, there was some urgency in 11 terms of the appointment of a trustee as a result 12 of a -- a transaction involving one of the 13 corporations, and this was explained to the 14 trustees? 15 A It was. There was also another complication, and 16 that is that we have to have five trustees at all 17 times in order to carry out business. 18 Q Okay. And -- and the succession plan that is 19 referred to in paragraph 16 had never been agreed 20 to by the trustees; is that correct? 21 A That's correct. 22 Q And with respect to and prior to the appointment of 23 Justin Twin as one of the trustees, it's my 24 understanding that you obtained information to show 25 that Justin Twin was a beneficiary of the 1985 26 Trust? 27 A That's correct.</p>
<p style="text-align: center;">42</p> <p>1 membership committee during all the years that it 2 existed? 3 A That's right. 4 Q And is it true the trustees, in their role as 5 trustees, do not participate, in any way, in 6 applications for membership in the Sawridge First 7 Nation? 8 A Not as trustees, no. 9 Q And in relation to paragraph 14 of Ms. Twinn's 10 affidavit, she refers to what may be the intent. 11 Are you able to confirm that the -- Chief Walter P. 12 Twinn continued in a practice, up until the time of 13 his death, where he involved elected officials as 14 trustees? 15 A Yes. There were elected officials on -- as 16 trustees up to his -- his passing in 17 October 1997 -- 18 Q Right. 19 A -- and there continued to be after his passing. 20 Q Right. In paragraph 15 of Ms. Twinn's affidavit, 21 she mentions about Walter Felix Twin and his 22 resignation. Would it be fair to say that the 23 trustees expected that to happen because Mr. Walter 24 Felix Twin was having some health problems? 25 A Yes. He'd had major surgery in -- in November, 26 December of the previous year. 27 Q And in paragraph 16 of Ms. Twinn's affidavit, where</p>	<p style="text-align: center;">44</p> <p>1 Q And the -- 2 MS. HUTCHISON: Mr. Molstad -- 3 MR. MOLSTAD: Yeah? 4 MS. HUTCHISON: -- I know I said I was going 5 to be quiet. I'm just struggling with how this is 6 relevant to the 5.13 application, or is there -- is 7 there another -- is it the position of the Sawridge 8 First Nation that this questioning can be used for 9 another purpose? 10 MR. MOLSTAD: Well, you've put the evidence 11 in. You tell me how it's relevant. 12 MS. HUTCHISON: I'll -- I'll reserve my 13 objections -- 14 MR. MOLSTAD: Yeah. 15 MS. HUTCHISON: -- for -- for the Court, then. 16 Thank you, Mr. Molstad. 17 MR. MOLSTAD: This is the evidence that 18 you've tendered, and we're questioning the witness 19 about the evidence, and our objective is -- is to 20 ensure that the evidence before the Court is 21 factual. 22 Q MR. MOLSTAD: And as I understand it, at -- 23 at this time, when Justin Twin was appointed, it 24 necessitated a court application? 25 A That's correct. 26 Q And what was that application in relation to? 27 A It was to transfer the assets from the old group of</p>

45

1 trustees to the new group of trustees.

2 Q And why was it necessary to go to court?

3 A Because Catherine Twinn refused to sign either the

4 appointment -- or the resolution appointing Justin

5 Twin as a trustee or the transfer of assets from

6 the old group of trustees to the new group of

7 trustees.

8 Q And were the Sawridge trustees successful in

9 obtaining an order of the court?

10 A Yes. The Court ordered that we proceed under my

11 direction, as the Trust administrator, without

12 Catherine's consent --

13 Q And --

14 A -- and that the transfer be effected that way.

15 Q And the transfer was effected that way?

16 A That's right.

17 Q And was that order appealed?

18 A No. There was no appeal.

19 Q Paragraph 18 of Ms. Twinn's affidavit. She

20 attaches Exhibit A to her affidavit as a document

21 tendered, and I just want to confirm that

22 Exhibit A, although presented, was never approved

23 or adopted by the Sawridge trustees in relation to

24 either the 1985 Trust or the 1986 Trust?

25 A No. It was a brainstorming planning document. It

26 was never a policy document.

27 Q Yeah. And is it true that there were no written

46

1 policies with respect to unanimous approval?

2 A There were and are no written policies regarding

3 unanimous approval.

4 Q And was -- and that's both in relation to the 1985

5 Trust and the 1986 Trust?

6 A That's correct.

7 Q And is it also true that there was no unwritten

8 policy requiring unanimous approval?

9 A Not as far as I know.

10 Q Yeah. And is it fair to say that the Trust deeds

11 govern the conduct?

12 A They always have, and we continue to follow that --

13 Q Yeah.

14 A -- that the Trust deeds are the governing

15 documents.

16 Q In paragraph 19 of Ms. Twinn's affidavit, you'll

17 see that she refers to raising issues about whether

18 Justin Twin was an eligible beneficiary --

19 A Can I just go back to 18 for a second?

20 Q Yeah.

21 A In the memo both for the appointment of Justin Twin

22 and -- and later for the appointment of -- of Peggy

23 Ward, I -- I sent the trustees the quotes right out

24 of the Trust deed regarding the process for

25 appointing, that it had to be by a majority

26 decision, that it was -- and it -- there was no

27 contesting at the meeting that -- you know, that

47

1 the Trust deeds were inaccurate.

2 Q Okay. Thank you. Paragraph 19 of Ms. Twinn's

3 affidavit. She indicates she raised concerns with

4 the other trustees, and with yourself, whether

5 Justin was an eligible beneficiary under the 1985

6 Trust. And as I understand it, the Sawridge

7 trustees saw it and received a legal opinion on

8 Justin Twin's membership status?

9 A That's correct.

10 Q And that was from Mr. McKinney, in-house legal

11 counsel for Sawridge First Nation?

12 A That's right.

13 Q And he concluded that Mr. Justin Twin was a member?

14 A That's right.

15 Q And I also understand that the Sawridge trustees

16 also received that confirmation, either directly

17 from INAC or through the Sawridge First Nation from

18 INAC, confirming in writing that Justin Twin was a

19 member of Sawridge First Nation?

20 A Yes, that's right.

21 Q And I just want to confirm that Sawridge First

22 Nation -- to your knowledge, chief and council did

23 not conduct a vote with respect to whether Justin

24 Twin was a member of Sawridge First Nation?

25 A No, they didn't.

26 Q And do you have knowledge of any person having been

27 removed as a member of the Sawridge First Nation

48

1 once they have achieved membership?

2 A I've never heard of it.

3 Q Paragraph 20 of Ms. Twinn's affidavit. You know,

4 first of all, the Sawridge trustees relied on the

5 legal counsel for the Sawridge First Nation and

6 INAC regarding Justin Twin's membership status;

7 correct?

8 A That's correct.

9 Q And the 1985 Trust and the 1986 Trust did not

10 retain Mr. Gilbert to do an opinion?

11 A No, they did not.

12 Q No. And if you look at Mr. Gilbert's opinion,

13 which is attached as Exhibit B to Ms. Twinn's

14 affidavit, there are just a couple points I want to

15 take you to there. On page 4 of Mr. Gilbert's

16 opinion, the last three lines, Mr. Gilbert

17 states -- and I'll read the last full paragraph

18 there. He says: (As read)

19 These questions arise because

20 recently Justin McCoy Twin was made

21 a beneficiary and appointed as a

22 trustee of that Trust by chief and

23 council of the Sawridge Indian Band.

24 Well, first of all, that's not true, is it?

25 A No. Trustees can only be appointed by trustees.

26 Q Right. And, also, if you go over to page 6 of this

27 document -- oh, sorry, I guess it's page 5 -- the

49

1 bottom of page 5. They quote paragraph 6. Is that
 2 paragraph 6 of the '82 -- 1982 Trust?
 3 A No. 1982.
 4 Q I -- that's what it's referred to.
 5 A Oh, okay.
 6 Q And what he says in terms of dealing with intention
 7 is an interesting comment because he says that --
 8 on page 6, in the first full paragraph there: (As
 9 read)
 10 By virtue of paragraph 6 of the
 11 Declaration of Trust, Sawridge Band
 12 Trust dated April 15th, 1982, I
 13 believe it was the intention of the
 14 settler of the 1985 Trust to exclude
 15 illegitimate children from being
 16 beneficiaries of the Trust.
 17 And if you look up above there, you see that the
 18 trustees: (As read)
 19 Shall be specifically entitled not
 20 to grant any benefit during the
 21 duration of the Trust or at the end
 22 thereof to any illegitimate children
 23 of Indian women, even though that
 24 child or those children may be
 25 registered under the *Indian Act*, and
 26 their status may not have been
 27 protested under section 12(2)

50

1 thereunder.
 2 I put it to you that that does not mean that they
 3 are not -- or that they are excluding illegitimate
 4 children. It gives a discretion.
 5 A Yes. This -- this paragraph is included in both
 6 the 1982 Trust --
 7 Q And --
 8 A -- the documents, and the 1985 Trust documents.
 9 Q Okay.
 10 A And -- and it doesn't -- it doesn't insist that
 11 they exclude. It just says that they can if they
 12 want.
 13 Q Right. And in terms of the make-up of the trustees
 14 of the 1985 Trust and the 1986 Trust, as a result
 15 of the appointment of Margaret Ward as a trustee,
 16 it doesn't matter if Justin Twin is a beneficiary
 17 or not, does it?
 18 A No, it doesn't.
 19 Q Now, paragraph 22 of Ms. Twinn's affidavit. The --
 20 I understand that you -- you and -- were not aware
 21 that Clara Midbo was terminally ill and, to your
 22 knowledge, the other trustees were not aware of
 23 this?
 24 A No. She was very ill, but we didn't --
 25 Q Yeah.
 26 A -- we didn't realize it was terminal.
 27 Q She was at the June 2014 trustees meeting?

51

1 A That's right.
 2 Q And she passed away the following month?
 3 A That's right.
 4 Q Yeah. And in paragraph 24, Ms. Twinn states that
 5 she emailed you, sir, and the other trustees asking
 6 who was being proposed, and she did not receive a
 7 response. And I understand that you did phone her
 8 and told her what the plan was?
 9 A Yeah. I -- she didn't receive a response to the
 10 email, but I did speak to her on the phone, where
 11 she inquired who was being proposed, and I told her
 12 then that there was no proposals. It would be
 13 discussed at the trustee meeting, like it had been
 14 at the last -- in the last case.
 15 Q Right. So it was to be discussed at the next
 16 trustee meeting?
 17 A That's right.
 18 Q Okay. And you communicated that to Ms. Twinn?
 19 A Yes, I did, verbally.
 20 Q If you go to paragraph 25 of the affidavit of
 21 Ms. Twinn, there was discussion at this trustee
 22 meeting about -- and Ms. Twinn proposed that an
 23 independent outside trustee be appointed; correct?
 24 A That's right.
 25 Q And Chief Roland Twinn basically responded that, in
 26 his view, the beneficiaries would not be open to
 27 outsiders as trustees; is that correct?

52

1 A That's correct.
 2 Q And at this meeting, the trustees offered to
 3 consider Ms. Catherine Twinn's proposal for an
 4 independent board in October; correct?
 5 A That's correct.
 6 Q And they asked Ms. Catherine Twinn to proceed with
 7 the appointment of a trustee to replace Clara
 8 Midbo, and I understand that Ms. Twinn refused to
 9 do so?
 10 A That's right.
 11 Q And I understand that Ms. Twinn also, again,
 12 refused to sign the transfer of assets?
 13 A Yes, she did.
 14 Q And this, again, required an application to the
 15 Court to deal with the transfer of assets?
 16 A It did.
 17 Q And that application proceeded and what was the
 18 result?
 19 A The result was that the Court ordered Catherine to
 20 sign the transfer documents and the appointment of
 21 the trustee.
 22 Q And was that then -- did that result in the
 23 transfer being signed?
 24 A It did.
 25 Q Was that order appealed?
 26 A No.
 27 Q Paragraph 26 of Ms. Twinn's affidavit, she talks

53

1 about the Sawridge group of companies and outside
 2 management. Can you respond to that? The -- the
 3 trustees were the shareholders and directors of the
 4 companies; is that correct?
 5 A That's right.
 6 Q And Mr. Mike McKinney was a director of the
 7 companies?
 8 A He was at the time, yes.
 9 Q And the Band council had no control over the
 10 companies?
 11 A No, they did not.
 12 Q And I believe that Mr. McKinney continues as an
 13 executive director and general counsel to these
 14 companies?
 15 A To -- yes, he does.
 16 Q Paragraph 27, the -- I think we dealt with this.
 17 Bottom line is that the trustees -- the majority of
 18 the trustees -- Sawridge trustees did not agree to
 19 delay the appointment of Justin Twin and Margaret
 20 Ward; is that correct?
 21 A No, they did not.
 22 Q And paragraph 28, with respect to Margaret Ward,
 23 who is referred to as Peggy Ward in Ms. Twinn's
 24 affidavit, as I understand it, the Sawridge
 25 trustees had established a process way back in --
 26 in 2004 to try to develop candidates who might be
 27 able to serve as trustees; is that correct?

54

1 A That's correct. From 2004 to 2007.
 2 Q Yeah. And the four candidates that were considered
 3 at that time as potential trustees were Justin
 4 Twin, David Midbo, Deanna Morton, and Margaret
 5 Ward?
 6 A That's correct.
 7 Q And -- and I understand that Catherine -- or
 8 Ms. Catherine Twinn advised you about Margaret Ward
 9 and about how she had done research on indigenous
 10 education and written a paper, and that she had a
 11 PhD; is that correct?
 12 A That's correct. I -- that paper was written
 13 specifically at the direction of the trustees --
 14 Q Oh.
 15 A -- and at the request of the trustees by Margaret,
 16 and Catherine Twinn also told me that Margaret Ward
 17 had been a trustee in training.
 18 Q Okay. So the -- the Sawridge trustees were aware
 19 of Margaret Ward's background, and -- in addition
 20 to the fact that she was a beneficiary of both the
 21 1985 and 1986 Trust?
 22 A Absolutely.
 23 Q Yeah. Paragraph 29 of Ms. Catherine Twinn's
 24 affidavit. Previously and historically,
 25 Ms. Catherine Twinn had agreed with appointment of
 26 Bertha L'Hirondelle, when she was chief, and Walter
 27 Twin, a councillor, and Roland Twinn, a councillor?

55

1 A That's correct.
 2 Q And in terms of the time that Ms. Catherine Twinn
 3 was on the membership committee, I think it was
 4 from -- actually, I may have misspoke. It was from
 5 1985 to March 31st, 2016. Is that your
 6 information?
 7 A Yes, as far as I understand.
 8 Q Yeah. I -- I believe it was March 31st of '16 that
 9 the membership committee ceased and applications
 10 for membership went to chief and council after
 11 that.
 12 A Okay.
 13 Q Now, in paragraph 29 of Catherine Twinn's
 14 affidavit, she does refer to political and personal
 15 agendas. The fact of the matter is that there has
 16 been, to this date, no distribution from the 1985
 17 Trust; correct?
 18 A That's correct.
 19 Q In paragraph 29, in the first part of this
 20 paragraph, Ms. Catherine Twinn states that when her
 21 concerns are expressed to the other trustees, the
 22 Chair, and Mr. Bujold, she is either ignored or met
 23 with varying degrees of ridicule, denial, reprisal,
 24 and/or contempt. Would you comment and respond to
 25 that allegation?
 26 A I -- I don't think that any of the trustees or the
 27 chair or myself ignore Catherine, ever, in a

56

1 meeting. She makes it very difficult to be
 2 ignored, and we don't -- certainly don't engage in
 3 ridicule, denial, reprisal, or contempt. We
 4 certainly may disagree with her ideas, but we try,
 5 as much as possible, not to engage in personal
 6 attacks.
 7 Q Okay. In paragraph 29(a) of this affidavit,
 8 mention is made of Chief Roland Twinn's children
 9 were quickly added to the Band membership list.
 10 It's my understanding that Chief Twinn's children's
 11 applications were dealt with, in one case, over a
 12 period of time of 557 days and, in another case,
 13 266 days, and when they were dealt with, Chief
 14 Roland Twinn abstained. Is that consistent with
 15 what you know?
 16 A Yes, it is.
 17 Q And I think we've confirmed that the Sawridge
 18 trustees have no role in determination of
 19 membership when they are acting as trustees?
 20 A None.
 21 MR. MOLSTAD: why don't we take -- why don't
 22 we take 15 minutes? Okay?
 23 MS. BONORA: Yeah. Thank you.
 24 (ADJOURNMENT)
 25 Q MR. MOLSTAD: If I could continue now the
 26 affidavit of Ms. Catherine Twinn in paragraph
 27 29(b). In terms of these remarks about Alfred

<p style="text-align: center;">57</p> <p>1 Potskin, it's my understanding that Mr. Alfred 2 Potskin was enfranchised May 28th, 1952? 3 A Yes, as far as I know. 4 Q Okay. And although she makes reference to the 5 membership committee, I -- I believe the fact is 6 that it is chief and council that an application 7 goes to now; correct? 8 A That's correct. 9 Q And -- 10 A Even the membership committee simply recommended to 11 council -- chief and council. It never actually -- 12 Q Never -- 13 A -- made a decision. 14 Q -- never decided. Right. 15 And in terms of the 17 16 children that have been admitted into membership, 17 are you aware that six of those never had a parent 18 on council? 19 A Yes. 20 Q Okay. 29(c). Do you have any knowledge about what 21 Ms. Catherine Twinn is speaking of in making this 22 allegation? 23 A I think that she is referring to the case of 24 Elizabeth Poytras, but we -- well, in our 25 examination of Elizabeth, there were problems with 26 her filling out the application. It was never 27 completed.</p>	<p style="text-align: center;">59</p> <p>1 A Yes, that is, in fact, correct. Until the Court 2 advises us who or what the definition will be -- 3 Q Right. 4 A -- we have no way of choosing. 5 Q I think you mentioned that as far as you know, the 6 intention, once the impact of Bill C-31 was 7 determined, would be to ensure that all members 8 were beneficiaries of the Trust? 9 A Well, the 1982 Trust were for the Band members. 10 1985 Trust, I think, had the same intent. It just 11 wanted to restrict anyone who could claim 12 membership -- 13 Q Yeah. 14 A -- through Bill C-31. 15 Q Okay. Paragraph 29(f) of Ms. Catherine Twinn's 16 affidavit. The -- would you agree that the -- that 17 how membership of -- in Sawridge First Nation is 18 determined is the responsibility of the Sawridge 19 First Nation? 20 A We had a very clear legal opinion provided us -- to 21 the trustees on that -- on that very point, and it 22 was very clear that the trustees had no business 23 interfering in any way with the determination of 24 membership. 25 Q Okay. And do you also understand that the Sawridge 26 First Nation membership code was drafted to 27 effectively give Sawridge First Nation control over</p>
<p style="text-align: center;">58</p> <p>1 Q But the fact is that Elizabeth Poytras was that -- 2 one of those person who was declared to be a member 3 by the -- 4 A She was declared in -- yeah, by Justice Hugessen. 5 Q Right. Paragraph 29(d) of Ms. Catherine Twinn's 6 affidavit, as I understand it, in response to this, 7 the Sawridge trustees very specifically sought the 8 direction of the Court to determine what it should 9 do; is that correct? 10 A That's correct. 11 Q And the trustees never made decisions to restrict 12 Sawridge First Nation membership; correct? 13 A No. No, they haven't. 14 Q Yeah. And at the -- at the -- at the present time, 15 there's only one elected official who's the 16 trustee; correct? 17 A That's correct. 18 Q And is it fair to say that it is, in fact, useful 19 to the board of trustees that you've observed them 20 when they do have an elected official -- an elected 21 official to come report on the needs of the nation? 22 A Yes, it's been very useful. 23 Q Referring to paragraph 29(e) of 24 Ms. Catherine Twinn's affidavit, since the matter 25 has been referred to the Court, the statement that 26 "we don't know who they are" may be, in fact, 27 correct. Is that fair?</p>	<p style="text-align: center;">60</p> <p>1 membership and that it wanted that complete 2 control? 3 A Yes. 4 Q 29(g) of Ms. Catherine Twinn's affidavit. And this 5 issue that she raises having been discussed, it's 6 my understanding that the Sawridge trustees have 7 discussed it, and the majority of the Sawridge 8 trustees have decided that Band membership is the 9 jurisdiction of the Sawridge First Nation? 10 A That's correct. 11 Q And is it also correct that the Sawridge trustees 12 did, in fact, obtain a legal opinion provided by 13 Donovan Waters that the trustees had no business 14 interfering in the membership process? 15 A That's correct. 16 Q Exhibit -- or Catherine Twinn's affidavit -- or 17 Ms. Catherine Twinn's affidavit at paragraph 29(h). 18 And I just want to confirm that in that there has 19 been no distribution from the 1985 Trust, one of 20 the purposes of your -- your application, your 21 questions that are being put to the Court, is to 22 allow you to provide benefits from the 1985 Trust 23 to the beneficiaries? 24 A That's correct. 25 Q Paragraph 29(i) of Ms. Catherine Twinn's affidavit. 26 Do you have any information that Sawridge Resource 27 Developments [sic] does not operate in accordance</p>

61

1 with the laws and good governance?
 2 A Not that I know of.
 3 Q 29(j) of Ms. Catherine Twinn's affidavit. Have you
 4 ever received any information or seen anything that
 5 suggests that Chief Roland Twinn has threatened to
 6 take Catherine Twinn's home away?
 7 A Certainly not at a trustee meeting. I've never
 8 seen it there.
 9 Q Yeah. And have you spoken to Chief Roland Twinn
 10 about these allegations in 29(j) of Ms. Catherine
 11 Twinn's affidavit?
 12 A He's -- he's had conversations with me about --
 13 about this allegation, but he's indicated he
 14 never --
 15 Q Yeah.
 16 A -- never said that.
 17 Q Did he deny this allegation?
 18 A Yes, he did.
 19 Q Yeah. It -- it says in paragraph 29(j) of
 20 Ms. Catherine Twinn's affidavit that she's afraid
 21 that if she speak out at trustee meetings, she'll
 22 be faced with reprisal from her because of Chief
 23 Roland Twinn.
 24 When you are in attendance at
 25 the Sawridge trustees meetings, does Ms. Catherine
 26 Twinn's behaviour ever demonstrate that she's
 27 afraid to speak out?

62

1 A Quite the contrary. She'll speak out on anything,
 2 any time, and will often oppose Chief Roland
 3 Twinn's proposals and will oppose motions that he
 4 votes on.
 5 Q Yeah. 29 -- at paragraph 29(k) of Ms. Catherine
 6 Twinn's affidavit --
 7 A M-hm.
 8 Q -- it refers to legal fees, and it's my
 9 understanding that the Sawridge trustees, including
 10 Ms. Catherine Twinn, agreed to pay the legal fees
 11 of the Sawridge First Nation when it became clear
 12 that considerable work would have to be done by the
 13 Sawridge First Nation for the Trust to complete
 14 their -- their application in relation to the
 15 transfer of the assets in the definition of
 16 beneficiaries; is that correct?
 17 A That's correct. I would have to get an
 18 undertaking -- or do an undertaking with you to
 19 provide the exact motion to ensure that Catherine
 20 actually voted in favour. It was discussed on a
 21 couple of occasions, and I think in the first
 22 occasion, yes, she was in favour. I think in the
 23 second occasion, she may have objected.
 24 Q Right. Well, the -- the -- the majority of the
 25 trustees --
 26 A But the majority of the trustees certainly --
 27 Q -- were in favour?

63

1 A -- were in favour, yes.
 2 Q Yeah. And in --
 3 MS. BONORA: Mr. Molstad, do you want that
 4 undertaking? You don't want -- you're satisfied
 5 with that answer?
 6 MR. MOLSTAD: Yeah, I am. Yeah.
 7 Q MR. MOLSTAD: Paragraph 29(l) of
 8 Ms. Catherine Twinn's affidavit.
 9 A M-hm. Yes.
 10 Q This concern expressed about Mr. Poretti, it's my
 11 understanding that although Mr. Poretti was one of
 12 the counsel in relation to the Bill C-31
 13 constitutional challenge advanced by the Sawridge
 14 First Nation, the issue of conflicts of interest
 15 were examined when he was first involved in the
 16 Trust application, and no conflict was identified
 17 by the sawridge trustees at that time; is that
 18 correct?
 19 A That's correct, and he also indicated very clearly
 20 that he wouldn't share any information from that
 21 previous action.
 22 Q Yeah. Paragraph 29(m) of Ms. Catherine Twinn's
 23 affidavit. I understand that you conducted, or
 24 someone on your behalf conducted, an investigation
 25 to determine what, if any, records in the Sawridge
 26 First Nation storage building in Slave Lake were
 27 destroyed, and it was determined that these records

64

1 were bar chits from the liquor services at the
 2 Sawridge Inn Slave Lake from the early days, late
 3 1970s, and that they had no relevance since the
 4 financial information was contained in the company,
 5 financial statements obtained by the Trust. Is
 6 that -- is that true?
 7 A That's correct, and I undertook that investigation
 8 myself.
 9 Q Okay. Paragraph 29(n) of Ms. Catherine Twinn's
 10 affidavit. When she refers to this proposal, it's
 11 my understanding that the proposal for a community
 12 centre was to see if there were other ways that the
 13 Trust could benefit the beneficiaries, and it was,
 14 in fact, recognized that the Trust funds could not
 15 be paid to the First Nation, and one of the
 16 proposals that was put forward was that the company
 17 pay licencing fees to the Sawridge First Nation of
 18 50,000 over ten years for the use of the Sawridge
 19 name and that that money, in turn, could be used by
 20 the Sawridge First Nation to assist in a
 21 building -- a new office building on the Reserve,
 22 but the agreement was never concluded or
 23 implemented; is that correct?
 24 A That's correct.
 25 Q And the fact is that 19 of the 44 beneficiaries of
 26 the sawridge Trust live away from the Reserve,
 27 while 25 of 44 and their families live on the

<p style="text-align: center;">65</p> <p>1 Reserve or close by?</p> <p>2 A That's correct.</p> <p>3 Q And that's the beneficiaries of the 1986 Trust?</p> <p>4 A That's right.</p> <p>5 Q Paragraph 30 of Ms. Catherine Twinn's affidavit</p> <p>6 refers to the code of conduct, which is Exhibit E</p> <p>7 to her affidavit.</p> <p>8 A Yes.</p> <p>9 Q If I could just turn -- or have you turn to that</p> <p>10 document.</p> <p style="padding-left: 40px;">Did Ms. Catherine Twinn draft</p> <p>11 this code of conduct?</p> <p>12 A She played a large part in drafting it, yes.</p> <p>13 Q Yeah. And the trustees, including Ms. Catherine</p> <p>14 Twinn, signed this code of conduct, Exhibit E?</p> <p>15 A Yes, she did.</p> <p>16 Q And in paragraph 6 of this code of conduct, it</p> <p>17 deals with confidentiality --</p> <p>18 A Yes.</p> <p>19 Q -- and an obligation of the trustees to maintain a</p> <p>20 confidentiality of the deliberations and other</p> <p>21 confidential information. Was an application made</p> <p>22 on behalf of Ms. Catherine Twinn to seal this</p> <p>23 affidavit?</p> <p>24 A Yes, it was. Well, it -- she never actually made</p> <p>25 the application. She requested it at -- at a</p> <p>26 hearing in front of Justice Thomas, and he said he</p> <p>27</p>	<p style="text-align: center;">67</p> <p>1 applying to the 1985 Trust defines</p> <p>2 beneficiaries for the purposes of</p> <p>3 that trust as: All persons who at</p> <p>4 any particular time qualify as</p> <p>5 members of the Sawridge Indian Band,</p> <p>6 pursuant to the provisions of the</p> <p>7 <i>Indian Act</i>, as those provisions</p> <p>8 existed on April 15th, 1982.</p> <p>9 Paragraph 2(a) of the Trust</p> <p>10 deed applying to the 1986 Trust</p> <p>11 defines beneficiaries for the</p> <p>12 purposes of that Trust as: All</p> <p>13 persons who at any particular time</p> <p>14 qualify as members of the Sawridge</p> <p>15 Indian Band under the laws of Canada</p> <p>16 in force from time to time,</p> <p>17 including the membership rules and</p> <p>18 customary laws with the Sawridge</p> <p>19 Indian Band, as they exist from time</p> <p>20 to time, to the extent that such</p> <p>21 membership, rules, and customary</p> <p>22 laws are incorporated into or</p> <p>23 recognized by the laws of Canada.</p> <p>24 And that summary is a -- a reasonably accurate</p> <p>25 summary of the beneficiaries?</p> <p>26 A It is.</p> <p>27 Q Okay. Paragraph 33 of the affidavit of</p>
<p style="text-align: center;">66</p> <p>1 wouldn't -- that there had to be a whole process</p> <p>2 that they had to go through.</p> <p>3 Q Right. They would have had to serve notice on --</p> <p>4 A On the media.</p> <p>5 Q -- the media?</p> <p>6 A Yeah.</p> <p>7 Q And do you know if that happened?</p> <p>8 A No, it didn't.</p> <p>9 Q So there's been no application to seal this</p> <p>10 affidavit?</p> <p>11 A No.</p> <p>12 Q If you go to Schedule A of the code of conduct</p> <p>13 that's been signed by the Sawridge trustees, it</p> <p>14 describes the responsibilities of the trustees, and</p> <p>15 under the title "Beneficiaries" -- and describes</p> <p>16 who they are. So the trustees, when they sign this</p> <p>17 code of conduct, undoubtedly, would have seen</p> <p>18 and -- the definition of the beneficiaries, as it's</p> <p>19 described in this document?</p> <p>20 A Yes.</p> <p>21 Q And is this an accurate description of the</p> <p>22 beneficiaries?</p> <p>23 A Yes, it is.</p> <p>24 Q And just for the record, the definition of</p> <p>25 beneficiaries in Schedule A of the code of conduct</p> <p>26 are described as follows: (As read)</p> <p>27 Paragraph 2(a) of the Trust deed</p>	<p style="text-align: center;">68</p> <p>1 Ms. Catherine Twinn. This deals with an allegation</p> <p>2 of -- of conflict, which we'll deal with later in</p> <p>3 terms of the direction of the Court, but would you</p> <p>4 agree that, to date, there has been no conflict in</p> <p>5 terms of a conflict of interest when the Sawridge</p> <p>6 trustees are addressing issues that they have to</p> <p>7 address?</p> <p>8 A Other than Catherine Twinn's general allegations,</p> <p>9 there have never been any specific --</p> <p>10 Q Yeah.</p> <p>11 A -- allegations of conflict of interest.</p> <p>12 Q And although Ms. Twinn has suggested independent</p> <p>13 trustees, that, in fact, would require an amendment</p> <p>14 to the Trust, which would require 80 percent of the</p> <p>15 beneficiaries to agree to that; is that correct?</p> <p>16 A That's correct.</p> <p>17 Q And that may be rather difficult in terms of the</p> <p>18 1985 Trust, when you don't know who all the</p> <p>19 beneficiaries are?</p> <p>20 A That's correct.</p> <p>21 Q And is it fair to say that the Sawridge trustees --</p> <p>22 or the majority of the Sawridge trustees believe</p> <p>23 that the beneficiaries do not want the Trust run by</p> <p>24 outside trustees that are not part of the</p> <p>25 community?</p> <p>26 A That's correct.</p> <p>27 Q Yeah. And in terms of your observation, have you</p>

69

1 observed that the trustees, four of them are not
2 elected to chief or council, are, in any way,
3 reluctant to take positions that -- when they
4 attend at meetings?
5 A No. They're -- they're all very eager to
6 participate fully in the -- the affairs of the
7 Trust.
8 Q Right. Paragraph 34 of Ms. Catherine Twinn's
9 affidavit. Would you -- you know, I -- I believe
10 it's alleged that Chief Roland Twinn is a primary
11 influence of the trustee decisions. Would you
12 agree that the decisions are made after discussion
13 and appear to be independent decisions of each
14 trustee?
15 A They are. I -- I would disagree that Chief Roland
16 Twinn is the primary motivator of -- of ideas that
17 come before the Trust. I think Catherine Twinn
18 is -- would be the one that brings most of the
19 ideas.
20 Q In paragraph 34 of Ms. Catherine Twinn's affidavit,
21 she indicates that she finds it hard as a
22 non-elected trustee to cast a vote against the
23 chief and other elected Band officials who are
24 trustees for fear of political, legal, financial,
25 and other repercussions. What is your observation
26 in relation to that statement?
27 A As I stated before, I -- Catherine Twinn never --

70

1 is never reluctant to express her opinion on
2 anything and is certainly not afraid to cast an
3 opposing vote or to abstain and to explain why she
4 is opposing or abstaining. I -- I've never seen
5 any reluctance at all in Catherine's participation.
6 Q And in past, is it correct to state that
7 Ms. Catherine Twinn has voted against positions of
8 the elected officials?
9 A On a number of occasions, yes.
10 Q Yeah. And -- now, the Sawridge First Nation is a
11 small First Nation relative to other First Nations
12 in Canada?
13 A That's correct.
14 Q And if you removed elected officials from the
15 ability to serve as Sawridge trustees, would you
16 lose a number of eligible candidates?
17 A If you were to remove the 5 people who are elected
18 out of 44, that would make a significant reduction
19 in qualified candidates as trustees, yes.
20 Q Yeah. And, generally, when the trustees make
21 decisions, those decisions are voted on after there
22 has been discussion of the issues?
23 A Considerable discussion, yes, and research, often.
24 Q Yeah. In paragraph 35 of Ms. Catherine Twinn's
25 affidavit, she makes mention of some First Nations
26 who structure their trust different from the
27 Sawridge First Nation. Would you agree that there

71

1 are a number of trusts that have been established
2 by First Nations who -- or that involve their
3 elected officials as trustees?
4 A Yes. The -- there's -- there's over 600 First
5 Nations in Canada, and of these, a number of these
6 would probably have trusts and a number of those
7 trusts are -- have Band officials and elected
8 members as -- as trustees.
9 Q Yeah. Okay.
10 MS. HUTCHISON: Are you done with that
11 affidavit, Mr. Molstad?
12 MR. MOLSTAD: Yes, I think I'm done with
13 that affidavit for now.
14 MS. HUTCHISON: I just would like to note on
15 the record, we were on that affidavit, by my count,
16 for over an hour.
17 Our letter of June 7th, 2016,
18 made note that we would make limited use of this
19 affidavit and maybe only refer to paragraph 29, and
20 that was 18 minutes of the questioning on
21 paragraph 29. We will be taking the position that
22 the vast majority of the questions on this
23 affidavit were completely irrelevant to the 5.13
24 application. Thank you, Mr. Molstad.
25 MR. MOLSTAD: The -- the evidence that you
26 have adduced in support of your application is the
27 whole of the affidavit.

72

1 MS. HUTCHISON: I -- I would just refer you to
2 the letter you've entered as an exhibit.
3 MR. MOLSTAD: I read your letter, and --
4 MS. HUTCHISON: Yeah.
5 MR. MOLSTAD: -- and your letter didn't say
6 that you would be relying on only that paragraph.
7 You said you would be relying mainly on that
8 paragraph, and until you tell me precisely what you
9 are relying upon, I will continue to ask questions
10 in terms of the correctness of the evidence that
11 you're putting forward.
12 MS. HUTCHISON: The questions, Mr. Molstad,
13 must remain relevant to the application that is
14 before the Court, which is a 5.13 application on
15 membership production.
16 MR. MOLSTAD: Well, right now we have two
17 applications before the Court. I understand what
18 you've told me in terms of the application in terms
19 of the transfer of assets, but that application has
20 not yet been resolved, dismissed, and is before the
21 Court, so...
22 I understand what your
23 position is, and, you know, if we want to put our
24 positions on the record, let me put mine on on
25 behalf of the Sawridge First Nation, that these
26 applications pursuant to 5.13 are duplicitous.
27 They are completely devoid of merit. They are a

<p style="text-align: center;">73</p> <p>1 waste of resources in terms of the Sawridge First 2 Nation, and we, on behalf of the Sawridge First 3 Nation, will be seeking solicitor-client costs 4 against the Public Trustee in relation to these 5 applications on the basis that the Public Trustee 6 is not indemnified from the Sawridge Trust. So -- 7 MS. HUTCHISON: Thank you, Mr. Molstad. And 8 I -- I assume that in those submissions, you'll 9 provide the Court with evidence about which of your 10 accounts were paid by the Sawridge Trust? 11 MR. MOLSTAD: No, we won't. I'll just take 12 a moment here. 13 Q MR. MOLSTAD: I'm showing you now an order 14 that's been signed by all of the counsel on these 15 proceedings that flow from the decision of 16 Mr. Justice Thomas, which, unfortunately, has 17 yet -- not yet been signed by the Court. So I'm 18 going to ask that this be marked -- this -- as an 19 exhibit. You've seen this, I assume, sir? 20 A Yes, I have. Yes. 21 MR. MOLSTAD: I'd ask that it be marked as 22 an exhibit. 23 EXHIBIT 7: 24 Order of Mr. Justice Thomas, signed by 25 all counsel in the proceedings 26 Q MR. MOLSTAD: The -- Exhibit 7, which is the 27 order of the Court. Do you have that in front of</p>	<p style="text-align: center;">75</p> <p>1 (a) The names of individuals who 2 have: 3 (i) Made 4 applications to join the Sawridge 5 First Nation which are pending; and 6 (ii) Had the 7 applications to join the Sawridge 8 First Nation rejected and are 9 subject to challenge. 10 (b) The contact information for 11 those individuals were available. 12 And in paragraph 13 it states: (As read) 13 The Public Trustee is instructed 14 that if it requires any additional 15 documents from the Sawridge First 16 Nation to assist it in identifying 17 the current and possible members of 18 category 2, minors who are children 19 of members of the Sawridge First 20 Nation, the Public Trustee shall 21 file a Rule 5.13(1) application by 22 January 29th, 2016. 23 Now, I think we've already marked as an exhibit the 24 letter that was sent to the Public Trustee 25 responding to the direction to the Sawridge First 26 Nation, which was sent out, I believe, on -- on 27 January 18th and has been marked as Exhibit 4 in</p>
<p style="text-align: center;">74</p> <p>1 you, sir? 2 A I do. 3 Q Appreciating that it has not yet been signed by the 4 Court but it has been approved by all counsel, 5 the -- I -- I want to take to you some of the 6 provisions of this and just ultimately ask you a 7 few questions. 8 In paragraph 5 of -- or, 9 sorry, paragraph 3 of this order, it was ordered by 10 the Court that: (As read) 11 The Public Trustee shall not conduct 12 an open-ended inquiry into the 13 membership of the Sawridge First 14 Nation and the historic disputes 15 that relate to that subject. 16 And in paragraph 4, it states that: (As read) 17 The Public Trustee shall not conduct 18 a general inquiry into potential 19 conflicts of interest between 20 Sawridge First Nation, its 21 administration, and the Sawridge 22 trustees. 23 And over on the next page, it states that: (As 24 read) 25 The Sawridge First Nation shall 26 provide the following to the Public 27 Trustee by January 29th, 2016:</p>	<p style="text-align: center;">76</p> <p>1 these proceedings. 2 After that letter was sent, 3 did the Public Trustee, through their counsel, 4 request any additional information from the 5 Sawridge trustees in relation to membership? 6 A No. 7 Q And paragraph 15 also states that: (As read) 8 The Public Trustee shall not engage 9 in collateral attacks on membership 10 processes of the Sawridge First 11 Nation, and the Sawridge trustees 12 shall not engage in collateral 13 attacks on Sawridge First Nation's 14 membership processes. 15 The Sawridge First Nation was not requested by -- 16 or, sorry. The -- the Sawridge trustees were not 17 requested by the Public Trustee to provide any 18 information following this letter in January of 19 2016 in relation to the membership process; is that 20 correct? 21 A That's correct. 22 Q Now -- 23 MR. MOLSTAD: Off the record. 24 (DISCUSSION OFF THE RECORD) 25 Q MR. MOLSTAD: The -- your counsel has 26 provided you with a -- a copy of their letter to 27 the Public Trustee, which is dated today -- oh,</p>

77

1 wait a minute. This is without prejudice.

2 A No. It's with prejudice.

3 MS. BONORA: It -- it's with prejudice.

4 Is -- are you referring --

5 MR. MOLSTAD: Oh, sorry. Yeah, it is

6 with --

7 MS. BONORA: -- to the July 27th --

8 MR. MOLSTAD: Yeah. Yeah. Sorry. Sorry.

9 Q MR. MOLSTAD: Yeah. This is a copy of what

10 your counsel sent to the Public Trustee today; is

11 that correct?

12 A That's correct, yes.

13 MR. MOLSTAD: Could we mark that as the next

14 exhibit, please?

15 EXHIBIT 8:

16 Copy of letter sent to the Public Trustee

17 dated July 27, 2016

18 Q MR. MOLSTAD: So Exhibit 8, which is the

19 letter from Mr. Poretti to the -- counsel for the

20 Public Trustee and to McLennan Ross is the form of

21 the order that the -- I understand, that the Public

22 Trustee has advised you today that they are

23 prepared to agree to; is that correct?

24 A That's correct.

25 Q And we don't know whether Ms. Platten, on --

26 counsel on behalf of Catherine Twinn, will agree to

27 this at this time, do we?

78

1 A No, we do not.

2 MR. MOLSTAD: Yeah. Those are the questions

3 that I have in cross-examination.

4 MS. BONORA: I have a couple of questions

5 I'd like to just put on the record for

6 clarification.

7 PAUL BUJOLD, PREVIOUSLY SWORN,

8 QUESTIONED BY MS. D. C. E. BONORA:

9 Q MS. BONORA: Mr. Bujold, the -- you were

10 asked questions about two different orders with

11 respect to the appointment of Justin Twin and

12 Margaret Ward. You were specifically asked whether

13 the order in respect of the appointment of Margaret

14 Ward and the transfer of assets was appealed. Can

15 you tell me whether the order with respect to the

16 appointment of Justin Twin and the transfer of

17 assets was appealed?

18 A No, it was not.

19 Q In respect of the appointment of Justin Twin, can

20 you tell me the order in terms of events, in terms

21 of when Justin Twin was appointed as a trustee and

22 when you received information in respect of his

23 membership status?

24 A Justin Twin was -- I mean, the -- the vote was

25 taken at the January 21st meeting, 2014. Justin

26 signed the documents in February of that year. The

27 letters from Mike McKinney and Indian Affairs were

79

1 received subsequent to that.

2 Q Can you just advise and put on the record what was

3 in the package that was sent to the trustees before

4 Margaret Ward -- before the meeting which Margaret

5 Ward was appointed as trustee?

6 A What was included was a notice of meeting, that it

7 was a special meeting, the requirements under the

8 Trust deeds on how trustees can be appointed, and,

9 basically, the date and place of the meeting.

10 Q And --

11 A Oh, and the other thing is that we had -- we had

12 designed resolutions to be passed by the trustees

13 with Justin -- with Justin's appointment -- or

14 prior to Justin's appointment. We had designed two

15 resolutions: one for transferring -- or -- or

16 appointing the trustee and transferring the assets

17 and one for limiting the term of -- of appointment.

18 And so those were presented in draft form.

19 Q I -- I just want to take you back to a letter which

20 was not marked as an exhibit for privacy reasons,

21 which is a letter to -- or an email from Dentons to

22 Hutchison Law dated April 5th, 2016.

23 A Yes.

24 Q And I believe you were asked the question, was

25 there any information requested with respect to

26 paragraph 13 of the order resulting from the

27 December 17th decision? And I believe your answer

80

1 was, No. And I want you to look at this and advise

2 whether you think that there was, in fact, any

3 information requested and then provided to the

4 Public Trustee's office.

5 A The request was for the list of minors. We updated

6 the minors as of -- as of the date of this email.

7 No other -- no further information was requested,

8 as far as I know.

9 MS. BONORA: Okay. Those are all my

10 questions.

11 MR. MOLSTAD: Okay. Anything else?

12 MS. HUTCHISON: No. Thanks, Ed.

13 MR. MOLSTAD: Okay. Thanks very much.

14 MS. HUTCHISON: Thank you.

15 MR. MOLSTAD: Thank you.

16 _____

17 PROCEEDINGS ADJOURNED 12:04 P.M.

18 _____

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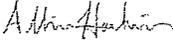
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CERTIFICATE OF TRANSCRIPT

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I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 2nd day of August, 2016.



Allison Hawkins, CSR(A)
Court Reporter



Tab B

03945:01 IN THE FEDERAL COURT OF CANADA
02 TRIAL DIVISION
03 Court File No. T-66-86
04 BETWEEN:
05 WALTER PATRICK TWINN, suing on his own behalf and on
06 behalf of all other members of the Sawridge Band,
07 WAYNE ROAN, suing on his own behalf and on behalf of all
08 other members of the Ermineskin Band, BRUCE STARLIGHT,
09 suing on his own behalf and on behalf of all other
10 members of the Sarcee Band
11 Plaintiffs
12 -and-
13 HER MAJESTY THE QUEEN
14 Defendant
15 -and-
16 NATIVE COUNCIL OF CANADA, NATIVE COUNCIL OF CANADA
17 (ALBERTA), AND NON-STATUS INDIAN ASSOCIATION OF
ALBERTA
18 Interveners
19 P R O C E E D I N G S
20 Held at the Federal Court of Canada
21 Edmonton, Alberta
22 October 29, 1993
23 Volume 25
24 Pages 3945 to 4047
25 Taken Before:
26 The Honourable Mr. Justice F. Muldoon

03946:01 APPEARANCES
02 M. Henderson, Esq. For the Plaintiffs
03 C. M. Twinn, Ms.
04 P. Healey, Esq.
05 D. D. Akman, Esq. For the Defendant
06 E. Meehan, Esq. Intervener for the
07 Native Council of Canada
08 P. J. Faulds, Esq. Intervener for the Native
09 T. K. O'Reilly, Esq. Council of Canada (Alberta)
10 T. P. Glancy, Esq. Intervener for the
11 Non-Status Indian
12 Association of Alberta

13
14 -----
15
16 June Rossetto Court Registrar
17 M. Andruniak, CSR(A) Court Reporter
18
19 * * * * *

10 I act as agent for Mr. Glancy?
11 THE COURT: Of course. With his consent, of
12 course.
13 MR. MEEHAN: With his consent.
14 MR. FAULDS: And at his request.
15 THE COURT: Mr. Faulds?
16 MR. FAULDS: Thank you, My Lord.
17 MR. TWINN CROSS-EXAMINED FURTHER BY MR. FAULDS:
18 Q Chief Twinn, when we broke at the end of yesterday, you
19 had in front of you two documents. They were
20 Exhibits 92(E), and I believe it was 92(G).
21 THE COURT: G and E?
22 MR. FAULDS: E and G.
23 Q MR. FAULDS: Now, Chief Twinn, just to keep
24 things straight, 92(E), I understand, is -- I'll call it
25 the 1985 trust which did not include the Bill C-31 people
26 as beneficiaries, and 92(G) is the 1986 trust which would
03949:01 include the Bill C-31 people as beneficiaries.
02 What I was asking you about at the
03 end of the day was, as far as you can recall, were these
04 two trusts supposed to exist side by side? Were there
05 supposed to be two trusts?
06 A No. The second trust was made after that, after the '85
07 trust. I think the '86 was made after the '85.
08 Q Was every asset held by the 1985 trust supposed to be
09 placed into the 1986 trust?
10 A Probably everything, unless there was some new company
11 that had been -- between '85 and the '86 was made. I
12 don't know that off the top of my head.
13 Q But the intention was that the 1985 trust no longer be
14 effective and that everything be in the 1986 trust?
15 A That's right.
16 THE COURT: So it's a substitution.
17 THE WITNESS: That's right.
18 Q MR. FAULDS: And it appears that with the
19 exception of the documents that Mr. Henderson pointed
20 out, that is, Document 92(K), which was a trust
21 declaration over Plaza Food Fare Inc., we don't have any
22 records or documents of the assets actually being placed
23 into the 1986 trust. That's correct?
24 A That could be correct.
25 Q But that was the intention?
26 A That's the intention.
03950:01 Q And if we can look at the back page of Exhibit 92(G), the
02 second last page, page 8, that would be your signature as
03 the settlor under A there?

Tab C

	Clerk's stamp:
COURT FILE NUMBER	1103-14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	<p>IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED</p> <p>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")</p>
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	Order
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	<p>Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8</p> <p>Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB</p>

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. G. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:
 - a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".
 - b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:
 - a. The Sawridge First Nation;
 - b. All of the registered members of the Sawridge First Nation;
 - c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;
 - d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;
 - e. All of the individuals who have applied for membership in the Sawridge First Nation;
 - f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;
 - g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;
 - h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and
 - i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia*, of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the “Beneficiaries and Potential Beneficiaries”)

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:
 - a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the “Website”);
 - b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the “Notice Letter”). The Notice Letter shall also provide information on how to access court documents on the Website;
 - c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and
 - d. Make a copy of the Notice Letter available by posting it on the Website.
5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.
6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.
7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.
8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.
10. Any replies by the Applicant shall be filed no later than December 16, 2011.
11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.
13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.
14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.
15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.
16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.
17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.
18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:
 - a. Legal counsel for the Applicants;
 - b. Legal counsel for any individual Trustee;
 - c. Legal counsel for any Beneficiaries and Potential Beneficiaries;
 - d. The Sawridge First Nation;
 - e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.



Justice of the Court of Queen's Bench in Alberta
Thomas J

809772; August 31, 2011

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
 Edmonton, Alberta T5J 3V5
 T 780 423 7100 F 780 423 7276
 Attention : Doris Bonora

REYNOLDS, MIRTH, RICHARDS & FARMER LLP
 3200 Manulife Place
 10180 - 101 Street
 Edmonton, AB T5J 3W8
 Attention: Marco S. Poretti

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
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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

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

PROCEEDINGS

Edmonton, Alberta
November 22, 2019

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TABLE OF CONTENTS

Description		Page
November 22, 2019	Morning Session	1
Submissions by Ms. Bonora		2
Submissions by Ms. Osualdini		2
Submissions by Mr. Molstad		5
Submissions by Mr. Faulds		6
Submissions by Ms. Hutchison		9
Discussion		27
Certificate of Record		31
Certificate of Transcript		32

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

2

3

4 November 22, 2019

Morning Session

5

6 The Honourable
7 Mr. Justice Henderson

Court of Queen's Bench
of Alberta

8

9 M.S. Sestito

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

10

11 D.C.E. Bonora

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

12

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 D. Tayloo

Court Clerk

18

19

20 THE COURT CLERK:

Order in court, all rise.

21

22 THE COURT:

Good morning.

23

24 MS. BONORA:

Good morning.

25

26 THE COURT:

Please be seated.

27

28 MS. BONORA:

So maybe I'll just start by just introducing
29 everyone who's here. So, Doris Bonora. Michael Sestito is with me from Dentons
30 representing the Sawridge Trustees.

31

32 THE COURT:

Yes.

33

34 MS. BONORA:

Janet Hutchison and Jonathan Faulds here
35 representing the Office of the Public Trustee and Guardian. Ed Molstad and Matthew
36 Cressatti are here representing Sawridge First Nation, Christa Osualdini is here
37 representing Catherine Twinn, and Shelby Twinn is here as a self-represented party.

38

39 THE COURT:

Excellent. Thank you very much.

40

41

1 **Submissions by Ms. Bonora**

2

3 MS. BONORA: Sir, perhaps just by way of introduction, we're
4 here because of a letter written by Ms. Osualdini.

5

6 THE COURT: Yes.

7

8 MS. BONORA: Obviously, there's been much said about the
9 nature of this application. We filed an application. You described it is pivotal and
10 foundational and we desire that it go ahead. On the 27th we wanted to canvass whether
11 there might be a full day on the 27th, if you were free in the morning. And so, you know,
12 if it -- if you thought this was because of the nature of the briefs that it should go to a full
13 day, we canvassed those days for January and February, but certainly, we feel it's important
14 in respect of the fact that this could be an issue which concludes litigation as it's an issue
15 that if the Court decided that the terms of 82 or if 86 would apply of the Trust, then we
16 would be satisfied with the advice and direction and the only issue remaining would be
17 grandfathering. And so, we understand that it's a very rather crucial part of the litigation
18 and it has to be canvassed fully.

19

20 So, those are all the things that I want to say to start. Thank you, Sir.

21

22 THE COURT: Okay, thank you.

23

24 **Submissions by Ms. Osualdini**

25

26 MS. OSUALDINI: Good morning, My Lord. As per my letter, it
27 appears that the parties are on very different planes about what the purpose of next week
28 is and what is to be argued next week. It was our understanding that the first question before
29 the Court was what is the proper interpretation of the consent order because until we
30 understand whether the subject consent order provides direction on which trust terms
31 govern it, it is very hard to move forward on this litigation without a clear understanding
32 of that point.

33

34 THE COURT: Yes, that's what I thought we were doing.

35

36 MS. OSUALDINI: That's what I thought we were doing and that's
37 what our submission is.

38

39 THE COURT: Yes, that's what I'm doing.

40

41 MS. OSUALDINI: Okay.

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THE COURT: That's my goal is to try to provide an interpretation of the August 2016 order so that we will know where we are. And, you know, Mr. Molstad has provided a brief which I must say I have only just superficially looked at. I haven't had time to really roll up my sleeves and look at any of the briefs in detail, but I gather you're concerned that he's focussing on another issue.

And I'll certainly let Mr. Molstad speak, but from my very high level look at it, I think what he was trying to do and he can correct me if I'm wrong, but I think he was trying to provide some background information and I think as a public trustee, he takes the position that this order can't be interpreted in isolation; you need to look at some of the principles that have been described by courts as to how to properly interpret an order. Mr. Molstad I think is saying you have to look at the broader picture here. How did we get here? What was the situation as it existed, for example, immediately before the granting of the consent order? What do the law and the facts tell us was the situation before Justice Thomas granted the order so that we can have that sort of context or that background so that that can assist in attempting to interpret it? I think that's what he was trying to do.

So, I don't know that you're totally at odds, but for me, the issue is very clear. The issue is as you described it. What does that order mean? And to be specific, the 1985 Trustees are clearly holding these assets. Who are they holding them for and under what terms? And it seems to me that's the issue. I don't know that we've gotten off the rails, but ...

MS. OSUALDINI: Well, My Lord, the concern with the submissions of the Trustee and the SFN is they pre-presume that the consent order does not resolve the issue of which trust is holding the assets and particularly, the submissions of the SFN jump into point 2, like the next step is if the order does not cover that issue by saying which trust should -- which trust term should govern these assets. And it also appears that the SFN is attempting to overturn the consent order through argument that the legal transfer was --

THE COURT: It is not being overturned. I don't have authority to overturn it.

MS. OSUALDINI: So, and that's the --

THE COURT: The order is in place.

MS. OSUALDINI: And that's --

THE COURT: That's the starting point.

1 MS. OSUALDINI: And that was the concern of our office and our
2 client is that our submissions are fully dialled into what are the interpretation conditions of
3 a consent order and how to apply those --
4

5 THE COURT: Well, Mr. Molstad wants to try to overturn the
6 order, he's in the wrong place. He can try to argue that up and down if he likes, but he's
7 going to have to be pretty persuasive to tell me that I have authority to overturn it. I'm
8 pretty sure I don't.
9

10 MS. OSUALDINI: And the second concern is if we start getting into
11 arguments about which trust should - assuming that the consent order doesn't cover it -
12 which one should, we would want to make submissions about evidence and production
13 requirements because we're now turning into a factual issue about what the facts were. And
14 the parties have never explored that, so that's not something that we -- from our perspective
15 -- that we can deal with on Thursday and we want to ensure the Court is not expecting
16 submissions in that regard.
17

18 THE COURT: Well, I'm going to take as much guidance as I can
19 from the information provided by counsel and the submissions of counsel and the evidence
20 that's presented to me so that I can do my level best to try to come to a proper interpretation
21 of the terms of the consent order. And, you know, it seems to me that there's a lot of material
22 here and sometime -- I mean the rubber's got to hit the road at some point, right? It seems
23 to me it's time. It's time to make some decisions on this case.
24

25 MS. OSUALDINI: I agree. As I said, our only concern is that if we're
26 going to say -- it's still a wide-open field as to whether -- as to which trust terms govern
27 these assets ...
28

29 THE COURT: Well, that is the question that I need to
30 determine.
31

32 MS. OSUALDINI: But that would be the second issue because first,
33 we have to determine if the consent order already provides for that.
34

35 THE COURT: Well, if the consent order -- if I interpret the
36 consent order on the basis that the assets were transferred from 1982 to 1985 and that the
37 1985 trust terms govern, that's the end of it.
38

39 MS. OSUALDINI: That is the end of it.
40

41 THE COURT: If I decide that the assets were transferred to

1 1982 but that the 1985 Trustees hold for the benefit of the 1982 Trustees, that's one other
2 option. And there might be something else. I don't know, but in order to get there, I need
3 to understand - and I think this is where Mr. Molstad's brief actually was helpful - is to
4 provide background. Like, how did we get here? What was this -- what was the lay of the
5 land prior to Justice Thomas' order? That provides the necessary context to me.

6
7 So, I mean if you want to apply to strike out parts of his brief or something, I'm -- I'll hear
8 you, you know? And as I say, I've only looked at it superficially, so I'm really speaking off
9 the top of my head here, but I didn't see anything totally offensive, but if you wanted to try
10 to stricken (sic) parts of his brief, I'd hear you on that.

11
12 MS. OSUALDINI: My concern for our client is clarifying what
13 exactly is the issue that we're arguing on Thursday because if the issue's just a consent
14 order --

15
16 THE COURT: Well, you know, I've -- you obviously have
17 transcripts of everything I've said over the last eight months. I don't have the benefit of
18 those transcripts, but I think I've tried to be as clear as I possibly can. The issue is pretty
19 narrow to me. And, I don't -- I do think it should get done. It's time to make some decisions
20 here.

21
22 MS. OSUALDINI: Thank you, Sir.

23
24 THE COURT: Mr. Molstad?

25
26 **Submissions by Mr. Molstad**

27
28 MR. MOLSTAD: If I may, Sir? Just to clear up one question that
29 was put to the Court, a proposition that was put to the Court, we do not seek to overturn
30 the -- we do not seek to overturn the order.

31
32 THE COURT: Okay, good, because that's a non-starter to me.

33
34 MR. MOLSTAD: Yeah, right. It's a non-starter for us, too. But I
35 just want to point out to remind everybody that this matter started as an application by the
36 Sawridge Trustees for advice and direction including what the definition was of the
37 beneficiaries of this '85 trust. And you, Sir, identified foundational and pivotal issues. In
38 the Sawridge First Nation brief, we identified in a number of paragraphs where you did
39 that - in paragraph 45, paragraph 47, paragraph 47 to 53.

40
41 And in paragraph 49 it's very helpful to look at that, Sir, in terms of what you did say in

1 our brief and we quoted here from your remarks: (as read)

2
3 When the order says that the transfer of assets from 1985 to 1982 (sic)
4 is approved, it's approved. So, the assets are here to there. What terms
5 are these assets -- those assets -- being held? Are they being held
6 subject to the '85 or subject to the '82? That's the issue for me.

7
8 And we say that is the issue for you, Sir. And we also point out that there was an application
9 that was filed by the Sawridge Trustees that identified very clearly that that's what the issue
10 is that they're asking you to determine. We say that you define the issue and we responded
11 to that.

12
13 The only matter that we have a concern about is that based upon the briefs that have been
14 filed whether or not a half-day is sufficient.

15
16 THE COURT: Yes. Yes, that's fair.

17
18 MR. MOLSTAD: And in that regard, because of the importance of
19 this issue, because this issue is pivotal --

20
21 THE COURT: Yes.

22
23 MR. MOLSTAD: -- and could result in the determination of a very
24 important matter, we would encourage yourself, Sir, and the parties to consider
25 rescheduling to one day.

26
27 Now, I've done some detective work and I've found out that there's one day available on
28 January 16th. I'm not sure if -- I've not talked to counsel about that date in terms of their
29 availability, but my concern is that this is a very important issue and my concern is as an
30 intervenor, I'm going to probably be heard last when there's not much time left. So, I'm
31 suggesting that this matter, because of the importance, because of the fact that it's important
32 that all parties be given a full opportunity to make submissions and be considered, it be set
33 for a full day.

34
35 THE COURT: Mr. Faulds?

36
37 **Submissions by Mr. Faulds**

38
39 MR. FAULDS: Thank you, My Lord. The Public Trustee shares
40 the concerns that were expressed by Ms. Osualdini about the direction of the briefs and the
41 fact that they seem to be going different ways.

1
2 One of the reasons for that is that the Sawridge First Nation in its brief filed on November
3 15th makes it clear that it is seeking a remedy. It uses that term. Now, and it seeks a remedy
4 which has the -- in the nature of the Court declaring that the assets are held pursuant to the
5 '82 Trust.

6
7 THE COURT: Right.

8
9 MR. FAULDS: And they make that argument for that remedy on
10 the basis that the transfer of the assets was improper and that therefore, a remedy is
11 required. And they -- in making the argument that the asset transfer is improper, they are
12 of course going behind the consent order which says that the asset transfer is approved.

13
14 THE COURT: Sure.

15
16 MR. FAULDS: So, that's the nature of the concern that the OPGT
17 has and the concern has two aspects. One aspect of that is the fact that our understanding
18 was the Sawridge First Nation was not seeking relief in -- through its intervention and the
19 transcript of the proceeding before (INDISCERNIBLE) in September showed that that was
20 also the Court's understanding, that they would not be seeking relief. We've had an
21 exchange with Ms. Osualdini on that point.

22
23 The second point is of course that the remedy which my friend Mr. Molstad says in his
24 brief that he is seeking is a final remedy that was eluded to by Ms. Bonora and by Mr.
25 Molstad and, as such, is something that's beyond the scope of the case management process.

26
27 THE COURT: But, Mr. Faulds, I just want to try to follow
28 through with this so that everyone has a clear understanding of where we're going. I think
29 uniformly, the view is that there has to be a decision with respect of the interpretation of
30 this order that will necessarily cause me to say either these assets are being held for the
31 1985 beneficiaries or they are being held for the 1982 beneficiaries or I can't tell or
32 something else.

33
34 That would be what I would be intending to say, but I would need -- I just can't have a -- I
35 just can't come to a conclusion on that. I have to follow a path to get me to whatever
36 conclusion I come to and that necessarily involves an analysis I think of where we have
37 been, what was Justice Thomas facing, and as you say, what pleadings and materials were
38 before him and I would come to a conclusion. But it isn't just a conclusory statement, it is
39 an analysis that leads to the conclusion. And that may not sound like granting a remedy,
40 but if I say that subject to what the Court of Appeal might have to say about my decision,
41 that looks like a remedy. I mean it isn't intended to be granting a remedy, but once I give

1 that interpretation, that sets the direction for where we go forward, does it not?

2

3 Like, if -- just if I were to say, for example, that these assets are being held for the 1982
4 beneficiaries, where would we be? Like --

5

6 MR. FAULDS: And the Court of Appeal, My Lord, as you
7 indicated, but --

8

9 THE COURT: Well, of course. I expect -- listen, don't get your
10 -- I expect this to be in the Court of Appeal no matter what I do, so there you go. That's the
11 lay of the land here.

12

13 MR. FAULDS: Right.

14

15 THE COURT: But in terms of next steps, like, maybe, Mr.
16 Molstad, and I didn't see this in his brief to be totally honest, but maybe he is asking me to
17 make a direction that one thing or another that amounts to a remedy. I don't know, but I
18 have a pretty clear vision as to where -- the type of order I need to make, but my concern
19 is listening to your submissions that you think that wouldn't be a remedy, but it comes
20 awfully close to that, doesn't it?

21

22 MR. FAULDS: My Lord, my concern is not that the Court have
23 regard to the context and circumstances and the relevant law. My concern only is that we
24 have a common understanding that what the purpose of the hearing is is to interpret the
25 order that has been granted as opposed to granting a remedy based on submissions that they
26 -- that the -- that that which the order approved in fact shouldn't have been approved.

27

28 THE COURT: True. Well, I don't think that I'm going to be
29 saying the order shouldn't have approved anything. I'm going to -- because it's not for me
30 to say whether we should have done one thing or another. That's for other people, not me.

31

32 MR. FAULDS: Right.

33

34 THE COURT: The order is there. What does it mean? What is
35 the effect of it? Are the assets being held for the 1985 beneficiaries or for the 1982
36 beneficiaries or for something else or is it uncertain? And what's the theoretical basis? If -
37 - what's the theoretical basis in trust law that gets us to wherever we get to? What was the
38 theoretical basis that existed before, the moment before the order was granted? What's the
39 theoretical basis after the order is granted? But once I give that interpretation subject to
40 whatever is said the Court of Appeal, that is looking awfully close to a remedy. And I think
41 Ms. Bonora's brief that I got yesterday which again, I just superficially scanned, is

1 relatively clear that this is getting pretty close to the end of the road; if I find one way or
2 another it may be that there's nothing left to do in this litigation. I think she's saying that,
3 but again, I looked at it just superficially.

4

5 So, Mr. Faulds, I hear you and what you're saying, I hear you saying you don't want me to
6 grant a remedy, but the necessary implication of whatever I conclude is looking awfully
7 close to a remedy to me. So ...

8

9 MR. FAULDS: I think that Ms. Hutchison would like to add
10 (INDISCERNIBLE) --

11

12 THE COURT: Absolutely. Yes, sure.

13

14 **Submissions by Ms. Hutchison**

15

16 MS. HUTCHISON: My Lord, I think you're identifying exactly the
17 problem and Ms. Osualdini engaged in a very useful conversation with you I believe on
18 October 30th about step 1 and step 2. The OPGT and I believe Ms. Twinn understood that
19 we were dealing on November 27th with step 1, the question of whether or not the 2016
20 consent order achieved what the parties and the Court intended it to achieve. If your answer
21 to that question is no, to go on and decide what the actual effect of the 1985 transfer was
22 or was not is to go into final relief, My Lord. We have not consented to dealing with final
23 relief before a case management justice on this matter. We have consented to dealing with
24 it before Justice Thomas as a consent order. So, if we are now going back to completely
25 revisit what the 1995 transfer did or did not do, we are into what Ms. Osualdini
26 characterized as the step 2 process. We are into the process that the OPGT has submitted
27 to you, My Lord, you cannot decide without a full evidentiary record before you.

28

29 And my friends in previous appearances have told you that this is just a question of law;
30 no additional evidence is required. It's really not such a massive issue. Today, I'm hearing
31 that it's such an important issue, it may conclude the entire proceeding. It's such an
32 important issue we may need a full day which suggests to me, My Lord, we have moved
33 into final relief and that was not where we were on September 4th or on October 30th, with
34 respect. And certainly, our client has a grave concern if that is where we are now headed,
35 My Lord.

36

37 If -- I can take the Court through the briefs, but that's not the purpose of the appearance
38 today. We have before you now a number of submissions from both the Trustees and the
39 Sawridge First Nation based on their understandings of critical points, My Lord, not
40 evidence, not evidence that the OPGT and Ms. Twinn or Shelby Twinn have been able to
41 test, My Lord, just their understandings. And if we are going forward to a final remedy that

1 will conclude this matter on the basis of understandings, we have a serious problem in the
2 process, My Lord. That's our concern, that we've gone from step 1 to step 2 when with the
3 best efforts of Ms. Osualdini, Mr. Faulds, and myself, we tried to secure assurances and
4 understandings we were dealing with step 1.

5
6 THE COURT: I thought though that step 1 was trying to
7 interpret what the August 2016 order means in terms of '82 and '85.

8
9 MS. HUTCHISON: Correct.

10
11 THE COURT: Step 2 is the issue that we tried to deal with way
12 back in April until the process was diverted and that issue was whether or not this Court
13 has jurisdiction as described as the jurisdictional issue, does this Court have jurisdiction to
14 vary the terms of a trust so as to modify the definition of "beneficiary" under the 1985
15 Trustee. That is what I thought step 2 was. I think that step 1 is the interpretation of the
16 meaning and effect of the consent order, but to me, once I've come to a conclusion as to
17 what the meaning and effect was ...

18
19 MS. HUTCHISON: But, My Lord, the parties are going beyond the
20 median effect of the 2016 consent order and, indeed, it's not as if the Court wishes to go
21 beyond that - to revisit the effect of the 1985 transfer itself. And there lies the problem, My
22 Lord. You can certainly decide what the effect of the 2016 order was or was not. To go
23 back to the point that we were at before we presented this consent order to Justice Thomas
24 and actually make a decision on what the effect of the 1985 asset transfer was goes beyond
25 the scope of relief that is available in case management absent consent of all parties at this
26 table and with respect, My Lord, you don't have that consent.

27
28 THE COURT: So, let me just try to understand exactly what
29 you're saying. You are saying that I can determine what the interpretation and the effect of
30 the consent order was and if I decide that the assets were transferred to 1985 to be subject
31 to the terms of the 1985 Trustee, that's A-Okay; we move on to the jurisdictional issue. If,
32 on the other hand, I decide that no, no, no, this couldn't be --

33
34 MS. HUTCHISON: The order didn't do what the parties thought it
35 did.

36
37 THE COURT: Because it's being held for the 1982. Or, you say
38 I can't say that, but isn't that exactly the very issue I raised the minute I looked at this file?
39 And I sent you an email, like, way back in April as we were trying to get ready for the
40 jurisdictional issue. I focused that and the issue I raised was am I satisfied that these assets
41 are being held --

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MS. HUTCHISON: Under the terms of the '85 Trust. And, My Lord, we've addressed you repeatedly to say if you're going to go to step 2, which is what terms are the assets held under, if they're not held under the terms of the 1985 Trust, we've repeatedly submitted to you that that is a bridge that can only be crossed with proper evidentiary production, with proper questioning as far as (INDISCERNIBLE) witnesses, and with proper argument on what the entire 1985 transfer dealt with.

MS. HUTCHISON: The Court, at least in all of the exchanges I've read, My Lord - and you're quite right, we've poured over every word of these transcripts - the Court has repeatedly assured the parties at least as we understood it that you would only be dealing with the pure legal issue of whether the 2016 consent order did what the parties understood it to do. And if you say it does not, we go on to what Ms. Osualdini characterized as step 2. I would suggest to you the jurisdiction order has become step 3.

THE COURT: Right.

MS. HUTCHISON: And if we go on to step 2, that is where we require evidentiary production and, My Lord, a final remedy. I mean, this is then stepping back into -- Justice Thomas was actually permitted to deal with final relief in his consent order. It's not that common that the parties agree to allow a case management judge to do that. We did that as a consent order. If this Court finds that the consent order which was final relief didn't do what it was intended to do, it cannot then go on to grant a new version of final relief without a full hearing. That's our point, My Lord.

THE COURT: So, you would like me to give a decision that says only yes or no to the question whether or not these assets are being held for the beneficiaries of the 1985 Trust.

MS. HUTCHISON: (INDISCERNIBLE) some direction, My Lord, as to next step because if --

THE COURT: If I find that they are not being held for the benefit of 1985 beneficiaries, wouldn't I have to explain to you why that's the case?

MS. HUTCHISON: My Lord, I don't believe you have adequate evidence before you to do that and I don't believe you have the consent of the parties to go into that territory.

THE COURT: Well, if that's the case, I don't have the ability

1 then to come to a conclusion as to whether the assets are being held for the benefit of the
2 1985 beneficiaries.

3

4 MS. HUTCHISON: Of the 1985 beneficiaries, My Lord?

5

6 THE COURT: Yes.

7

8 MS. HUTCHISON: You do indeed. If the parties accomplished and
9 the Court accomplished what they intended to accomplish, you can make that finding.

10

11 THE COURT: Well, the answer to that is either yes or no.

12

13 MS. HUTCHISON: Correct.

14

15 THE COURT: If the answer is yes, we're in business. We'll
16 move forward.

17

18 MS. HUTCHISON: Fine. If the answer's no --

19

20 THE COURT: If the answer is no, I have to explain why the
21 answer is no.

22

23 MS. HUTCHISON: -- we'll move on to another stage of this hearing.

24

25 THE COURT: I need to explain why the answer is no and once
26 I give that explanation, it -- you know --

27

28 MS. HUTCHISON: But, My Lord, if that was the Court's purpose and
29 intent from day 1 in this process, then we would submit that the exchanges particularly
30 around whether Sawridge was seeking relief, Ms. Osualdini's exchanges with you on step
31 1 and step 2 certainly have left these two parties with the understanding that if the answer
32 was no, we would go on to another phase of this issue that involved production, likely
33 applications by both of these parties to access privileged evidence or potentially if it's still
34 privileged evidence about how the 1985 transfer was structured.

35

36 The reality, My Lord, is you would be moving onto to this (INDISCERNIBLE) transaction
37 that you have almost no evidence about. And --

38

39 THE COURT: Didn't I read in the preamble to the 2016 order
40 that you were satisfied that you basically had everything that there was?

41

1 MS. HUTCHISON: That the Trustees had produced -- and the
2 wording was very careful as I recall, My Lord, and I didn't bring the order today, but I
3 recall negotiating the wording in that order very carefully that we were relying on the
4 Trustees' representation that they had done what they could do to provide evidence. That
5 has nothing to do with Sawridge First Nation and what Sawridge First Nation has available
6 to it as evidence, My Lord. And if the Court wishes to have submissions on that order, I'll
7 locate it, but it was not an acknowledgement that no other evidence could possibly be
8 brought to bear on the issue.

9

10 THE COURT: Well, to me, I -- firstly, I hear what you're saying.

11

12 MS. HUTCHISON: Thank you, My Lord.

13

14 THE COURT: But to me, I don't know how I could get to step
15 1 and satisfy the concerns that you raise. I can't come to a conclusion that these assets are
16 being held under the terms of a 1985 trust for the purpose of the beneficiaries of 1985
17 without explaining how I get there and that necessarily involves an analysis of what's taken
18 place in the past. And on the flip side, if I come to the conclusion that it's not being held
19 for the 1985 beneficiaries, I have to say something about that and --

20

21 MS. HUTCHISON: My Lord --

22

23 THE COURT: -- but you know, I -- and the other thing that I
24 need to look at and I would be grateful if you could get me a booklet of transcripts of
25 everything we've said so that I could go back and see, but I mean as far as I can remember,
26 I have been saying from the very outset that the issue I need -- including the morning -- the
27 issue I need to decide is whether these assets are being held for the 1985 beneficiaries or
28 the 1982 beneficiaries. That is the sole issue and that revolves around the interpretation of
29 the consent order.

30

31 MS. HUTCHISON: And the interpretation --

32

33 THE COURT: I guess that presupposes, and maybe this is part
34 of the analysis that has to be done, I don't know, that that would presuppose that prior to
35 Justice Thomas' order the assets were being held for the 1982 beneficiaries and maybe
36 that's the reason that there is a third alternative I'm not able to determine that because there's
37 uncertainty.

38

39 MS. HUTCHISON: But, My Lord, and the Court is suggesting that to
40 decide this issue you must go deeply into what happened in 1985.

41

1 THE COURT: I intend to.
2

3 MS. HUTCHISON: The 2016 consent order, and what it was
4 intended to do, is the issue before this Court. And that deals, My Lord, with the test under
5 (INDISCERNIBLE) that my friend's have not even spoken to at this point in time.
6

7 THE COURT: M-hm. Yes, but fortunately you have, so I have
8 the benefit of that.
9

10 MS. HUTCHISON: And that deals with what occurred in 2016, what
11 the intention of the parties were --
12

13 THE COURT: M-hm.

14

15 MS. HUTCHISON: -- what the pleadings said.
16

17 THE COURT: M-hm.
18

19 MS. HUTCHISON: That's the issue before this Court. If the Court
20 says, I'm not satisfied that the parties achieved what they said they intended to achieve, and
21 it is still an open question whether these assets are held in the '85 trust on terms that benefit
22 the '82 beneficiaries or that the transfer wasn't done properly, all the other options this
23 Court has suggested. Our understanding from our many exchanges with this Court,
24 including listening to some of your very useful discussions with Ms. Osualdini on step 1,
25 step 2, is if we got into that deeply, if that issue was actually decided, it would occur after
26 there was an appropriate production of evidence, after there's an appropriate testing of
27 evidence so that the Court had a full and complete picture of what actually occurred --
28

29 THE COURT: M-hm.

30

31 MS. HUTCHISON: -- between 1982 and 1985.
32

33 THE COURT: M-hm.
34

35 MS. HUTCHISON: And then the Court would be in a position to
36 decide if these assets are not being held with the '85 Trust or the '85 beneficiaries, what
37 else has happened? The Court cannot make that decision with respect to an award on the
38 basis of what is before you. This is a case management process, this is not a final --
39

40 THE COURT: So would you like me to direct a trial of an issue
41 then and --

1
2 MS. HUTCHISON: I'm sorry?
3
4 THE COURT: Do you want a trial? Is that where we're headed?
5
6 MS. HUTCHISON: If that's -- if the Court finds that the 2016 consent
7 order did not achieve what it has intended to achieve, I believe that is where we must
8 properly go forth - a trial of an issue. We've tried to give a very clear report about the need
9 for evidence, about why there is a concern about moving on to deal with those deeper
10 issues.
11
12 THE COURT: Yeah.
13
14 MS. HUTCHISON: We certainly regret that the Court didn't fully
15 appreciate what we were saying. I -- I certainly listened to Ms. Osualdini in that step 1,
16 step 2 exchange --
17
18 THE COURT: M-hm.
19
20 MS. HUTCHISON: -- and understood that she'd clearly
21 communicated the position of our client as well.
22
23 THE COURT: Yes.
24
25 MS. HUTCHISON: And I thought the Court actually had an
26 understanding of what she was saying as well. So I -- perhaps it's very useful that we're
27 here today, My Lord. It seems that we've --
28
29 THE COURT: M-hm.
30
31 MS. HUTCHISON: -- got some different understandings.
32
33 THE COURT: As you're speaking, I guess I'm wondering how I
34 could even address the first issue without, as you say, the full evidentiary basis. Because I
35 can tell you right now that this is not going to be an exercise of me sitting down and looking
36 at the order and saying you must've meant this or you must've meant that. That is not what
37 I will do. I'm going to go down to ground zero and go through the whole process and use
38 that as the context in which I can properly interpret the order. What you're telling me is I
39 don't have the context. That's what you're telling me.
40
41 MS. HUTCHISON: I'm telling you, My Lord, you have the context

1 of what occurred in 2016, and you should go to ground zero about what the knowledge of
2 the parties was, what the intention of the -- what is laid out in the pleadings of the Trustees
3 in 2016. You should go to ground zero on what was happening in 2016.

4
5 THE COURT: But not go beyond that.

6
7 MS. HUTCHISON: If you wish to go to ground zero in 1985, My
8 Lord, that is a different process.

9
10 THE COURT: Well, I think I have to go there.

11
12 MS. HUTCHISON: Well, perhaps you do, but you cannot do it in this
13 application.

14
15 THE COURT: I can't do anything then in relation to this
16 application.

17
18 MS. HUTCHISON: You just --

19
20 THE COURT: These are --

21
22 MS. HUTCHISON: I disagree, My Lord. Because if the 2016 order
23 did what it was intended to do, we're done and we move on to the jurisdiction application.
24 And you absolutely have jurisdiction to decide whether or not Ms. Osualdini's client and
25 our client are presenting a proper and reasonable interpretation of the 2016 order. If we are
26 correct that the 2016 order did what it's intended to do, we're done with the step and we
27 move on to the jurisdiction application.

28
29 THE COURT: Right. Exactly.

30
31 MS. HUTCHISON: And those are both proper steps. If this Court
32 finds by going to ground zero on what was before the Court in 2016, that the 2016 order
33 didn't do what it was intended to do, then there must be a triable issue or some sort of a
34 final remedy to go back to the relief that the Trustees took off the table with the consent
35 order. Which was a litigation -- a trying of the question of whether the '85 transfer had been
36 done properly or not. And, as I hear the Court, My Lord, you sound tempted to go to ground
37 zero on whether 1985 was done properly or not. That is beyond the scope of this
38 application.

39
40 THE COURT: Well, I can't possibly understand how I could
41 determine whether or not Justice Thomas' order should be interpreted so that the assets of

1 the transfer were for the benefit of the 1985 beneficiaries without understanding what the
2 situation was immediately prior to him granting that order. I would have to come to a
3 conclusion as to what the status of the 1982 beneficiaries was at that time, what the status
4 of the 1985 beneficiaries was at that time. That -- that is the most important piece of
5 context, in my mind, to what was the situation that existed immediately prior to the order
6 being granted. And what changes were to be effected by that order. That is --

7
8 MS. HUTCHISON: That is --

9
10 THE COURT: -- critical.

11
12 MS. HUTCHISON: With respect, My Lord, that is different with the
13 whole litigation, a whole hearing of what the 1985 transfer itself did or did not do. And
14 you -- to go beyond the discussion of what a 2016 consent order did, we must go into a
15 different process. We're not suggesting to the Court you can't consider history, we're not
16 suggesting to the Court you cannot look at the evidence that was available to the parties
17 and the Court in 2016.

18
19 THE COURT: But why --

20
21 MS. HUTCHISON: But to go back --

22
23 THE COURT: It's not fair, in my mind, for us to go into a
24 process where I'm constrained in terms of what I can do. I can only find one way, but not
25 the other. That's not the way litigation goes. You may be correct, as I say, I want to go back
26 and I want to look at the transcripts, so can someone get me these transcripts --

27
28 MS. HUTCHISON: My Lord, we're saying you're constrained on this
29 application. If this Court wants to direct the parties to go forward to a trial of a hearing,
30 that is absolutely within this Court's purview. But there is critical evidence --

31
32 THE COURT: What critical evidence are you looking at?

33
34 MS. HUTCHISON: -- that has not -- (INDISCERNIBLE) file, My
35 Lord.

36
37 THE COURT: This litigation has been going on for eight years
38 or more.

39
40 MS. HUTCHISON: Correct, My Lord. And in 2016, our client
41 stopped pushing for critical evidence that related to the assets because the issue was settled.

1 For the Court to suggest that that is an indicator that nothing else exists with the Sawridge
2 First Nation simply is not supported by the facts, My Lord.

3
4 THE COURT: But didn't --

5
6 MS. HUTCHISON: We stopped pushing --

7
8 THE COURT: -- we go through this last time and Mr. Molstad
9 represented that everything had been turned over subject to the privilege documents?

10
11 MS. HUTCHISON: And there's a massive issue to be discussed, My
12 Lord, about whether there is actually privilege over those documents. We've -- My Lord,
13 we've gone through this with the Court in the past, the parties have said it's not relevant,
14 the Court has said it's not relevant because we were dealing with a discreet legal issue. If
15 we are now dealing what -- with effectively a trial of the 1985 transfer, that cannot be dealt
16 with in this application, My Lord. The Court can identify that that issue needs to be
17 determined and that that issue remains outstanding. It cannot be dealt with on the basis of
18 the application before you.

19
20 THE COURT: Okay. Thank you.

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

23
24 MS. BONORA: Sir, may I just address a few things my friend's
25 brought up?

26
27 THE COURT: Sure.

28
29 MS. BONORA: So if we look at the -- I think this is something
30 that you had said, if we look at the consent order of 2016, we preface it by saying the whole
31 purpose of bringing the transfer issue forward was because there was no documentation to
32 show how it happened. And we have been saying that over and over again. But despite that,
33 consent order says that upon hearing representations from counsel for the Sawridge
34 Trustees and that the Sawridge Trustees had exhausted all reasonable options to obtain a
35 complete documentary record regarding the transfer of assets from '82 to '85, and that the
36 parties to this consent order had been given access to all documentation regarding the
37 transfer of access from '82 to '85. When you look at our brief that we filed in 2016, there
38 are several paragraphs that deal with the fact that there was documentation, there is
39 supporting affidavits, all of those affidavits were examined on, there were undertakings
40 given. And so it's not as -- there is no other documentation. Mr. Molstad said before you,
41 as an officer of the Court, there are no documents that Sawridge First Nation has. We are

1 done with production. This is -- if we had another application, you'd have affidavits saying
2 there is nothing more. So we are -- and my friends have examined on these affidavits.

3
4 So this is not a position where we now need to have a trial, now have to have more
5 production. There is no more.

6
7 When my friend said that it's not appropriate for you to decide any issue which might end
8 this litigation, I think we need to remember that it is advice and direction, and if you gave
9 us advice and direction that we could then withdraw our application, that might be enough.
10 That's all that's -- this application isn't a statement of claim, we're seeking advice and
11 direction.

12
13 And I think the other important point that is -- that should be made, is that the jurisdiction
14 order may end this litigation. So this is not a situation where the parties are not before you
15 on other issues that end this litigation if the advice and direction is given in a certain
16 direction. We would have that ability to withdraw our application if you gave direction in
17 a certain way.

18
19 THE COURT: M-hm.

20
21 MS. BONORA: We are absolutely encouraging you to go ahead
22 with this application. We will give you the transcripts. I think it will be very clear that --
23 we believe you have been very clear that the whole issue of the transfer of assets from '82
24 to '85 is before you. And the whole transcript, Sir, we don't have is the intervenor brief --
25 or transcript which is for your approval.

26
27 I'll let my friend -- oh, yes, Sir. Sorry. Just to be clear, we just don't have your decision on
28 the intervenor brief -- or transcript because it's for your review. We have all the other
29 transcripts and we'll provide those to you.

30
31 THE COURT: Didn't I review that? I think I looked at that a
32 couple days ago. I've been away, so.

33
34 MR. MOLSTAD: I was just going to encourage my friends who
35 represent the Public Trustee to read the application that we've got before you, Sir.

36
37 THE COURT: Right.

38
39 MR. MOLSTAD: Because my friend, Ms. Bonora, on behalf of her
40 client, filed an application on September 13th --

41

1 THE COURT: Right.
2

3 MR. MOLSTAD: -- of this year and the reliefs that she sought in
4 that application --
5

6 THE COURT: M-hm.
7

8 MR. MOLSTAD: -- is a determination and direction of the effect of
9 the consent order made by Mr. Justice Thomas, pronounced on August 24th, 2016.
10

11 THE COURT: M-hm.
12

13 MR. MOLSTAD: Respecting the transfer of assets from the
14 Sawridge Band Trustee April 15th, 1982, the 1982 trust, to the Sawridge Band Inter Vivos
15 Settlement dated April 15th, 1985. And more particularly described the
16 (INDISCERNIBLE). This is an application that's before you. It's been identified --
17

18 THE COURT: M-hm.
19

20 MR. MOLSTAD: -- to seek your direction in that regard. The
21 affidavit -- the affidavits that are relied upon are set out in her application including
22 affidavits previously filed in the action, questionings filed in the action, undertakings filed
23 in the action, affidavits of records and supplemental affidavits of records to the action and
24 such further material. For my friend to stand up today and suggest that you don't have
25 jurisdiction to deal with this is taking us by surprise because it wasn't in her brief in terms
26 of your jurisdiction to deal with this application.
27

28 THE COURT: M-hm.
29

30 MR. MOLSTAD: And I think it's just more -- more evidence that
31 this is going to take longer than a half a day.
32

33 THE COURT: M-hm.
34

35 MR. MOLSTAD: And I'd encourage you to consider that, Sir.
36

37 MR. FAULDS: My Lord, may I (INDISCERNIBLE) --
38

39 THE COURT: Sure.
40

41 MR. FAULDS: -- if I might just make this observation. The

1 understanding of the Public Trustee and I believe the Court, and I believe all the parties, is
2 that the purpose of this application is to -- of this hearing on the 27th is to interpret the asset
3 transfer.

4

5 THE COURT: M-hm.

6

7 MR. FAULDS: In other words, what (INDISCERNIBLE) it do.

8

9 THE COURT: M-hm.

10

11 MR. FAULDS: And Your Lordship talked about the possible
12 options.

13

14 THE COURT: Right.

15

16 MR. FAULDS: One of them was that you find that in fact
17 (INDISCERNIBLE) that the 1985 -- that the trust assets transferred are held for the benefit
18 of the 1985 beneficiaries.

19

20 THE COURT: Yes.

21

22 MR. FAULDS: Another possible outcome is that you find, based
23 upon the principles that apply to the interpretation of that order, that its effect is the assets
24 are held for the benefit of the 1982 beneficiaries. I'll say plainly I have a very difficult time
25 seeing how an interpretation of that order -- how such an interpretation of that order could
26 be achieved. But if applying the ordinary principles of the interpretation of orders, that's
27 the conclusion, then that's the conclusion.

28

29 The third possibility is that you conclude that the effect of the order is that it confirms that
30 the assets that are in the 1985 trust but the terms on which they're held are not resolved.

31

32 THE COURT: M-hm.

33

34 MR. FAULDS: Seems to me those are the -- those are the three
35 principal available options --

36

37 THE COURT: Yes. That's --

38

39 MR. FAULDS: -- before the Court.

40

41 THE COURT: -- probably right.

1
2 MR. FAULDS: I -- the point I think we've been trying to make is
3 that if Your Lordship goes beyond those kinds of interpretation of the order in order to
4 draw a conclusion about what ought to be the case, then you're going farther than an
5 interpretation of the order, then you're going into question of the effect of what the asset
6 transfer was and -- and that's a separate matter. And that was the basis for your discussion
7 I believe with Ms. Osualdini on October the 3rd. I think if Ms. Osualdini was suggesting
8 that the most likely outcomes were -- either were in the 1985 or we don't know. And that
9 if we --

10
11 THE COURT: Maybe that's right, but if --

12
13 MR. FAULDS: And if that's the case -- I'm sorry, My Lord.

14
15 THE COURT: Mr. Faulds, I mean, I don't -- maybe I don't
16 understand this well enough. I don't know, so you'll have to help me out, but how could I
17 possibly interpret the August 2016 order without coming to some conclusion as to what the
18 beneficial ownership of the assets was immediately prior to the order so that I can
19 determine what Justice Thomas was trying to do? Was he, I mean, if I conclude that the
20 assets were being held beneficially for the 1985 beneficiaries immediately prior to the
21 order, it makes it a lot easier to come to the conclusion that the order endorsed the transfer
22 and confirmed the beneficiary status of the 1985 beneficiaries. If I come to the contrary
23 conclusion, if I say, for instance, that this was an unlawful trust transfer of the 1982
24 beneficiaries were in breach of their trust obligations, they transferred it to 1985 Trustees
25 who knew that there was a breach of trust giving rise to a constructive trust for the benefit
26 of the 1982 beneficiaries, that's a totally different ballgame; right?

27
28 MR. FAULDS: So --

29
30 THE COURT: How can I interpret the 19 -- I mean 2016 order
31 without coming to some of those preliminary determinations?

32
33 MR. FAULDS: My Lord, with respect, I think the issue on the
34 interpretation on the order is what were the circumstances and the context before Justice
35 Thomas when he granted that.

36
37 THE COURT: Exactly.

38
39 MR. FAULDS: And those context and circumstances are what
40 was -- what was advanced and presented to Justice Thomas in connection with that order.
41 And if there is material which demonstrates that Justice Thomas was acting on the basis of

1 one belief or another about where the beneficial (INDISCERNIBLE), then that would be
2 relevant -- a relevant circumstance. But I'm concerned that to do what Justice Thomas
3 would do in the (INDISCERNIBLE) of interpreting his order is going too far and is
4 revisiting the order as opposed to interpreting it.

5
6 That -- those are my further submissions.

7
8 THE COURT: M-hm. M-hm. Okay.

9
10 MS. OSUALDINI: And, My Lord, just finally, I'd ask, in
11 considering this matter, to look at very specifically page 56 of the October 30th transcript.

12
13 THE COURT: Okay.

14
15 MS. OSUALDINI: Because in that transcript, the comments, My
16 Lord, is they were talking about step 1 and step 2 --

17
18 THE COURT: M-hm.

19
20 MS. OSUALDINI: -- is that once we deal with step 1, you were
21 contemplating a further application before the Court if the SFN was to intervene, and that
22 might involve document production for that future application.

23
24 THE COURT: For the jurisdictional issue.

25
26 MS. OSUALDINI: But the jurisdiction issue is a question of law
27 which is I think what put us down the --

28
29 THE COURT: I think both of the -- both of these are questions
30 of law.

31
32 MS. OSUALDINI: Well the question though of which trust terms
33 govern these assets is a question of mixed fact and law. It is not a (INDISCERNIBLE)
34 question of pure law.

35
36 THE COURT: Well then why did you agree to have this process
37 go forward then? Like, really --

38
39 MS. OSUALDINI: Which process, My Lord?

40
41 THE COURT: The process of interpreting the order. That,

1 ultimately, seems to me, will determine, as Mr. Faulds says, that either the 1985
2 beneficiaries are the beneficiaries of these trust assets, or the 1982, or I can't tell. Those are
3 the three choices.
4

5 MS. OSUALDINI: My Lord, I think an important distinction here is
6 the interpretive exercise of the 2016 order is based on the record before the Court. The
7 record that's now before the Court and the evidence that's been put before the Court by the
8 SFN was not before the Court. So we've now turned this into a different issue and you're
9 considering different factors than what Justice Thomas did. I think that's the crux of where
10 this divergence is arriving, is we've now turned it into a new application.
11

12 THE COURT: Sure. Okay. Well I don't want to repeat myself
13 but, as I say, I don't think I can interpret his order without knowing what the lay of the land
14 was immediately prior to him granting the order.
15

16 MS. OSUALDINI: And that's based on what was before Justice
17 Thomas at the time, not what new submissions are about that.
18

19 THE COURT: That's based upon everything that's in the record
20 before me.
21

22 MS. OSUALDINI: Well, with respect, My Lord, I think when you
23 turn to the test for interpretation of a consent order, it's based on the record before the
24 Court.
25

26 THE COURT: Well --
27

28 MS. OSUALDINI: Which would be an issue to be argued, but I think
29 that --
30

31 THE COURT: Sure.
32

33 MS. OSUALDINI: -- that's where the difficulty's arising.
34

35 THE COURT: Okay.
36

37 MS. OSUALDINI: And our point simply is that there's new evidence
38 now before you which, from our perspective, would go towards if we haven't -- if the 2016
39 consent order does not resolve the final relief that we thought it was resolving, that final
40 relief now remains open. And as part of resolving that issue, we're going to need to test
41 evidence and seek production because there's now new evidence before the Court.

1
2 THE COURT: M-hm. I just think we're really spinning our
3 wheels here to be totally honest. I mean, we've been around the block on this thing for a
4 long time. And if there was some -- some substantial piece of evidence that was available,
5 I want you to have it. But I'm hearing your friend say there isn't anything there. So why --
6
7 MS. OSUALDINI: Well --
8
9 THE COURT: -- why are we delaying the final outcome of this
10 thing? Let's just get on with it. Why not?
11
12 MS. OSUALDINI: Well, one particular issue, My Lord, that's come
13 up is the SFN have an entirely new argument that's being raised now for the first time in
14 these proceedings --
15
16 THE COURT: M-hm.
17
18 MS. OSUALDINI: -- is that the effect of the provisions of the *Indian*
19 *Act* and the access to the capital and revenue accounts impact the determination of this
20 transfer.
21
22 THE COURT: Right.
23
24 MS. OSUALDINI: That's new.
25
26 THE COURT: Okay.
27
28 MS. OSUALDINI: We have not been allowed to explore the source
29 of these funds. The SFN has not put before the Court an accounting record of where these
30 funds actually came from. They're asking you to assume that that's where they came from
31 because they say so, and we'd like the opportunity to test that. So there is new evidence and
32 while all the parties I think would like to come to a resolution, we have to do it through a
33 proper process.
34
35 THE COURT: M-hm.
36
37 MS. OSUALDINI: These are very, very serious issues that are
38 before the Court and they can't be rushed or decided on an incomplete evidentiary record.
39
40 THE COURT: How are you going to get access to the records?
41 If I were to say to you, go ahead, you've got a month to get the records, what would you

1 do? You'd write to Mr. Molstad and ask for the records, he's going to write back and say
2 sorry, I've given you everything I have. So, where are we going?

3
4 MS. OSUALDINI: We don't know that everything's been given in
5 terms of the tracing of these assets. And, also, there's another issue about privilege, whether
6 it exists over these files. Whether vis-à-vis the beneficiaries and the Trustees have ever
7 existed at all, and whether the vis-à-vis the Sawridge First Nation, whether that's been
8 waived. These are all evidentiary issues that we need to sort out.

9
10 MS. HUTCHISON: My Lord, and Ms. Osualdini, I apologize for
11 interrupting, if I may speak to your question of what would we do --

12
13 THE COURT: Yes.

14
15 MS. HUTCHISON: -- if we were now to engage in a process to seek
16 out evidence to deal with the issues that have been raised by my friends, in the OPGT's
17 original questioning of (INDISCERNIBLE), we largely stayed away from 1982 and 1970,
18 or more to the point, we were largely prevented from going into those matters, because the
19 position of the Trustees, and indeed to some degree the parties, was that pre-'85 was largely
20 irrelevant. When the consent order came through and when the 513 application was
21 resolved, the OPGT was able to accept that position because, and didn't pursue it, because
22 we had resolved the issue of the asset transfer with the consent order.

23
24 THE COURT: M-hm.

25
26 MS. HUTCHISON: So, one piece of the OPGT's efforts in this area
27 would be to go back to question Mr. Pugault (phonetic), we've never questioned Catherine
28 Twinn on her affidavit of records because since we've had the affidavit of records we've
29 been stuck in this jurisdictional issue. We would most certainly be questioning Ms. Twinn
30 about the evidence and information she has about 1982 and 1970. We would be seeking
31 documents from the SFN about their position that all of the funds that are -- that were used
32 to purchase the assets in these trusts were taken from capital revenue funds. And we would
33 also be seeking production of the records that show how Canada dealt with that issue both
34 in the 1970s at the time that the trust was created and at the time the '85 trust was created.
35 Because we believe, My Lord, that there will either be an absence of evidence that
36 disproves some of the positions taken by the SFN, or there will be documentation that
37 explicitly proves that Canada has taken very different positions on what happens to capital
38 and revenue funds once they're released and is being advanced to the Court.

39
40 THE COURT: Yes.

41

1 MS. HUTCHISON: That's one piece, My Lord. I expect there would
2 also be an application for production of Maurice Cullamy's (phonetic) file on the basis that
3 any privilege that exists over that file has been waived. It was waived by the SFN in their
4 questioning of Mr. Pugault in 2016. The OPGT has not pursued that issue because we
5 understood that the asset transfer issue was settled in 2016.

6

7 If we are now back to where we are examining the entire process of the 1985 transfer, My
8 Lord, we have not even scratched the surface in request for document production. And I'd
9 invite the Court to look at the copy of our 513-asset production application. It was included
10 in the intervention materials. There's a shopping list longer than my arm, My Lord --

11

12 THE COURT: M-hm.

13

14 MS. HUTCHISON: -- of the documents that did not and have not
15 been produced. That is why we have been before this Court saying if the Court wishes to
16 go here, we must fill the evidentiary gaps before we go there. It's not enough to do the best
17 we can with what we have, My Lord. We have to have production of the relevant evidence.
18 The issues changed in 2016. There have been supplementary affidavits filed by both Mr.
19 Pugault and Ms. Twinn that have not been questioned on around these issues. It's simply
20 not appropriate to go forward to step 2 without the documentary piece, My Lord. Thank
21 you. Sorry (INDISCERNIBLE) thank you for allowing me to interrupt.

22

23 Discussion

24

25 MS. BONORA: Sir, I'll just be very brief. I honestly can say as an
26 officer of this Court that my friend asked us to write to so many individuals to ask for
27 records specifically with respect to the assets and the documents and the records of the
28 1982 trust and 1985 trust and we did all of those and nothing was produced. And, My Lord,
29 I am confident that there will be nothing coming from now, yet another attempt to get more
30 records. It will just be more money spent. And, as you know, we're paying for the Office
31 of the Public Trustee (INDISCERNIBLE) to go down those paths. Trustees don't -- are not
32 fulfilling their fiduciary duties if they don't say that is a path that will cost a lot of money
33 and lead to nothing.

34

35 The evidence is before the Court. Not the -- the evidence with respect to the funds that
36 came from the capital and revenue accounts, the information that we have that we pursued
37 is before the Court. The whole record is there. And we implore you not to go down that
38 path. There is a letter that is part of the affidavit of records where Mr. Cullamy says, I act
39 for the Sawridge First Nation in respect of the trust. That's -- then privilege belongs to
40 Sawridge First Nation. And this idea of the case that my friend put forward from the 1920s
41 that says documents belong to the beneficiaries is old law. There is new law that we can

1 look at what in fact does belong to beneficiaries. But we don't believe we have Mr.
2 Cullamy's privilege even to release.

3
4 And so, My Lord, I implore you to take the evidence that we have, which we say is
5 absolutely everything there is, because Mr. Pugault has said he's gone through an extensive
6 exercise of asking for all of the records in respect of the trust going back and there is
7 nothing more. So we can do this --

8
9 THE COURT: Has he been cross-examined on his affidavit of -

10 -

11
12 MS. BONORA: He's been cross-examined on the affidavit. So if
13 you look at our brief that we filed for the 2016 application, and because that obviously was
14 an issue, that we thought the Court should know. So we go through, on page 3 of that brief
15 that was before the Court in 2016 and say very categorically what documents were
16 produced, who was examined, when they were examined, what undertakings were filed so
17 that we could prove to the Court that there were no other records so that the preamble was
18 accurate.

19
20 THE COURT: M-hm.

21
22 MS. BONORA: And so I would say that we can try that, we can
23 spend a lot of money, but we will find nothing because we've already said that on the record
24 and under oath.

25
26 THE COURT: M-hm.

27
28 MS. BONORA: And then Mr. Molstad confirmed that Sawridge
29 First Nation doesn't have (INDISCERNIBLE). So I would ask that you not entertain that
30 because that has already been fully explored and will produce nothing more for this Court.

31
32 THE COURT: M-hm.

33
34 MR. MOLSTAD: Can I just add, excuse me, Sir, you've got the
35 application before you, no one's asked for the adjournment except I've suggested that we
36 set it for a date. I submit, Sir, that the application should be heard on the merits and full
37 argument made at that time and then you can decide exactly, you, Sir, what jurisdiction
38 you have and what your decision is.

39
40 THE COURT: M-hm. Okay.

41

1 MR. FAULDS: And, My Lord, given the nature of the discussion
2 we've had this morning, the OPGT wouldn't be opposed to saying that we should have
3 (INDISCERNIBLE).
4

5 THE COURT: We should have a what?
6

7 MR. FAULDS: That we should have day rather than a half a day
8 for this.
9

10 THE COURT: You're opposed to that?
11

12 MR. FAULDS: Yeah. I mean -- no, we're not opposed. No.
13

14 MS. BONORA: We're in support of.
15

16 THE COURT: I was going to say, you think we need less time
17 for this?
18

19 MR. FAULDS: No, no. No. Just the opposite.
20

21 THE COURT: Okay. Well, what we're going to do here is -- the
22 Trustees are going to get me these transcripts from the last -- can you get me the transcripts
23 of all the sessions that I've had with you over the last six months or whatever? So I can try
24 to, and particularly this October 30th transcript, so I can understand a little more clearly. I
25 thought I understood as I walked in the courtroom this morning but I'm being told that
26 maybe I didn't understand quite correctly. But I would like a clear grip on what I thought
27 we were doing, what directions I thought I was giving in the context of the notice of motion
28 that was filed. And I will review those, I will take into account the submissions of all the
29 parties. We'll come back on Wednesday afternoon, the 27th, at 2:00, and I will give you
30 some direction with respect to what we're going to do. In the meantime, someone told me
31 we had a date booked or available for --
32

33 UNIDENTIFIED SPEAKER: Ms. Bonora advised me, Sir, that she checked
34 and January 16th was available.
35

36 THE COURT: Is that a day that we can log in with everyone?
37 What I would, I mean, we are not going to do this application in a half a day. I mean, that
38 just doesn't make any sense. We can't even agree on what we're going to do in an hour. So
39 it's -- a day is required for sure. But I also want to address my mind, and I will over the
40 next few days, as to what exactly we're going to do, so whether I'm going to direct that we
41 go ahead with the application on the date we book, or whether we're going to give some

1 direction for a timeline for investigation, examination, disclosure, whatever, leading to a
2 date where we can actually get this decision done. So I need to look at the transcripts to
3 make a decision as to what we're going to do on that and we'll do that on Wednesday
4 afternoon.

5
6 MS. BONORA: Sir, I'll just say, we normally order the transcripts
7 so we'll expedite this one for you --

8
9 THE COURT: Could you do that?

10
11 MS. BONORA: -- so we'll give you the others right away, and
12 then as soon as we get this one, we'll give it to you as well.

13
14 THE COURT: Okay. Good. Thank you very much. Yes. That'll
15 give me a better idea.

16
17 MR. FAULDS: But the applications will not be going ahead next
18 week.

19
20 THE COURT: No, no. Next week is so that I can try to give you
21 some direction as to what we are going to do. So just a preliminary --

22
23 MS. BONORA: Sir, shall we book the 16th then? January 16th?

24
25 THE COURT: Yes. Well, provided the parties are in agreement.

26
27 All right. I'll get you to drop this off at the trial coordinator's office just to make sure that's
28 still available.

29
30 MS. BONORA: Thank you. We checked yesterday and we're free
31 that day, so.

32
33 THE COURT: Okay. Excellent. Thank you very much.

34
35 Okay. Well, thank you for your assistance today.

36
37 THE COURT CLERK: Order in court, all rise.

38
39
40 PROCEEDINGS ADJOURNED UNTIL 2:00 PM, NOVEMBER 27, 2019
41

1 **Certificate of Record**

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I, Danielle Tayloo, 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 22nd day of November, 2019, and that I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

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I, Gaye Laing, 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-1004-4463
Dated: November 26, 2019

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

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

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

IN THE MATTER OF THE SAWRIDGE BAND INTER 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, TRACEY SCARLETT,
EVERETT JUSTIN TWIN and DAVID MAJESKI, as
TRUSTEES FOR THE 1985 SAWRIDGE TRUST (the "1985 Trustees")

Applicants

PROCEEDINGS

Edmonton, Alberta
November 27, 2019

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta, T2P 5P7
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TABLE OF CONTENTS

Description	Page
November 27, 2019 Afternoon Session	1
Discussion	1
Certificate of Record	12
Certificate of Transcript	13

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

2

3

4 November 27, 2019

Afternoon Session

5

6 The Honourable
7 Mr. Justice Henderson

Court of Queen's Bench
of Alberta

8

9 D.C.E. Bonora

For R. Twinn, M. Ward, T. Scarlett, E. Justin
Twin, D. Majeski, as Trustees for the 1985
Sawridge Trust ("the 1985 Trustees")

10

11

12 M.S. Sestito

For R. Twinn, M. Ward, T. Scarlett, E. Justin
Twin, D. Majeski, as Trustees for the 1985
Sawridge Trust ("the 1985 Trustees")

13

14

15 E.H. Molstad, Q.C.

For Sawridge First Nation

16 E. Sopko

For Sawridge First Nation

17 P.J. Faulds, Q.C.

For the Office of the Public Trustee

18 J.L. Hutchison

For the Office of the Public Trustee

19 D. Risling

For C. Twinn

20 C. Osualdini

For C. Twinn

21 (No Counsel)

For S. Twinn

22 N. Lachat

Court Clerk

23

24

25 **Discussion**

26

27 MS. BONORA:
28 that's all right.

Sir, I'll just introduce everyone for the record if

29

30 THE COURT:

Sure. Yes. Go ahead.

31

32 MS. BONORA:

Sir, this afternoon, Doris Bonora and Michael
Sestito here for the Sawridge Trustees; Mr. Molstad and Ellery Sopko are here on behalf
of Sawridge First Nation; Janet Hutchison and John Faulds are here on behalf the Office
of the Public Trustee and Guardian; Dave Risling and Crista Osualdini are here behalf of
Catherine Twinn; and Shelby Twinn is here representing herself.

33

34

35

36

37

38 THE COURT:

Welcome.

39

40 MS. BONORA:

So, Mr. Molstad would like to present the order

41 from October 31st and has a few comments if that would be all right.

1
2 MR. MOLSTAD: Thank you. We've circulated the order, Sir, and
3 I can tell you that we almost have an agreement. It was very close.
4
5 THE COURT: Okay. Well, come back when you do.
6
7 MR. MOLSTAD: Well, I don't think we will, Sir.
8
9 THE COURT: Oh, okay.
10
11 MR. MOLSTAD: It's a very small issue that we think you should
12 decide.
13
14 THE COURT: All right.
15
16 MR. MOLSTAD: And it's paragraph 2 of the order. My friend is
17 of the view that the words should be added to that "as a condition of its intervention in
18 the jurisdiction applications". We say that's not what you said at page 6, lines 14 to 21 of
19 your decision.
20
21 THE COURT: What did I say?
22
23 MR. MOLSTAD: Pardon me?
24
25 THE COURT: What did I say?
26
27 MR. MOLSTAD: Page 14 -- page 6, lines 14 are as follows: (as
28 read)
29
30 That the Public Trustee argued that if I were to grant the intervenor
31 application, I should impose conditions specifically with respect to
32 the production of documents. I did hear yesterday Mr. Molstad tell
33 me that all of the documents have been turned over to the trustees
34 apart from the documents over which privilege has been maintained.
35 In my view, nothing but delay and additional expense would be
36 incurred if I were to impose conditions with respect to the
37 production of additional documents.
38
39 THE COURT: M-hm.
40
41 MR. MOLSTAD: (as read)

1
2 We should simply proceed to deal with the important issues that
3 need to be dealt with and that is what we will do.
4

5 THE COURT: Yes. And so the public trustee would like to
6 qualify paragraph 2 to say vis-à-vis or only in respect of the asset transfer issue that I'm
7 going to hear --
8

9 MR. MOLSTAD: Yeah. I --
10

11 THE COURT: -- and the jurisdictional issue.
12

13 MR. MOLSTAD: -- think we'll let her what she would like to add.
14

15 MS. HUTCHISON: Thank you, Mr. Molstad.
16

17 My Lord, we simply suggested adding words "as a condition of leave to intervene" at the
18 end of paragraph 2 to make it clear that it's not a foreclosure of all future productions.
19

20 THE COURT: Okay. Anything else you'd like to say?
21

22 MR. MOLSTAD: Nothing, Sir.
23

24 THE COURT: I was dealing with the issue of your -- Sawridge
25 Band's intervention on two applications. I granted intervenor status with respect to the
26 asset transfer issue and with respect to the jurisdiction issue and my comments with
27 respect to the production of documents related to those. So you've got no obligation with
28 respect to production of documents in relation to those two issues.
29

30 I don't know what is going to happen in the future. It's impossible for me to say. You
31 might become a party to the litigation, your client might become a party to the litigation
32 at some point, you might apply to intervene with respect to another step. I wouldn't want
33 to foreclose something.
34

35 MR. MOLSTAD: We'll redraft it --
36

37 THE COURT: Good. Thanks.
38

39 MR. MOLSTAD: -- consistent with what my friend has requested.
40

41 THE COURT: Good.

1
2 MR. MOLSTAD: I just have two minor points that I wish to make
3 in addition --
4
5 THE COURT: Yes, please.
6
7 MR. MOLSTAD: -- and concerns. And the first one is that on
8 November 22nd when we appeared, Mr. Faulds and Ms. Hutchison made submissions
9 that you do not have jurisdiction to decide this application without their consent.
10
11 THE COURT: Yes.
12
13 MR. MOLSTAD: And that's found in November 22nd transcript --
14
15 THE COURT: Yes, I saw that. M-hm.
16
17 MR. MOLSTAD: -- on page 9 and page 10. And the jurisdiction
18 of the case manager, who is a justice, is set out in *Rules* 4.9 to 4.15. They are broad and
19 they include an obligation, Sir, to hear every application unless the Chief Justice, or you,
20 Sir, order otherwise. And that's found in *Rule* 4.14(2). The only restriction in relation to
21 case management was found in *Rule* 4.15 which provides that unless the parties and the
22 judge agree that he will not hear an application for judgment by way of summary trial and
23 he will not reside as a trial judge in the action. That is the only restriction.
24
25 We say, Sir, that you have an application in front of you, which is at tab T of our book of
26 documents, it is neither for judgment by way of summary trial or the trial for the action,
27 and any suggestion that you do not have jurisdiction to hear the application, in our
28 submission, is devoid of merit.
29
30 THE COURT: Okay.
31
32 MR. MOLSTAD: We didn't respond to that the last time we
33 appeared but we wanted to respond to that today.
34
35 THE COURT: Okay.
36
37 MR. MOLSTAD: Those are our submissions.
38
39 THE COURT: Thank you very much.
40
41 Does anyone else have anything that they want to add? No?

1
2 Mr. Faulds, you --

3
4 MR. FAULDS:

Oh, no. No, I was just saying no, My Lord.

5
6 THE COURT:

Good. When we left off last time, I indicated
7 that I would review the transcripts from the previous proceedings. Thank you very much
8 for providing those to me. I have had an opportunity to review them. That review was for
9 the purpose of attempting to determine whether or not there was any concern with respect
10 to the issue raised in relation to the application on the asset transfer issue that was to be
11 argued November 27th, but which we have now arranged for January 16th.

12
13 I have reviewed the transcripts. I see no lack of clarity with respect to the issues that have
14 been set out. The issues I initially raised on April 25th, 2019, as I review that transcript,
15 and I was speaking at that time when I knew much less about the case than I do today,
16 but, in any event, going back to that transcript I think that it sets out quite clearly what
17 my concerns were. I raised those very same concerns on September the 4th when the
18 parties were before me. And the notice of motion was filed shortly thereafter. And the
19 notice of motion, it's now called an application I'm afraid, so the application that was
20 filed sets out the application that is being made. There is clarity in that. It conforms very
21 closely to what I discussed in my comments on April 25th and again on September the
22 4th. There is, in my view, no lack of clarity here.

23
24 The issues that we are going to hear on January 16th are a question of the interpretation
25 and the effect of Justice Thomas' order from August of 2016. As part of that process,
26 we're going to consider whether that order should be interpreted so as to confirm that the
27 trust assets are being held by the 1985 trustees for the benefit of the beneficiaries as
28 defined in the 1985 trust deed. Or, alternatively, whether those trust assets are being held
29 by the 1985 trustees for the benefit of the beneficiaries described in the 1982 trust deed.
30 Or, as I mentioned last time, a third alternative. The third alternative is I will not be able
31 to answer that question.

32
33 And maybe I will just elaborate a little more clearly with respect to what I was thinking
34 there because I see that I didn't articulate that the last time. I have not been able to review
35 all the materials on this file. The application refers to essentially the materials on the file
36 as being a record that the trustees rely on in seeking advice and direction. One of two
37 things is going to happen: either I will have sufficient confidence in the state of the record
38 that I will be permitted to answer the question posed by the trustees, or I will not. If I
39 have sufficient confidence in the state of the record, I will provide an answer to the
40 question - do the trustees hold for the benefit of the 1985 beneficiaries? If not, do they
41 hold for the benefit of the 1982 beneficiaries? Or, if the record shows some other

1 alternative, maybe that will arise as well.
2

3 But if I do not have sufficient confidence in the state of the record, I reserve the right to
4 say no, this will not happen on this application. I can't tell you how I will rule on that
5 until I have a better handle on the record that's before me. And I don't have that today, I
6 will propose to address that issue specifically in the reasons. So, I will hear argument, I
7 hopefully will be able to give you an answer, I will do my best to give an answer, but I,
8 sitting here today, cannot tell you with an absolute certainty that you will walk away with
9 an answer. There is a chance that I will be concerned about the state of the record and,
10 therefore, I will not be able to give you an answer. And that's really where I think we will
11 be.
12

13 I want to specifically address a concern or a caution that was raised with me by Mr.
14 Faulds, I believe, at the last appearance, and that is inviting me to look at page 56 and 57
15 of the transcript of the October 30th hearing. And there, Mr. Faulds I think was pointing
16 me to commentary that could suggest that there were two issues at stake here - one, is
17 whether I agreed or would conclude that the 1985 trust assets were being held by the
18 1985 trustees for the benefit of the 1985 beneficiaries; and, if I didn't agree on that front,
19 we would stop and do something else. And I see his -- I see that there is something in the
20 record that would point in that direction but I can tell you that that is not what I was
21 attempting to articulate at the time I made those comments. What I was doing, and if we
22 follow along, I was trying to suggest that that is something that Mr. Faulds had referred to
23 earlier in the presentation.
24

25 The two issues that I see, and always have, are the asset transfer issue and the
26 jurisdictional issue. It would not be possible to cut the asset transfer issue in two parts
27 and finish off by saying yes or no to whether or not the 1985 trustees hold for the benefit
28 of the 1985 beneficiaries, and then wait for further argument. That is not possible.
29 Because to get to the point where I make a ruling on 1985, I'm going to have to have
30 considered the context, and the background, and most importantly, what was the status of
31 this trust immediately prior to Justice Thomas granting his order.
32

33 So that is where I think we are. Now, we did hear further submissions from the parties
34 last time with respect to two issues - document production and process. I've previously
35 given a ruling, and indeed there was debate about that just a few minutes ago, my prior
36 ruling was that there's no need for any further document production. That is the ruling. If
37 there is something in particular that any of the parties think they need in order to properly
38 advocate their position, I am prepared at least on the surface to reconsider my ruling if
39 you tell me what you want and why it would impact the decision that I have to make. So
40 if anyone wants to make submissions on that, they're welcome to do that.
41

1 Secondly, on the issue of process, if someone has some suggestion as to how we could
2 conduct this process in a manner that would come to a fairer result for everyone, I'm
3 happy to hear from you. But, at the moment, we have an application that's been brought
4 by the trustees in the ordinary course, as trustees do from time to time, to seek advice and
5 direction that is routinely conducted on the basis of affidavit evidence and heard in
6 chambers, and that's the way I think that this has been set up. That would seem to be a fit
7 and proper process. It would permit, in my view, a fair opportunity to have all of the
8 submissions made with respect to potential outcomes. And, in the absence of some
9 submissions or suggestions to the contrary, that's how we will go.

10
11 MR. FAULDS: My Lord, might I ask --

12
13 THE COURT: Sure.

14
15 MR. FAULDS: -- in respect of those last two points, how would
16 you like -- if any of the parties or the intervenor do indeed wish to present that, is a letter
17 to Your Lordship sufficient to set that out or would you prefer an application?

18
19 THE COURT: You know, I don't like letters, generally
20 speaking, because then we're waiting for other parties to comment and it just doesn't -- it's
21 not a proper process, in my mind. So if you, or any of the parties, if any of the parties
22 want to deal with either of those issues, if there are particular documents that you want to
23 see, tell me what in particular you want and tell me how those documents will impact in a
24 material way the outcome of the decision, just call my assistant, and I have no free days
25 between now and Christmas, but there's always 8:30, there's lunch hours, and there's 4:30
26 if we need to. Similarly, if someone has an idea as to a fairer mode of hearing that we
27 could undertake on the 16th of January, I'm -- I want to do whatever we can to make sure
28 that we give everyone the fairest opportunity to make a full presentation so that a proper
29 outcome can be had in relation to this case.

30
31 MR. FAULDS: Thank you.

32
33 THE COURT: Okay. Anything else we need to deal with?

34
35 MS. OSAULDINI: In terms of the January hearing, we would like
36 the opportunity to file further written submissions in light of the clarification today.

37
38 THE COURT: Yes. That was the other issue I had wanted to
39 raise. There is been some water under the bridge since the briefs were filed and I -- I
40 think it would be quite appropriate if supplemental briefs were provided if you thought
41 that was necessary. I would -- I don't want to turn this into a ping-pong game where

1 people are passing briefs back and forth but I know certainly from your perspective you
2 have -- did not have a chance to file a brief. But if anyone else has additional submissions
3 to make, that would help me in terms of getting ready for the 16th. So I would be -- I
4 would be content with that for sure.

5
6 One other issue that I would like to have from all the parties an agreement on, if it is a
7 subject of -- it's a factual issue, I've heard numbers kicked around, I think Ms. Hutchison
8 addressed this in part in one of her submissions, she told me I think that there are 30
9 members of the 1985 trust for the beneficiaries who are not members of the Sawridge
10 Band. And so I'm taking that as being a number that's agreed upon. Later there was some
11 reference to 23. But that order of magnitude, 20, 25, 30, that's the number I am thinking
12 of. So, if the parties could confirm that's generally true?

13
14 On the flip side, do we have any handle on the number of people who were not Sawridge
15 Band members prior to 1985 but, because of the change of legislation in April of 1985,
16 became members? So they would -- they would not be members or beneficiaries under
17 '85 but are members of the Sawridge Band. Do we have a handle on those numbers?

18
19 MS. BONORA: So I think in the Justice Hugessen decision,
20 there were 11 people who were made members as a result -- were -- as a result of the Bill
21 C31 legislation. So I think it's those --

22
23 THE COURT: So they came in immediately after April 1985,
24 11 of those people, and they're still around?

25
26 MS. BONORA: Some of them have died.

27
28 THE COURT: Okay. Well, how many --

29
30 MS. BONORA: They were made members as a result of an
31 injunction through the Hugessen decision, but he said they were basically members from
32 1985. But there were 11 people in that decision.

33
34 THE COURT: Okay. So if I use 11 and 30, are those the -- Mr.
35 Molstad?

36
37 MR. MOLSTAD: If I could speak briefly, Sir?

38
39 THE COURT: Yes.

40
41 MR. MOLSTAD: As a litigator, I can tell you that I don't know

1 what the position is of my friends in terms of who ought to be a beneficiary based on
2 their interpretation of the 1985 trust.
3
4 THE COURT: Okay.
5
6 MR. MOLSTAD: I'd like to see that.
7
8 THE COURT: Okay.
9
10 MR. MOLSTAD: I'd like them to tell me who they say is a
11 beneficiary --
12
13 THE COURT: M-hm.
14
15 MR. MOLSTAD: -- and the reason that they say they're
16 beneficiaries.
17
18 THE COURT: M-hm.
19
20 MR. MOLSTAD: In terms of the individuals who --
21
22 THE COURT: I don't need that for this application, Mr.
23 Molstad. I'm just trying to think of order of magnitude because ---
24
25 MR. MOLSTAD: We don't know that though.
26
27 THE COURT: We don't know that. Okay. Well, then there is
28 an agreement on that.
29
30 MR. MOLSTAD: Yeah. And -- and in terms of what my friend,
31 Ms. Bonora, said, that's what Sawridge has, as a First Nation, has encouraged, the fact
32 that these people who, by order of Hugessen, were made members are not beneficiaries.
33 Their objective was to take steps to ensure that they became beneficiaries. Sawridge First
34 Nation wants those 11 people who are members and who, based on the interpretation of
35 the 1985 trust, are not considered beneficiaries, they want them to be beneficiaries.
36
37 THE COURT: Okay.
38
39 MS. BONORA: So, Sir, sorry, I perhaps should've said, I think
40 their second point, there is a agreement it is those 11. I think on the first point, perhaps a
41 way to do it is to maybe have it addressed it in the supplemental briefs and then we can

1 see --

2

3 THE COURT: Sure. I mean, I'd just like to have some -- some
4 indication of what I'm dealing with. Because as I've been reminded several times, there
5 were consequences and I want to understand what those consequences are of making a
6 decision.

7

8 MR. FAULDS: My Lord --

9

10 THE COURT: Not that it would necessarily impact the
11 decision but I'd like to know what those consequences are.

12

13 MR. FAULDS: And, My Lord, the numbers that you referred to
14 and which were referred to in one of the briefs of the Public Trustee --

15

16 THE COURT: M-hm.

17

18 MR. FAULDS: -- those were numbers which were derived from
19 Mr. Bugauld's (phonetic) affidavits from I believe 2011 and then 2015. I don't know
20 whether or not the trustees might be in a position to update those numbers again but, you
21 know, perhaps that might be a useful thing to do.

22

23 We've used those because those -- because those numbers -- the numbers which have
24 been deposed to, there may be some basis for --

25

26 THE COURT: M-hm.

27

28 MR. FAULDS: -- adjusting those numbers based on the
29 interpretation of the -- of the trust beneficiary definitions. But those seem to be -- those
30 seem to be certainly ballpark numbers.

31

32 THE COURT: Okay. Well, maybe you could provide --

33

34 UNIDENTIFIED SPEAKER: We'll address it in our brief.

35

36 THE COURT: -- whatever your best information is.

37

38 UNIDENTIFIED SPEAKER: Yeah. M-hm.

39

40 THE COURT: So, okay. Nothing further?

41

1 UNIDENTIFIED SPEAKER: Thank you.

2

3 THE COURT: Okay. Thank you very much.

4

5

6 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

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I, Nicole Lachat, certify that this recording is the record made of the evidence of proceedings in the Court of Queen’s Bench, held in courtroom 315, at Edmonton, Alberta, on the 27th day of November, 2019, and I was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

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I, Nicole Carpendale, 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

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TEZZ TRANSCRIPTION, Transcriber
Order Number: AL-JO-1004-4827
Dated: November 30, 2019

Action No.: 1103-14112
E-File Name: EVQ19TWINNW
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

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 ("1985 Sawridge Trust")

P R O C E E D I N G S

Edmonton, Alberta
December 20, 2019

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TABLE OF CONTENTS

Description		Page
December 20, 2019	Morning Session	1
Submissions by Ms. Bonora		1
Submissions by Mr. Faulds		5
Submissions by Ms. Osualdini		13
Submissions by Mr. Molstad		14
Ruling		35
Certificate of Record		39
Certificate of Transcript		40

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

2

3 December 20, 2019

Morning Session

4

5 The Honourable

Court of Queen's Bench of Alberta

6 Mr. Justice Henderson

7

8 D.C. Bonora

For the Trustee

9 M.S. Sestito

For the Trustee

10 C. Osualdini

For Catherine Twinn

11 E.H. Molstad, QC

For Sawridge First Nations

12 E. Sopko

For Sawridge First Nations

13 J.L. Hutchison

For the Office of Public Trustee and Guardian

14 P.J. Faulds, QC

For the Office of Public Trustee and Guardian

15 R. Lee

Court Clerk

16

17

18 THE COURT:

Good morning, please be seated.

19

20 MS. BONORA:

Thank you, Sir. I'll just introduce the parties if -

21

-

22

23 THE COURT:

Sure.

24

25 MS. BONORA:

So Doris Bonora is speaking and she is here with

26 Michael Sestito for the Sawridge Trustees, Ed Molstad, and Ellery Sopko are here for

27 Sawridge First Nation, Janet Hutchison and John Faulds are here for the Office of the

28 Public Trustee and Guardian, Crista Osualdini is here for Catherine Twinn and I don't

29 believe Shelby (phonetic) Twinn is here. The - the application today unfortunately has just

30 become a scheduling application.

31

32 THE COURT:

M-hm.

33

34 **Submissions by Ms. Bonora**

35

36 MS. BONORA:

We had -- when we were before you on

37 November 27, you had made a direction that your prior ruling was that there was no need

38 for further document production.

39

40 THE COURT:

M-hm.

41

1 MS. BONORA: That is the ruling. That's what you said. If there
2 was something in particular that any of the parties think they need in order to properly
3 advocate their position you have prepared to at least on the surface to reconsider your
4 ruling.

5
6 THE COURT: M-hm.

7
8 MS. BONORA: If you want to tell me what and why you need --
9 it might impact the decision. This is from paragraph -- or page 6 and 7 of the November
10 27. And sorry just -- I -- we order all of the transcript I am wondering if you would like
11 you to send you the transcripts --

12
13 THE COURT: That would be helpful.

14
15 MS. BONORA: -- as we receive them.

16
17 THE COURT: Yes, that would be helpful.

18
19 MS. BONORA: So we will do that. You further went on to say --
20 so if any --

21
22 THE COURT: Just electronically.

23
24 MS. BONORA: Pardon me?

25
26 THE COURT: Just electronically.

27
28 MS. BONORA: Electronically?

29
30 THE COURT: Trying to avoid the paper.

31
32 MS. BONORA: Very good, Sir. So if any of the parties want to
33 deal with either of these issues and you dealt with production as well as procedure and if
34 there is any particular document that you want to see tell me in what in -- tell me what in
35 particular you want and tell me how those document will impact you in a material way --

36
37 THE COURT: Yes.

38
39 MS. BONORA: -- or materially out -- impact the outcome of the
40 decision. So just call my assistant and I have no free days between now and Christmas but
41 there's always 8:30, there's lunch hours and there's 4:30 if we need to.

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THE COURT: M-hm.

MS. BONORA: And, Sir, none -- obviously those applications did not happen.

THE COURT: M-hm.

MS. BONORA: From April 25th to November 27th there was seven appearances before you. And at least in three of those appearances the Office of the Public Trustee and Guardian addressed production.

THE COURT: M-hm.

MS. BONORA: And yet there is still no application for production before you.

THE COURT: M-hm.

MS. BONORA: And none that we have received.

THE COURT: M-hm.

MS. BONORA: Although, we received a letter, yesterday, from the Office of the Public Trustee and Guardian late in the day. That's -- that has a paragraph that I think is -- should be concerning to all of us, which says, (as read)

... without prejudice to the Office of the Public Trustees and Guardians fundamental objections to the current transfer issue proceeding the Office of the Public Trustee and Guardian has taken the position that further protection is required.

And then proceeded to say that the reason there was no application was because Catherine Twinn filed the supplemental affidavit of documents and they wanted to see what was in there. But then the Office of the Public Trustee and Guardian goes on to say that there are documents they need. These documents would not have been in Catherine Twinn's possession and they would have been at least in Sawridge First Nation's possession.

THE COURT: Yes.

MS. BONORA: And, so, it is not necessarily my practice to try

1 and address bad behaviour in litigation, but I say this because I feel now we are off of
2 January 16th, there is no way to achieve that. Mr. Molstad's going to address a new
3 schedule for us. And that we want the application to be peremptory on the Office of the
4 Public Trustee and Guardian because we don't think we're ever going to proceed unless it
5 is peremptory on them. I think your direction was very clear that the applications for
6 production should have happened between now and Christmas. And - and they were limited
7 because your direction was already that no production was required. And so then we
8 unfortunately I don't think can achieve it and we of course want the procedural fairness.
9 But the problem is now because we don't have an application and it hasn't been made and
10 now it's Christmas and all of those delays happened we won't be able to get to January 16.

11
12 THE COURT: Yes.

13
14 MS. BONORA: Catherine Twinn for -- filed a supplementary
15 affidavit that was produced. Ms. Os -- there's a lot of video, Ms. Osualdini has offered to
16 direct us to the parts of the video that are relevant. So I think Catherine Twinn has been an
17 active participant and has followed your direction. But we do think that we need some
18 direction from you now after seven appearances --

19
20 THE COURT: M-hm.

21
22 MS. BONORA: -- on this issue.

23
24 THE COURT: M-hm.

25
26 MS. BONORA: To get to a conclusion.

27
28 THE COURT: M-hm.

29
30 MS. BONORA: So, I - I am going to end my submissions there
31 and allow Mr. Molstad to put forward a schedule that I think is generally in agreement
32 among the parties.

33
34 THE COURT: Okay.

35
36 MR. MOLSTAD: I am not sure my friends have agreed to the
37 schedule but I advised them of it this morning --

38
39 THE COURT: Okay.

40
41 MR. MOLSTAD: -- myself and Ms. Bonora have agreed to it and I

1 believe that it's going to be satisfactory to them. But we're advised that we will be served
2 today with an application for production. We haven't seen it, so we don't know what the
3 scope is or what will be requested. So the time line is that we be served today with the
4 Public Trustee's application for production and as I understand it her submission is going
5 to be served today as well. Am I correct, in that understanding?
6

7 MR. FAULDS: No it won't be served today but it will be served
8 as soon as possible.
9

10 MR. MOLSTAD: Oh, okay. Well then we should set a day for the
11 service of the submission. Is it - is it completed or is it?
12

13 **Submissions by Mr. Faulds**
14

15 MR. FAULDS: No it's not. And, My Lord, may I perhaps just
16 before Mr. Molstad presents his proposed schedule if I might just provide a little bit of
17 additional background or insight into what's - what's occurred.
18

19 THE COURT: Sure. Mr. Molstad we will give you plenty of
20 opportunity to say whatever you'd like.
21

22 MR. MOLSTAD: Thank you, Sir.
23

24 MR. FAULDS: Thank you, I'd --
25

26 THE COURT: Mr. Faulds, it seem I should know what the issue
27 is rather than letting you give the schedule without me knowing what the issue is.
28

29 MR. MOLSTAD: Yeah. True.
30

31 MR. FAULDS: Just - just by way of time lines.
32

33 THE COURT: Yes.
34

35 MR. FAULDS: On November the 27th --
36

37 THE COURT: Yes.
38

39 MR. FAULDS: Your Lordship clarified -- made a further
40 clarification which included the comments which Ms. Bonora said --
41

1 THE COURT: M-hm.

2

3 MR. FAULDS: -- inviting any party to --

4

5 THE COURT: Yes.

6

7 MR. FAULDS: -- seek further production if they considered it
8 essential, and to make any suggestions regarding process.

9

10 On December 3rd we received instructions to proceed with such an application. On
11 December 6th we received advice that Catherine Twinn was filing a supplementary
12 affidavit of records, the contents of which at that point we had no idea what it is about. As
13 a result of that, on December 6th Ms. Hutchison advised all of the parties that we wished
14 to review what Ms. Twinn was producing before we proceeded with an application. On
15 December the 16th, that is this Monday, we received the actual production of the
16 documents from - from Ms. Twinn and have had some opportunity to review it but certainly
17 not a full opportunity to review its contents.

18

19 On -- yesterday we issued a letter to all of the parties advising that having reviewed --
20 having conducted at least a preliminary review it appeared that there were additional
21 materials that we would be seeking.

22

23 THE COURT: M-hm.

24

25 MR. FAULDS: And we ser -- and we made two alternative
26 suggestions. We suggested that if the parties were willing to voluntarily produce those
27 materials that we might then take all of the steps necessary to conduct any questioning in
28 relation to those materials before the 10th of January and that that would permit the
29 application to proceed on January the 16th.

30

31 THE COURT: M-hm.

32

33 MR. FAULDS: If on the other hand the production was contested
34 then it was our view that - that the matter would have to be adjourned somewhat, we'd
35 anticipated perhaps we could use January 16th to argue about the production issues and
36 proceed from there. My friend's schedule doesn't - doesn't take advantage of - of that. But
37 that's - that - that's the - the factual background. I - I --

38

39 THE COURT: But what - what are we looking for? Like what -
40 - how -- what --

41

1 MR. FAULDS: We're - we're looking for things that directly
2 relate to assertions in the - in the Sawridge First Nation's submission.
3
4 THE COURT: M-hm.
5
6 MR. FAULDS: On which there has been no production, or for
7 which there - there is no current --
8
9 THE COURT: M-hm.
10
11 MR. FAULDS: -- evidentiary support.
12
13 THE COURT: M-hm.
14
15 MR. FAULDS: For example, we are looking for documents
16 relating to the status of the 1982 Trust. You may recall that Mr. Bujold the corporate
17 representative of the Sawridge Trustees gave evidence in response to a question from Mr.
18 Molstad in questioning in the run up to the August 2016 order that the 1982 Trust did not
19 exist.
20
21 THE COURT: M-hm.
22
23 MR. FAULDS: Mr. Molstad contests that in his submissions --
24
25 THE COURT: M-hm.
26
27 MR. FAULDS: But we have no records that - that would allow
28 that - that assertion to be assessed.
29
30 THE COURT: So who -- to that -- and I apologize if - if I don't
31 understand the complexities as well as I should at the moment. But to that I say so what.
32 The trust either exists or it doesn't right now. How does that effect the interpretation of
33 Justice Thomas' order which is really what we are looking for right now? How - how -
34 how does that?
35
36 MR. FAULDS: Well, I suppose that if the trust ceased to exist on
37 -- in 1985 are we understand --
38
39 THE COURT: Yes.
40
41 MR. FAULDS: -- to be the case. Any suggestion that the assets

1 are held for the 1982 Trust is moot. There is --

2
3 THE COURT: The beneficiaries didn't go anywhere. They were
4 still there. They are still there today. The '82 beneficiaries. So the assets can be transferred
5 to 1985, and held for the '85 beneficiaries or held for someone else. That - that is one of
6 the issues that has to be assessed in the context of what Justice Thomas meant when he
7 gave his order.

8
9 MR. FAULDS: Right. And --

10
11 THE COURT: So how -- whether the trust exists or not why -
12 why - why --

13
14 MR. FAULDS: Well perhaps again our -- we have appeared
15 before Your Lordship a number of times and - and - and - and I think our struggle with the
16 issue has been apparent. Our understanding is that Your Lordship intends to address what
17 the legal and factual situation was immediately prior to the granting of the asset transfer
18 ordered by Justice Thomas.

19
20 THE COURT: Right. I think I have to do that because we have
21 to know what the landscape was when Justice Thomas set about to grant the order. Was -
22 was he doing nothing more than saying everything was done properly in 1985 and therefore
23 I am just confirming that everything was done appropriately, so therefore I am confirming
24 the asset transfer, or was he saying, well no things were not quite done properly but I am
25 going to get an order to clean up some of the errors that were made. And if it is that scenario
26 was he intending to clean it up completely by saying the beneficial ownership was moved
27 to the 1985 beneficiary. So, I mean I -- it's -- I don't think I could try to interrupt Justice
28 Thomas' order without having a - a clear understanding of what in fact and in law the status
29 was immediately prior to him granting the order. That - that is what I intended to convey
30 and that is my plan for trying to deal with this, and I will be guided by your submission.

31
32 MR. FAULDS: And in -- and on that basis the - the Public
33 Trustee is of the view that the landscape relevant to that determination would include
34 whether or not the 1982 Trust continued to exist after the transfer occurred.

35
36 THE COURT: Okay. I am -- you - you could be right. I - I can't
37 see it right now. But you -- you know I haven't given it any thought until just this minute,
38 so you - you can --

39
40 MR. FAULDS: Sure. That -- sure that - that - that's --

41

1 THE COURT: -- persuade me of that.
2
3 MR. FAULDS: -- that's - that's one instance --
4
5 THE COURT: Okay.
6
7 MR. FAULDS: -- of the kind of thing.
8
9 THE COURT: Yes.
10
11 MR. FAULDS: Another instance there is reference in the -- in -
12 in our submissions that were filed initially relating to the fact that the 1985 Trust contained
13 assets which did not originate in the 1982 Trust.
14
15 THE COURT: Okay.
16
17 MR. FAULDS: And one of the examples of that was a
18 \$12,000,000 --
19
20 THE COURT: Debenture.
21
22 MR. FAULDS: -- debenture.
23
24 THE COURT: Yes. No, I see that.
25
26 MR. FAULDS: And in the - the Sawridge First Nation's
27 submissions there are submissions to the effect that they understand that debenture is of
28 limited value. If it - it seems to me that whether or not a 1985 Trust has \$12,000,000 in it
29 but originates from somewhere else or \$10 in it that originates from somewhere else could
30 be of significance.
31
32 THE COURT: I am not seeing how, but the --
33
34 MR. FAULDS: Well if the na --
35
36 THE COURT: Could be - could be right.
37
38 MR. FAULDS: If there are assets in the 1985 Trust.
39
40 THE COURT: Yes.
41

1 MR. FAULDS: Which did not originate in the '82 transfer --
2
3 THE COURT: Yes.
4
5 MR. FAULDS: And therefore were not affected by Justice
6 Thomas' order they're simply assets placed in that trust.
7
8 THE COURT: Sure.
9
10 MR. FAULDS: Then we have to still deal with a 1985 Trust.
11
12 THE COURT: All right. Well sure, whatever, yes --
13
14 MR. FAULDS: And - and - and that would --
15
16 THE COURT: Sure. Okay --
17
18 MR. FAULDS: -- involve the -- you know the --
19
20 THE COURT: -- so you want some - you want some other
21 materials, okay. So what are we going to do?
22
23 MR. FAULDS: So -- well that's the - that's the background, My
24 Lord.
25
26 THE COURT: Okay.
27
28 MR. FAULDS: And - and as I say, Mr. Molstad has the --
29
30 THE COURT: Yes. Yes.
31
32 MR. FAULDS: -- schedule which he was going to now speak to.
33
34 THE COURT: Yes.
35
36 MR. FAULDS: And I just wanted to -- I wanted - I wanted to
37 respond to the suggestions that the OPGT was acting in a dilatory fashion and was acting
38 improperly which --
39
40 THE COURT: Yes.
41

- 1 MR. FAULDS: -- obviously --
2
- 3 THE COURT: True.
4
- 5 MR. FAULDS: We - we - we can't accept.
6
- 7 THE COURT: Yes, I am not - I am not pointing fingers at
8 anyone and I am sure Ms. Bonora was not trying to point fingers at anyone. But at - at the
9 end of the day, you know, it is time to - to make some real progress on this. And, you know,
10 when we start talking about document production in most lawsuits the concept of
11 diminishing returns comes into play. And you can - you can spend forever chasing down
12 every scrap of paper and the last few pieces of paper that you manage to get generally have
13 next to no impact on the outcome. And so at some point you have to say to yourself, you
14 know, when - when do we have enough of a factual background in place so that --
15 (UNREPORTABLE SOUND) excuse me. Excuse me. So that we can come to a proper
16 determination. And that is really what I am driving at. And that is why I opened the window
17 to permit any of the parties to - to come forward and if there is something that will be
18 helpful, I want it. Trust me, I want it. But I don't want to be in a situation for the next year
19 we are chasing down that last scrap of paper that may have totally marginal value and isn't
20 going to impact my decision in any event.
21
- 22 MR. FAULDS: And - and --
23
- 24 THE COURT: Because ultimately the - the facts -- the raw facts
25 are pretty well established in terms of when the trusts were created and the purpose of the
26 trusts were created and what the flow was. It is -- what - what - what arises from those
27 series of transactions that was presented to Justice Thomas when he made his decision.
28 That - that is --
29
- 30 MR. FAULDS: Yes. And --
31
- 32 THE COURT: -- that is what - that is what I am after but --
33
- 34 MR. FAULDS: I -- and - and My Lord, I -- I hope the OPGT is
35 not giving the impression that it is chasing the last scraps of paper. This is an issue that is
36 the legal effect of the asset of the transfer. This is ground which was not plowed before
37 Justice Thomas.
38
- 39 THE COURT: M-hm.
40
- 41 MR. FAULDS: This is ground which is OPGT was beginning to

1 explore before the asset transfer was - was approved.
2

3 THE COURT: M-hm.
4

5 MR. FAULDS: And which the OPGT then considered need not
6 be explored at that time --
7

8 THE COURT: M-hm.
9

10 MR. FAULDS: -- because the asset transfer order appeared to
11 resolve matters. So from a perspective --
12

13 THE COURT: Well it may well have -- it may well have Mr.
14 Faulds that is one of the options.
15

16 MR. FAULDS: Yeah.
17

18 THE COURT: That this may be totally over and if so we will -
19 we will - we will move on in that direction.
20

21 MR. FAULDS: So with -- so -- and - and we just -- then the
22 OPGT just wants to make it clear we're dealing with substantial interest of minors who the
23 OPGT was appointed by the Court to --
24

25 THE COURT: I am --
26

27 MR. FAULDS: -- to protect them --
28

29 THE COURT: I am totally painfully aware of the consequences
30 of any decision that I make. I am totally aware of that and it will have an impact on many,
31 many lives. But - but --
32

33 MR. FAULDS: So --
34

35 THE COURT: -- the reality is I want to come to the right
36 decision. Okay.
37

38 MR. FAULDS: Yes. And - and the - the OPGT of course wants
39 to assist in that process.
40

41 THE COURT: Good. Thank you.

1
2 MS. OSUALDINI: My Lord, if I might speak as well --
3
4 THE COURT: Sure.
5
6 MS. OSUALDINI: -- about an issue that has arisen this morning that
7 may require some scheduling.
8
9 THE COURT: Does this - does this fit into Mr. Molstad's
10 schedule or --
11
12 MS. OSUALDINI: It does. It's an issue raised by Mr. Molstad.
13
14 THE COURT: Oh okay.
15
16 MR. MOLSTAD: Perhaps I should speak to it first before you apply
17 to --
18
19 MS. OSUALDINI: Okay. Well I'd like to start because the process
20 was initiated by our office. I'd like to speak to it first, if that pleases the Court.
21
22 THE COURT: Sure.
23
24 **Submissions by Ms. Osualdini**
25
26 MS. OSUALDINI: So as mentioned by Mr. Faulds our client served
27 a supplemental affidavit of records earlier this month and following your directions about
28 the types of issues and the nature of the arguments that you are seeking at the asset transfer
29 application.
30
31 THE COURT: M-hm.
32
33 MS. OSUALDINI: So following that our client re-reviewed her
34 records, as the Court will know she's a former trustee, she was a trustee for 30 - 30 some
35 odd years in trust.
36
37 THE COURT: Yes.
38
39 MS. OSUALDINI: We reviewed her records and located some
40 records that came -- unadvised came into her possession as a trustee and were part of the
41 Trustee's records. Those records speak to the 1985 asset transfer, it speaks to the source --

1 in part speaks to the source of funding for the assets that - that were transferred to 1985
2 Trust. And it also speaks to beneficial distributions being made from the 1985 Trust. All
3 of which when we reviewed believed were relevant to the issues before the Court.
4

5 THE COURT: Okay.

6
7 MS. OSUALDINI: And directly respond to some of the issues.
8 Particularly issues being raised by the intervenor. When we first advised the parties that
9 were intending on circulating a supplemental affidavit of records the trustee's requested
10 that that they had the opportunity to review it first as they were concerned about other
11 privilege documents were in that doc -- were in our affidavit of records, which we did, and
12 subsequently it was resolved by saying, go ahead and distribute the records to the Office
13 of the Public Guardian and Trustee but we reserve our rights to say that they are privileged.
14

15 This morning Mr. Molstad brought to my attention the *Code of Conduct* for lawyers, this
16 is the first time this was brought to my attention. With a suggestion that Mr. Molstad's
17 client believes those are privileged records belonging to his client. So at this point now that
18 the code has been brought to our attention we are going to require Court direction on how
19 to resolve this. It's my understanding that these are not privileged records because they're
20 coming from the Trustee records. If Mr -- if the documents originate with Mr. Molstad's
21 clients it would appear to me that the privilege is waived when they were provided to
22 another party.
23

24 THE COURT: M-hm.

25
26 MS. OSUALDINI: But it appears - it appears that a dispute is
27 wanting to be asserted about these records and certainly our office does not want to be
28 violation of the code.
29

30 THE COURT: M-hm.

31
32 MS. OSUALDINI: So we're going to require direction on what we
33 are to do.
34

35 THE COURT: Okay.

36
37 MR. MOLSTAD: Do I get a chance now?
38

39 THE COURT: So, you are - you are on, Mr. Molstad.
40

41 **Submissions by Mr. Molstad**

1
2 MR. MOLSTAD: Thank you, Sir. First of all I just want to speak to
3 the schedule that -- and proposal, and the reason that I proposed today for the filing of the
4 Public Trustee's application and also for the submission to be filed is that yesterday the
5 Public Trustee's counsel sent us a letter with a proposed schedule that had as item 1 the
6 December 20, 2019 OPGT production application and submission file. So I assumed that
7 they were read to go today but if they're not tell us when.
8
9 MR. FAULDS: My Lord, I would suggest having regard to the
10 schedule that Mr. Molstad is proposing now I would suggest the 2nd of January, which is
11 technically free - free working days for him.
12
13 THE COURT: So - so you are planning that - that I would hear
14 the application?
15
16 MR. FAULDS: We're planning that you -- that Mr. Molstad -- I
17 don't think that's offensive to the schedule that Mr. Molstad is going to suggest --
18
19 MR. MOLSTAD: My schedule is based upon the letter that they
20 sent me yesterday and that says December 20th Public Trustee files application and
21 submission. If they want a later date, I think that's what my friend is saying that they want
22 a later date. We're proposing January 17th to reply to the production and February 5th at
23 2:00 to hear the application before you, Sir, as we're advised that you're available on that
24 date at 2:00.
25
26 THE COURT: Just hold on a minute. Yes, I think I am
27 Edmonton that week. Yes.
28
29 MR. MOLSTAD: And - and May 19th we're advised you're
30 available that full day for the application in relation to the asset transfer.
31
32 THE COURT: Oh just a minute now. I've got a 2019 calendar
33 that is not helping me out. I should have brought my --
34
35 MR. MOLSTAD: We were advised I think was it yesterday by -- or
36 the day before? Very recently.
37
38 THE COURT: May 19th?
39
40 MR. MOLSTAD: May 19th for the full day for the asset transfer
41 issue.

1
2 THE COURT: Yes. I - yes, I think -- okay.
3
4 MR. MOLSTAD: And - and if - if this schedule --
5
6 THE COURT: So the trial coordinators have told you that I am
7 available on that day?
8
9 MR. MOLSTAD: They have. Yes, yeah.
10
11 THE COURT: Okay. Okay.
12
13 MR. MOLSTAD: And if these dates are set we would ask that they
14 be set based on your direction and that they be set peremptory in relation to the parties
15 including the Public Trustee.
16
17 And I just want to say in terms of our past experience the Sawridge First Nation has been
18 the respondent in an application for production by the Public Trustee previously that we
19 say was devoid of merit and which was dismissed in terms of its application.
20
21 THE COURT: Yes.
22
23 MR. MOLSTAD: And you don't have to take my word for it you
24 can read Mr. Justice Thomas' decisions in that regard. In that case we asked for cost against
25 the Public Trustee on the basis that they not be reimbursed.
26
27 THE COURT: M-hm.
28
29 MR. MOLSTAD: And the learned justice reserved but he
30 ultimately decided that they would be. We want them to be on notice that if -- we haven't
31 seen this application.
32
33 THE COURT: M-hm.
34
35 MR. MOLSTAD: But if this application is devoid of merit we will
36 on behalf the Nation seek instructions to seek costs as against the Public Trustee on the
37 basis that they not be reimbursed by the trust, and I want them to be aware of that.
38
39 THE COURT: Okay.
40
41 MR. MOLSTAD: Secondly, Sir, the documents received from Ms.

1 Osualdini's office on December 16, we've asked her to advise us how and in what capacity
2 her client came into possession and we heard today I think from her that they were part of
3 the trust documents. Keep in mind that her client has served in different capacities and at
4 times she has acted as legal counsel on behalf of the Sawridge First Nation as well as having
5 served as a trustee. And, we've also asked for particulars of the redacted documents
6 because documents had been redacted with no information as to the reason --

7
8 THE COURT: M-hm.

9
10 MR. MOLSTAD: -- that they have been redacted. I understand that
11 she'll be providing particulars of that to Ms. Bonora and providing her with copies of what
12 has been redacted and they can then decide whether we should see it. But based upon what
13 we seen so far the documents are clearly solicitor client privileged in any respect, some are
14 not, but most are.

15
16 THE COURT: M-hm.

17
18 MR. MOLSTAD: And we say, Sir, we don't have to make an
19 application in relation to these documents. They're in their possession and we can simply
20 make a demand pursuant to 7.2-13 of the *Code of Conduct*. That these privileged
21 documents are in their possession and that they be returned to our offices forthwith and
22 that's what we intend to do in relation to this matter.

23
24 So if you - if you agree with the schedule, Sir, and I'm not sure what day -- they told us
25 yesterday that they would be filing their submission today and I believe now they want to
26 change it to January 2nd, is that correct?

27
28 MR. FAULDS: That's my suggestion, My Lord. Where -- our --
29 just to be clear, our application and supporting affidavit are ready to be filed.

30
31 THE COURT: Okay.

32
33 MR. FAULDS: If - if the parties wish I can circulate them now
34 with my undertaking to file them and provide them with a copy --

35
36 THE COURT: Sure.

37
38 MR. FAULDS: -- that was filed with a stamp page.

39
40 THE COURT: Sure.

41

1 MR. MOLSTAD: Today is fine, I don't -- we don't need them now.
2 But you know --

3
4 THE COURT: Okay.

5
6 MR. MOLSTAD: -- we'd like to get the submission in --

7
8 THE COURT: Sure. Okay.

9
10 MR. MOLSTAD: In a timely way.

11
12 THE COURT: What we are going to do first is we are just going
13 to take a 2 minute break. I want to go get my calendar because I know that you may have
14 spoken with a trial coordinator but I don't want to start making firm dates.

15
16 MR. MOLSTAD: All right. Fine, Sir.

17
18 THE COURT: And then have --

19
20 MR. MOLSTAD: Yeah.

21
22 THE COURT: -- have to get back to you to try to get a
23 reasonable work -- so I will be back in just --

24
25 MR. MOLSTAD: Yeah.

26
27 (ADJOURNMENT)

28
29 **Discussion**

30
31 THE COURT: Please be seated. Sorry Mr. Molstad you were in
32 the middle of your submissions when I interrupted you.

33
34 MR. MOLSTAD: Oh no I - I - I completed my --

35
36 THE COURT: Okay.

37
38 MR. MOLSTAD: I - I am concerned about procedural fairness.

39
40 THE COURT: Sure.

41

1 MR. MOLSTAD: And that's why I proposed that, Sir.

2
3 MS. BONORA: Sir, just -- Mr. Molstad's schedule I think just
4 misses a few dates that I think we should also set so that we are sure to get to February, at
5 least to February 5th. And, so our proposal is that all questioning on -- in respect of the
6 production be done by January the 17th, and then briefs be filed by January 24th, and the
7 replies by January 31st. My friends had offered to file a brief with their application and
8 we're suggesting that's unnecessary that one brief by the OPGT would be sufficient
9 especially, you know, given the costs involved in a brief we would prefer they do one as
10 opposed to two.

11
12 THE COURT: M-hm.

13
14 MS. BONORA: Given that we have to pay those costs. And we
15 think that's more efficient in any event. And so, if we could just set those dates for
16 questioning and briefs, as well this morning, as directed by the Court, so that there is no
17 chance that we will also lose our February 5th date. I asked my friends if we could set those
18 dates, they had some difficulties, so I'll allow them to respond to those dates.

19
20 MR. FAULDS: My Lord, the - the -- in general terms, that sounds
21 reasonable, and I thank my friend for the suggestion that the OPGT just file a - a - a single
22 brief --

23
24 THE COURT: Yes.

25
26 MR. FAULDS: -- once whatever questioning and so forth has -
27 has conducted and with - with same right of replies everybody else has. They -- one of the
28 questions that now arises in the relation to the January 17th dates suggested by my friend
29 for the conclusion of questioning is there has been this preliminary privilege issue that has
30 been raised which may affect the ability to conduct the questioning. And so it - it would
31 seem that that issue requires resolution in order that we -- in - in order that the questioning
32 can occur. And that the OPGT is not directly concerned in that --

33
34 THE COURT: M-hm.

35
36 MR. FAULDS: -- appears to be an issue between the Saw --
37 primarily between the Sawridge First Nation and Ms. Twinn. But that -- we just flag that
38 but that's one issue --

39
40 THE COURT: So you - you say February 5th is potentially in
41 jeopardy?

1
2 MR. FAULDS: Well I am - I am just -- I am just identifying that
3 as - as an issue that's been raised --
4
5 THE COURT: Yes.
6
7 MR. FAULDS: -- because of that - of that controversy, yeah.
8
9 MR. MOLSTAD: The February 5th date was a date that we simply
10 proposed that Sawridge would file a reply. The dates --
11
12 MS. BONORA: No, no.
13
14 THE COURT: No.
15
16 MS. BONORA: That would be the date for the hearing.
17
18 MR. FAULDS: No, that was the hearing.
19
20 MR. MOLSTAD: Oh sorry.
21
22 MS. BONORA: Yes.
23
24 MR. MOLSTAD: Pardon me, the hearing of the -- oh, sure, yeah,
25 you're right, sorry.
26
27 MS. BONORA: Sir, I don't think that that's a very extensive
28 application. You had offered to do a production application either at 8:30 or noon or at 4:30
29 and perhaps sometime before January 7 -- before let's see perhaps January 12th we would
30 allow those parties to bring an application before you to deal with the privileged
31 documents, if that's in fact necessary. So if we could deal with that before January 12th.
32 The original schedule by the OPGT certainly had a number of things happening before
33 January 16th and so I think that could occur, if you would indulge them in an early morning
34 application on that to preserve the February 5th date.
35
36 MS. OSUALDINI: And, My Lord, just in terms of the privilege
37 issue, it appears that part of the privilege issue is - is disseminating from where these
38 records came from. Did they come from the Trustee records or did they come from the
39 SFN's records. So we're also going to need disclosure and affidavits from the parties that
40 speak to those issues because my client's going to say that they come from the Trustee
41 records, and I understand the Trustees are saying that they don't all from from the records,

1 so that's going to be a very relevant determination for you to have to make. It's -- the
2 privilege application is not -- I think as - as simple and able to be heard on a weeks' notice
3 over Christmas as - as is being suggested.
4

5 THE COURT: Well, there is no application on privilege at the
6 moment. Mr. Molstad's position is either you will get a letter this afternoon demanding the
7 return of the documents and you will either comply with his demand or you won't, and if
8 you don't presumably you better do something about it. So it looks to me like the onus is
9 on you to do something and unless I have misunderstood the landscape.

10
11 MR. MOLSTAD: Yes, that's - that's the position he takes, Sir.

12
13 THE COURT: So --

14
15 MS. OSUALDINI: Well it appears to me - it appears to me that the
16 rule -- I'm sorry My Lord, this was only brought to my attention this morning so I haven't
17 had time to properly prepare, but it doesn't - it doesn't appear that there is a -- the rule is
18 clear about whose obligation it is to - to bring the application. Because we - we very clearly
19 advised the parties that our understanding is these aren't privileged records, and I would
20 say if Mr. Molstad believes otherwise there is an onus upon him to bring an application to
21 assert his privilege.
22

23 THE COURT: Well, I guess we better have an application to
24 determine who has the onus to bring the application. You know, I -- at - at some point - at
25 some point all the money in this trust is going to be gone paying lawyers, to be totally
26 honest, and there is going to be nothing left for the beneficiaries no matter who they are if
27 - if keep going around in circles like this. So, what are we going to do about the schedule
28 then?
29

30 MS. BONORA: Sir, could we just say by February -- sorry
31 January the 12th their applications will be made with respect to privilege and the parties
32 can determine who has to bring it. We won't decide today whose onus it is. The parties
33 will decide obviously whose obligation that is. And that I think we also want to say that all
34 applications on production by any party have to be brought. The 12th is a Sunday, Sir, so
35 the 13th would be the date that I am proposing. And --
36

37 THE COURT: So -- and then we would have to try to find some
38 time to hear that application.
39

40 MS. BONORA: Yes, I am suggesting that it has to be brought
41 before that date.

1
2 THE COURT: It has to be brought before -- the application has
3 to be brought before the 13th?
4
5 MS. BONORA: Yes.
6
7 THE COURT: Okay. Is that -- and -- yes, you could try to find
8 some time to do that if you like but why --
9
10 MR. FAULDS: My Lord, I wonder if we might at minimum snag
11 the dates that are available which appear to be available February the 15th and March the
12 19th. So --
13
14 MR. MOLSTAD: February the 5th.
15
16 THE COURT: February the 5th.
17
18 MR. FAULDS: February the 5th, I am sorry. Yes February the
19 5th and - and May the 19th.
20
21 THE COURT: Yes. Well I can - I can tell you that when the trial
22 coordinator tells you that those days are available that means that I am in Edmonton on
23 those days and it doesn't mean to say I am doing nothing else that day, and you know, if
24 you want an opportunity on a case like this to have a meaningful motion, you know, I
25 would like an opportunity to read the materials before I steer -- start hearing you. And so
26 when I look at both February 5th and May 19th, when I look at what is going in the days
27 and weeks leading up to that, you know it -- it is -- now that is not your problem that is -
28 that is my problem. So, whatever we will - we will books those days and I will do whatever
29 so --
30
31 MR. FAULDS: Yes I -- it just --
32
33 THE COURT: But it - but it -- but what I am saying is that if
34 you know this - this is not something that I am going to be able to sit and at the end of
35 hearing you say, yeah, yeah sure you win, go ahead, go ahead and do whatever you want.
36 But it - it takes a little energy to - to properly review this stuff. And -- whatever.
37
38 MR. FAULDS: And - and we're - we're aware that this was
39 complex and the - and the parties -- the parties experience some of what Your Lordship is
40 --
41

1 THE COURT: M-hm. Right.
2
3 MR. FAULDS: -- referring to as well. Given the nature of these
4 issues and the --
5
6 THE COURT: Yes.
7
8 MR. FAULDS: -- that have arisen.
9
10 THE COURT: This is -- what I am saying this isn't something
11 you can do off the corner of your desk.
12
13 MR. FAULDS: Yes, yes I -- we --
14
15 THE COURT: Which - which is what most case managements
16 are. Getting together and saying, yes you can bring your notion on 2 days from today or
17 whatever it is -- these -- this is different?
18
19 MR. FAULDS: Yes. Yes. That has -- that has not been the history
20 of this proceeding since the outset, I think that is fair to say.
21
22 THE COURT: Yes. Okay.
23
24 MR. FAULDS: But if we had -- it seems we are looking for three
25 - three determinations one is a determination of this privilege issue; two, is a determination
26 of the production issues that will follow that; and then three, is the actual asset transfer
27 order and those - those events aren't -- now - now it's clear those aren't going to have to
28 be determined and --
29
30 THE COURT: M-hm.
31
32 MR. FAULDS: And so whatever dates that the Court is able to
33 provide that are suitable.
34
35 MS. OSUALDINI: And, My Lord, I just might stand up at this point.
36
37 THE COURT: Yes.
38
39 MS. OSUALDINI: I have advised my friends that the May 19th date
40 isn't available in my calendar, it requires some cancellations, and I was hoping there might
41 be another day to -- for the actual asset transfer application.

1
2 MS. BONORA: Sir, it is difficult to find full days if we don't
3 chose May 19th we may be off to the end of the year. Certainly into the fall. We think the
4 parties have to make some adjustments in order to have this proceed and so we're asking
5 you to set May 19th as a peremptory application date. We also -- in terms of the actual
6 scheduling you had also made reference to the ability of parties to bring an application for
7 procedural fairness.
8

9 THE COURT: M-hm.

10
11 MS. BONORA: And, so I wonder if we could just have an all-
12 encompassing January 2nd, 2020, every application that is going to be brought will in fact
13 be brought by that day. And at least filed and served because we - we can't have the position
14 where you know we deal with production --
15

16 THE COURT: M-hm.

17
18 MS. BONORA: And then suddenly we are back to square one on
19 the - on the issue of fairness. And so, I wonder if we could have that as an all-encompassing
20 day. And so then on the days we have our -- with my proposal, subject to my friends'
21 submissions January 2nd, January 12th for privileged -- 13th I'm sorry. And then January
22 17 for questioning, first briefs, primary briefs on the 24th, reply briefs on the 31st and then
23 the production application on February 5th and the asset transfer issue on May 9th, with
24 those dates being peremptory. Sorry May 19th -- ha --
25

26 THE COURT: So the only issue we have is that one of the
27 counsel isn't available the 19th and is that a hard --
28

29 MS. OSUALDINI: Well I can make some calculations but I was
30 hopeful that there might be a different day.
31

32 THE COURT: Well, I am sure there is a different day but I mean
33 try - trying to - trying - trying to find a day when this array of people and myself are
34 available is going to be tough. That is presumably the reason we are off to May 19th. Is
35 there anything before that Mr. Molstad? Like what's the --
36

37 MR. MOLSTAD: We weren't advised of any dates before that, Sir.
38

39 MS. BONORA: I think that was --
40

41 MR. SESTITO: Yeah, no, those --

- 1
2 MS. BONORA: Those were dates the Trustees were --
3
4 MR. SESTITO: -- those were the only -- May 19th we're advised
5 was the only full day on your calendar that has been set so far.
6
7 MS. HUTCHISON: And, My Lord, we just spoke to Ms. Hinz
8 yesterday so that's pretty current information I think about your calendar.
9
10 THE COURT: Okay. Well I - I -- you know, I don't know what
11 to say. I -- I mean I - I gather it is the end of the fall. The fall, my time in the fall at the
12 moment is free. Because the fall schedule hasn't come out, but the fall is a long way away.
13 You know for something that has been kicking around for 9 or 10 months already going to
14 the fall would be problematic for me. So, like it -- are -- is this a major imposition to you
15 or --
16
17 MS. OSUALDINI: I mean I'll make my schedule work I was just
18 hoping that I would -- there might be some other date available.
19
20 THE COURT: Well, it - it doesn't -- it doesn't look like that is
21 likely to me. So I apologize if it is problematic for your personal schedule, and I hate to do
22 that to you but I am not thinking there is much alternative here unless we put it off into the
23 time horizon that is totally unsatisfactory.
24
25 MS. OSUALDINI: Okay.
26
27 THE COURT: Okay.
28
29 MR. FAULDS: My Lord, Ms. Bonora proposed a schedule
30 which -- well it's a very tight time line and which - which doesn't necessarily resolve the
31 concern that we identified, but the privilege issue may not actually be resolved before the
32 deadline for conducting questioning on the documents. And so if -- I - I don't know if - if
33 this is feasible but I mean if February the 5th which we know is available were the date to
34 resolve the - resolve the privilege issue, the question then would be is there some dates say
35 within the - the next month, say you know by early March when we could address the
36 production issue before Your Lordship and then that -- and then we have March the 19th
37 for the actual --
38
39 THE COURT: May - May the 19th.
40
41 MR. FAULDS: Yeah -- or May, I am sorry, I keep on saying

1 March, yeah, May 19th for the actual hearing if -- that would seem to --
2

3 THE COURT: Well we have the whole day booked on the 16th
4 of January. That - that time is now all --
5

6 MR. FAULDS: Of course, yes. Then perhaps we could do the
7 privilege subject to - to my friends if we could deal with the privilege issue on the 16th,
8 deal with the production issues on the 5th. Right, and then - and then we would be looking
9 at - at -- in terms of the -- what's - what's - what's produced is clarified then you know I
10 am sure the parties can work out a schedule for any final examinations and solutions in --
11 to work towards the May 19th date. I wouldn't imagine that's a problem.
12

13 MS. BONORA: Sir, we - we - in fact do find that problematic. We
14 - we though there was a clear direction that the app -- the production application should be
15 filed.
16

17 THE COURT: M-hm. Yes.
18

19 MS. BONORA: At least filed by today.
20

21 THE COURT: Sure.
22

23 MS. BONORA: And it hasn't been.
24

25 MR. FAULDS: But it will be.
26

27 MS. BONORA: And so, we I think need dates directed by the
28 Court.
29

30 THE COURT: M-hm.
31

32 MS. BONORA: So that we don't have another delay and another
33 postponement that puts us into the fall.
34

35 THE COURT: M-hm.
36

37 MS. BONORA: And so, my new proposal is then, Sir, is that
38 privilege will be deal with by -- on the January 16th date, and then that just puts us into
39 some tighter timelines, questioning by the 22nd, primary briefs by the 28th, replies by the
40 31st. And the Trustees then are taking the smallest amount of time in getting their reply
41 ready for -- in the 4 day period. So that then we can for sure get to the February 5th by

1 giving you still only 5 days to read our reply briefs.
2

3 MS. HUTCHISON: My Lord, just one comment. At the moment the
4 schedule we're discussing doesn't allow for questioning after the production application is
5 decided, which sort of presupposes there will be no further production and that's a bit
6 problematic if there is -- if there is further production it's quite likely that there will be
7 questioning on it because we will never have seen those documents before. And there will
8 only be production of them if they're relevant and material to the asset transfer issue. And
9 it also raises the question, My Lord, about the appropriateness of some of these dates being
10 peremptory. I think you are hearing that there are a lot of pieces -- moving parts at the
11 moment. I ought -- I am hearing all counsel --
12

13 THE COURT: Yes I am - I am - I am hearing a lot of that. But I
14 have yet to hear anything that tells me that there is anything material that is going to have
15 any impact on the decision that I am going to make on this -- on this asset transfer issue,
16 like --
17

18 MR. HUTCHISON: With res - with respect, My Lord, that is not
19 something this Court can determine until the application is before it.
20

21 MS. BONORA: Sir, two points, I agree with my friend we have
22 not addressed questioning after production but we have from February 5th to May 19th to
23 deal with that. And if there's a problem we can come back to you. The other thing as
24 presupposes is that there actually be a production application. It was our view that we
25 would try and be cooperative in the list of ques -- documents that are being requested. We
26 think there is probably zero documents that will be produced. Perhaps -- sorry, no, there is
27 a - a couple -- perhaps a couple in respect to the debenture issue because that has never
28 been an issue. The rest -- we will -- I am sure the answer will be they have all be produced.
29

30 We started the transfer issue -- I just wanted to say this, we started the transfer issue on the
31 basis that there were no documents to show that the transfer was done properly. And that's
32 why we needed the Court to confirm it. So that's the whole basis for the transfer issue is
33 that there are no documents. But we will look at our clients -- our - our friend's application.
34 It is our intention to be cooperative. We wrote a letter earlier this month saying please give
35 us a preview we can start to work on it and we had no response to that. And that is - that is
36 fine. But, we also didn't get an application. So that is why we're saying, I think at this point
37 we need the Court's direction on dates so that we can get to at least February -- well January
38 16th and February 5th.
39

40 THE COURT: Okay. Does anyone have any concerns with the
41 dates that have been proposed? The deadlines that have been proposed?

1
2 MR. FAULDS: Could - could Ms. Bonora just please repeat, I --
3 sorry, I wasn't -- didn't make a note of that.
4
5 MS. BONORA: Sir, I would say all applications of any sort
6 addressed in November - November 27th hearing have to be filed - filed and served by
7 January 2nd. That any applications with respect to privilege have to be brought - brought
8 by January 12th and will be heard on January 16th.
9
10 THE COURT: Filed by January 13th?
11
12 MS. BONORA: 13th.
13
14 THE COURT: I keep remembering the 12th is a Sunday.
15
16 THE COURT: I will - I will -- I am so sorry. So any applications
17 with respect to privilege will be brought by January 13th and heard on January 16th. The
18 questioning with respect to the applications that are filed on January 2nd will happen by
19 January 22, the primary briefs on production will have --
20
21 THE COURT: The question - the questioning on those
22 applications will take place by January 22nd?
23
24 MS. BONORA: Correct.
25
26 THE COURT: Yes, I thought you said the applications but --
27 yes.
28
29 MS. BONORA: Sorry the questioning on all the applications that
30 are filed will happen by January 22nd. The primary briefs with respect to the February 5th
31 application will happen on January 28th, the replies to those primary briefs will be filed by
32 January 31st, and the February 5th application -- with respect to the applications filed
33 January 2nd will be peremptory, so that's on February 5th, and the asset transfer issue will
34 happen on May 19th.
35
36 MS. OSUALDINI: My Lord, just so I am understanding so no dates
37 are being set at this point and by court order for the OPGT's questioning of Catherine
38 Twinn or Paul Bujold on the produced documents, is that correct? You are talking about
39 questioning on affidavits filed in support of the applications only, I am just not clear on
40 that.
41

1 MR. SESTITO: I - think our intention is that all questioning that
2 will be required in advance of the February 5th application occur on or before the 22nd of
3 January.
4

5 MS. OSUALDINI: And the February 5th date would be for
6 production -- including the production application is that --
7

8 THE COURT: That is the principle reason for February 5th.
9

10 MS. OSUALDINI: Yes. Okay. And so then after February 5th we're
11 all in agreement that there may be -- if there is a production, even if -- and if the privilege
12 issue allows production of the documents in dispute there will be -- there well -- maybe
13 questioning before May 19th. And we're just not setting dates or deadlines for that?
14

15 MR. SESTITO: That -- we will - we will need to get the results
16 of the February 5th application and it may involve another appearance.
17

18 MS. OSUALDINI: Yes, thank you, Mike. Thanks.
19

20 MS. BONORA: Sorry, Mr. Mol said - said I was confusing and I
21 probably was. The applications are being filed by January the 2nd, all applications. And
22 then the briefs are being filed -- the primary briefs are being filed by anyone who is seeking
23 production on January 28th.
24

25 MR. FAULDS: No, no their brief has to be filed January 2nd.
26

27 MR. MOLSTAD: And the brief -- their application for production
28 is filed today. Their brief in relation to that application is filed January 2nd.
29

30 THE COURT: You -- actually that was the old position we have
31 moved from there.
32

33 MS. BONORA: Yes. I know there is so many dates planned.
34

35 MR. FAULDS: Ms. - Ms. Bonora proposed that we not do - do
36 repetitive briefs --
37

38 THE COURT: To minimize the number of briefs.
39

40 MR. FAULDS: Yeah.
41

1 MR. MOLSTAD: Well, you know, you are going to give me two
2 days to reply? No that is not enough. If you want to file your brief on -- if I am filing a
3 reply to your production application, in which I will likely be perhaps seeking costs against
4 the Public Trustee without indemnification, I - I don't want to be in the position where you
5 have -- we have to -- you're filing on the 28th and we have to file on the - the 31st.
6

7 THE COURT: Yes. That is pretty tight Mr. Mol - or Mr. Faulds.
8

9 MS. BONORA: So we -- we will concede that there needs to be
10 two briefs then, Sir.
11

12 MR. MOLSTAD: Yeah we want their brief now. It was to have
13 been filed and served today.
14

15 THE COURT: When - when can you realistically get that Mr.
16 Faulds?
17

18 MR. FAULDS: Well My Lord --
19

20 THE COURT: Cause Mr. Molstad needs a couple of weeks at
21 least to respond, I think is what he is saying.
22

23 MR. FAULDS: Sure. So -- well then let's - let's -- if I can look
24 at the calendar again. But working backwards from Mr. Molstad would file --
25

26 MR. MOLSTAD: We want it January 2nd that's when we want it.
27

28 THE COURT: Can you do January 2nd?
29

30 MR. FAULDS: As somebody said you can't always get what you
31 want.
32

33 MR. MOLSTAD: Well you told us you would give it to us. It was
34 your date.
35

36 MR. FAULDS: Sure, I am -- sorry I -- My Lord, I had lost my
37 calendar.
38

39 THE COURT: Well January 2nd is a - a Tuesday.
40

41 MR. FAULDS: It's - it's a --

1
2 MR. MOLSTAD: It's a Thursday.
3
4 THE COURT: Or a Thursday, sorry.
5
6 MR. FAULDS: It's a Thursday. It's - it's the day after - after --
7
8 THE COURT: Right. So --
9
10 MR. FAULDS: -- New - New Years and I - I mean I will - I will
11 - I will say, I was attempting to be as cooperative as possible in terms of getting things
12 moving, but given - given the way things have unfolded, I am going to suggest January the
13 7th.
14
15 THE COURT: Mr. Molstad, will that give you enough time to -
16 -
17
18 MR. MOLSTAD: Yes.
19
20 THE COURT: -- respond.
21
22 MR. MOLSTAD: Thank you, Sir.
23
24 THE COURT: January 7th for the Public Trustee to file a brief.
25
26 MS. HUTCHISON: I apologize, My Lord, I -- if counsel could -- when would briefs on the
27 privilege application be made -- filed? I am not clear on our schedule for that.
28
29 MS. OSUALDINI: Yeah, I was just about to say that. Because, My
30 Lord, yeah it appears even in terms of a privilege application that we need to give some
31 structure around evidence because it sounds like evidence is going to be important on
32 sourcing the documents. And my other suggestion too is perhaps today given that we're
33 running under very tight time lines to do things is that we decide today who is bringing the
34 application because we don't really have a lot of time to waste on determining that. And
35 my suggestion given the tight time line is Mr. Molstad apparently knows what - what he
36 believes is privileged in that. So let's have his client bring that application. Put forward
37 what they think is privileged and why and then I can respond to it.
38
39 MR. MOLSTAD: We haven't seen the documents yet, Sir. It's send
40 over a bunch of documents that are redacted in - in many ways so we have to see them all
41 before we can -- they've seen them.

1
2 MS. OSUALDINI: Sir, this can become a much larger issue than
3 what Mr. Molstad's saying because my client has other trustee records so what - what am
4 I to do that I have seen.

5
6 THE COURT: Well if they are privileged you turn them back to
7 where they have come from. If they are not privileged you keep them and use them. Well
8 that is pretty straightforward to me.

9
10 MS. OSUALDINI: But from my perspective these documents
11 weren't privileged because they're trustee records. I don't know how a third party --

12
13 THE COURT: Well then - then - then we would have an issue.

14
15 MS. OSUALDINI: So that is what I am saying --

16
17 THE COURT: Mr. Molstad says there are.

18
19 MS. OSUALDINI: This isn't an easy issue because the records from
20 my understanding is in the Trustee's possession. And now a third party is trying to assert
21 privilege over them which in my perspective would have been waived if - if they were
22 released to a third party. So this - this is not an easy issue. And we would like to have it
23 dealt with properly so there -- this -- there isn't any confusion going forward.

24
25 THE COURT: M-hm.

26
27 MS. OSUALDINI: And it would appear to be an issue from the
28 Trustee's perspective as well because from my understanding they're also in possession of
29 them. So are we to be returning these documents to the SFN. It's also an issue that affects
30 the OPGT because these records are now in their possession as well. So what are we to do
31 in the interim?

32
33 THE COURT: Well, I think what Mr. Molstad has done is to say
34 that quite apart from this litigation you have a professional obligation, a duty to the Law
35 Society to ensure that you are not using privileged documents that may have come into
36 your possession inadvertently or into your client's possession inadvertently and he wants
37 them back. So -- but he hasn't seen them yet so he can't tell you fully what his position is
38 on that. So --

39
40 MS. OSUALDINI: Sure.

41

1 MS. SOPKO: The redacted ones are going to the Trustees?
2

3 MS. OSUALDINI: Yeah.
4

5 MS. SOPKO: Is my understanding.
6

7 MS. OSUALDINI: So they - they have seen the underacted
8 documents.
9

10 MS. SOPKO: The - the redacted ones.
11

12 THE COURT: Right. The unredacted.
13

14 THE COURT: The redacted but not the underacted?
15

16 MS. SOPKO: The redacted.
17

18 MR. MOLSTAD: Yeah, we haven't seen the unredacted
19 documents. We've only been provided with documents that are redacted that have portions
20 of them that have been deleted.
21

22 MS. OSUALDINI: Oh I see - I see what you are saying. You have
23 seen the pages that don't have --
24

25 MR. MOLSTAD: Yes.
26

27 MS. OSUALDINI: I see what you're saying.
28

29 THE COURT: So when can you get those to him?
30

31 MS. OSUALDINI: Today. I can let my paralegal know to send those
32 today.
33

34 THE COURT: Okay. So, Mr. Molstad you will get those
35 documents today and can we at least narrow down the documents that you think are subject
36 to privilege?
37

38 MR. MOLSTAD: I feel that -- I can tell you what we seen so far,
39 the communications between the Sawridge First Nation in house counsel and legal counsel
40 that was acting for the Sawridge First Nation.
41

- 1 THE COURT: Oh okay.
- 2
- 3 MR. MOLSTAD: So it's not really a complicated issue, Sir.
- 4
- 5 THE COURT: Okay. Okay. So, the question is how did - how
6 did those documents get into possession of other people. That is --
- 7
- 8 MS. OSUALDINI: And - and Sir --
- 9
- 10 MR. MOLSTAD: I - I don't - I don't know that Sir. One of the
11 problems we have too, Sir, with the First Nation is that they closed down their offices for
12 approximately 2 weeks over the Christmas period, so it makes it difficult to communicate
13 with them.
- 14
- 15 MS. SOPKO: They close after today till the 6th.
- 16
- 17 MR. MOLSTAD: I think the 6th of January.
- 18
- 19 MS. SOPKO: After today until the 6th, yeah.
- 20
- 21 MR. MOLSTAD: Yeha.
- 22
- 23 MS. OSUALDINI: And - and the other issue, Sir, is that these
24 documents are about the trusts. So, they're not about First Nation business, they're about
25 the trusts.
- 26
- 27 THE COURT: Well sure. But if - if it is communications
28 between counsel presumably a First Nation can seek advice with respect to a trust. So just
29 because the subject matter is the trust doesn't mean to say it is not privileged.
- 30
- 31 MS. OSUALDINI: M-hm.
- 32
- 33 THE COURT: So it may well be a privilege.
- 34
- 35 MS. OSUALDINI: And - and another issue that may have to be dealt
36 with is whether there is a privilege vis-à-vis the beneficiaries. And the Trustee's and the
37 First Nation in regards to this information. So this --
- 38
- 39 THE COURT: M-hm.
- 40
- 41 MS. OSUALDINI: This actually is a quite complicated --

1
2 THE COURT: M-hm.
3
4 MS. OSUALDINI: -- issue.
5
6 THE COURT: Well I sure hope there is something of substance
7 that is going to impact the outcome when we start going down this path, because it looks
8 to me like this is totally going off the rails. That is the way it looks to me.
9
10 MS. OSUALDINI: So My Lord, I think we just need direction on
11 who is to file the application by January 2nd.
12
13 THE COURT: Well I am not going to give a direction on that.
14 One of you is going to decide that it is an issue that you want me to make a ruling on. And
15 when a motion comes to me I will make a decision. Do you think you want to bring an
16 application go right ahead. If Mr. Molstad does he can go right ahead but I don't know
17 enough about it to determine who should be making the motion.
18
19 MS. OSUALDINI: Okay.
20
21 THE COURT: But if there is a motion I will hear it.
22
23 MS. BONORA: So Sir, can we have a direction that that schedule
24 then is ordered?
25
26 **Ruling**
27
28 THE COURT: All right. We will make that a direction that --
29 with the amendments that Mr. Faulds has suggested. So January 2nd the applications,
30 January 7th the Public Trustee will file its brief, January 13th the privilege materials,
31 January 16 the privilege application to the extent that there might be one, January 28th for
32 a questioning -- I am sorry, January 22nd questioning.
33
34 MR. MOLSTAD: On or before, I believe.
35
36 MR. SESTITO: On or before, yeah.
37
38 MR. MOLSTAD: On or before January 22nd, Sir.
39
40 THE COURT: 22nd?
41

1 MR. MOLSTAD: Yeah.
2
3 THE COURT: And the 28th of January for the brief -- primary
4 brief; January 31st for the rebuttal brief; April 5th for the production application.
5
6 MR. SESTITO: February, Sir.
7
8 THE COURT: February 5th.
9
10 MR. SESTITO: February 5th
11
12 THE COURT: February 5th, whatever.
13
14 MS. BONORA: And - and May 19th for the asset transfer --
15
16 THE COURT: And May 19th for the actual application.
17
18 MS. BONORA: Are - are those preemptory, Sir?
19
20 THE COURT: I am telling you that I want them to happen.
21 Peremptory is a funny word and never - never means never. So, I mean, the message I want
22 to convey is if there is something that is going to be important that will help me make the
23 right decision I want to have access to it.
24
25 MS. BONORA: Of course.
26
27 THE COURT: But at the same time I want this to get dealt with.
28 So I implore you to get it ready for May 19th. So if I said preemptory and something came
29 up on the 5th of May I would -- I am not going to force it on if there is something about to
30 be available that would help me. So --
31
32 MS. BONORA: Thank you for those comments.
33
34 THE COURT: -- I don't -- I would be tempted to say preemptory
35 but I would be fooling myself if I said that.
36
37 MS. BONORA: Thank you, Sir.
38
39 MS. HUTCHISON: Thank you, My Lord I - I just want to be sure we're clear January 7th is
40 the OPGT's brief of production application.
41

1 THE COURT: The pro --

2
3 MS. HUTCHISON: January 28th are the responding briefs to the production applications, is
4 that correct?

5
6 THE COURT: Well I think there were going to be two briefs.
7 One is the Public Trustee would file its brief on January 7th.

8
9 MS. HUTCHISON: Yes.

10
11 THE COURT: Once you got some additional material from
12 questioning you would file a supplemental brief if that is what you wanted to do. And then
13 the responding briefs would be filed by the 31st.

14
15 MS. HUTHCINSON: So --

16
17 THE COURT: That -- so I think --

18
19 MS. HUTCHISON: Thank you, My Lord. So if --

20
21 THE COURT: -- Ms. Bonora was trying to avoid having you do
22 two briefs.

23
24 MS. HUTCHISON: So if we are able to question on a privileged materials between January -
25 January 16th priv - privilege motion being argued and January 28th we would -- got it.
26 Thank you. Thank you, My Lord.

27
28 THE COURT: Okay are we - are we there?

29
30 MR. MOLSTAD: I hope. I think - I think I know what the schedule
31 is but I am not sure.

32
33 MS. BONORA: I think - I think we got it.

34
35 MR. SESTITO: We'll - we'll bring Mr. Molstad up to speed.

36
37 THE COURT: I know it is - it is a tight time frame in January
38 for sure there is a lot going on. But it sounds to me is if we don't get that schedule in place
39 everything else is going to fall apart on us. It seems to me. So let's try to get that done, if
40 we can.

41

1 MS. BONORA: Thank you for your indulgence today, Sir.

2

3 THE COURT: Thank you very much.

4

5 MS. OSUALDINI: Thank you very much, My Lord. Merry
6 Christmas.

7

8

9

10 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

2
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4 in the Court of Queen’s Bench, held in courtroom 415 at Edmonton, Alberta, on the 20th day
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1 **Certificate of Transcript**

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Dated: December 23, 2019

Action No.: 1103-14112
E-File Name: EVQ20TWINNR
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")

P R O C E E D I N G S

Edmonton, Alberta
October 8, 2020

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TABLE OF CONTENTS

Description		Page
October 8, 2020	Morning Session	1
Submissions by Ms. Bonora		1
Submissions by Mr. Molstad		3
Submissions by Ms. Hutchison		4
Submissions by Ms. Osualdini		5
Submissions by Ms. Twinn		6
Certificate of Record		11
Certificate of Transcript		12

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

2

3 October 8, 2020

Morning Session

4

5 The Honourable

Court of Queen's Bench of Alberta

6 Mr. Justice Henderson

7

8 D.C. Bonora, QC (remote appearance)

For Sawridge Trustees

9 M.S. Sestito (remote appearance)

For Sawridge Trustees

10 J.L. Hutchison (remote appearance)

For Office of Public Trustees

11 P.J. Faulds, QC (remote appearance)

For Office of Public Trustees

12 O. Osualdini (remote appearance)

For C. Twinn

13 (No Counsel)

For S. Twinn (remote appearance)

14 S. Twinn

Intervener

15 E.H. Molstad, QC (remote appearance)

For Sawridge First Nations

16 E. Sopko

For Sawridge First Nations

17 M. Cressatti

For Sawridge First Nations

18 N. Varevac

Court Clerk

19

20

21 THE COURT:

Good morning. Please be seated. Okay. So, this

22 is the Sawridge Trust matter. Ms. Bonora are you leading the application?

23

24 **Submissions by Ms. Bonora**

25

26 MS. BONORA:

I'll lead the application, Sir. Thank you. First, I'll

27 just introduce everyone. So, Michael Sestito is with me and we are on for the Sawridge

28 Trustees. Crista Osualdini is on for Catherine Twinn. And I think Catherine Twinn is sitting

29 with Ms. Osualdini. John Faulds and Janet Hutchison are here and they're on for the office

30 of the public trustee and guardian. Shelby Twinn is also on the line and she, of course, is

31 granted intervener status. Ed Molstad, Ellery Sopko and Matthew Cressatti are here for the

32 Sawridge First Nation, who are also interveners.

33

34 So, we're here to reschedule an application that has been adjourned several times, and to

35 seek some direction from you in respect of filing briefs. The last adjournment of this

36 application was on May 19th, 2020. Of course, that was adjourned because of COVID. I

37 think that we basically have agreement from the parties in respect of a schedule, with the

38 exception of Catherine Twinn and Ms. Osualdini wants to speak that schedule.

39

40 So, currently, you have available dates on November 9th and 10th. And then not -- you are

41 not available again until the spring. There have been -- I'm going to take you through a bit

1 of the history. But just to be -- just to have you be aware, there have been initial brief and
2 reply briefs, extensive initial and reply briefs filed. And those were filed in November of
3 2019 for an application that was to happen then.

4
5 So, now, we're just talking about some briefs with respect to further clarification that you
6 gave us. So, our proposal is that any briefs would be filed October 26th. November 2nd
7 would be responses. And then the application would proceed on November 9th and 10th.

8
9 Just to recap for you. You started with us on December 18th, 2018. There was an
10 application set to proceed on jurisdiction, which was to determine if the Trust could be
11 amended. That was set for April 25th, 2019. And at that time, you posed a question to us
12 with respect to the asset transfer order and which definition of beneficiary applied, and
13 what was the effect of that asset transfer order. That application was set for November 27th.

14
15 On September 4th, we appeared in front of you for further clarity. On October 17th, we
16 entered a litigation plan. October 30th, you heard an intervener application and gave us a
17 decision on October 31st, 2019.

18
19 On November 1st, all of the parties filed briefs for the November 27th application. And
20 then on November 15th and 20th replies were filed. At that time, Ms. Osualdini, on behalf
21 of Catherine Twinn, filed a letter raising concerns about the content of the briefs and a
22 misunderstanding about what was to be in the briefs. And therefore, the November 27th
23 application was adjourned to January the 16th. The -- there was a litigation plan that would
24 deal with production of documents and deal with privilege issues. In December, those
25 applications had not been filed, and therefore, there was a further direction in respect of
26 filing those applications and dealing with them. But ultimately, the January 16th
27 application was then also adjourned to May the 19th.

28
29 Then in February, you signed privilege orders and production orders, which the parties
30 were able to work out. Of course, May 19th was delayed due to COVID. We canvassed the
31 parties to determine if we could have a virtual hearing. But the parties -- some of the parties
32 felt that the case could not be presented properly in a virtual setting. And therefore,
33 canvassed dates for an in-person hearing.

34
35 In the summer, we canvassed dates. And Ms. Twinn -- Catherine Twinn advised that she
36 would not be able to proceed until November. So, now we have a date in November. And
37 we're seeking direction that that in fact proceed with the schedule that I have just laid out.

38
39 And again, I want to be clear that the briefs that have already been filed in -- almost a year
40 ago, were quite extensive. So, the plans for -- what -- which was to happen in May, was
41 that there would be -- everyone would have the ability to file some more briefs, everyone

1 would have the ability to reply a week before the application, and then we would proceed
2 with the application on May 19th.

3
4 I can tell you that the -- that our office, on behalf of the Trustees, will not be filing another
5 brief. We may wish to reply to the briefs filed in this next round. But we won't be filing an
6 initial brief. And I understand that Sawridge First Nation has the same position in respect
7 of this application if it goes ahead on November 9th and 10th, although, I'll let Mr. Molstad
8 address that as well.

9
10 Sir, we're not certainly suggesting that anyone is intentionally delaying this. But obviously,
11 from the beneficiaries' perspective, there's an appearance of delay. We're coming up on the
12 tenth anniversary of this litigation. This Trust could be helping people. And certainly, it's
13 not helping them now. And we're certainly seeking your direction today that this not be put
14 over to the spring, that we file our briefs on October 26th and November 2nd and then
15 proceed on November 9th and 10th so we can try and move to closure on this matter.

16
17 Those are all of my submissions. Thank you.

18
19 THE COURT: Okay. Thank you. Mr. Molstad do you -- I take
20 it, have the same position as the Trustees?

21
22 **Submissions by Mr. Molstad**

23
24 MR. MOLSTAD: Yes. Yes, Mr. Justice Henderson. The position of
25 the Sawridge First Nation, who we represent, is one that, if the matter does proceed on
26 November 9th and 10th, we will accommodate Ms. Osualdini and not file a supplementary
27 brief. But we will file a response brief.

28
29 Our position, however, if the matter is adjourned to the spring, we will consider at that time
30 whether we will or will not file a supplementary brief. We are anxious to have this matter
31 dealt with.

32
33 THE COURT: Okay. Mr. Faulds do you have a position that
34 your clients want to put forward on this issue?

35
36 MR. FAULDS: My Lord, if I -- if I might defer to Ms. Hutchison

37 --

38
39 THE COURT: Yes.

40
41 MR. FAULDS: -- on that point and have her speak to it.

1
2 THE COURT: Absolutely.

3
4 MR. FAULDS: Thank you. Thank you.

5
6 **Submissions by Ms. Hutchison**

7
8 MS. HUTCHISON: Thank you, My Lord. GOPTT has discussed to
9 the parties our availability for dates and we are willing to accommodate a filing schedule
10 that would allow the matter to proceed on November 9th and 10th. I would note that we're
11 -- the concept that there would not be supplementary briefs filed by the Trustees or by the
12 SFN is a - a new -- a new suggestion, I believe as of late yesterday. We haven't really had
13 an opportunity to absorb how that impacts the matter. One of the reasons that we'd ask for
14 the opportunity to file supplementary briefs was because of the expanded scope of the
15 issues. I suspect we can deal with this because we have a two day hearing. But certainly, a
16 bit of a concern about whether we'll be using the Court's time as efficiently as we could on
17 November 9th and 10th if there are not supplementary briefs filed by all parties. That's very
18 much the structure that we'd agreed to in the original litigation plan when we expanded --
19 or, confirmed with the Court the expanded scope. But in any event, My Lord, we've - we've
20 indicated to our friends that we can file supplementary brief by October 26th and file a
21 reply brief by November 2nd.

22
23 THE COURT: No -- by November 6th, I think was the date,
24 wasn't it?

25
26 MS. HUTCHISON: I believe that is the date our - our friends have
27 put forward, My Lord. But we - we were willing to file by November 2nd if necessary.

28
29 THE COURT: Okay. Okay.

30
31 MS. BONORA: November -- sorry, Sir, November 2nd is the date
32 we're putting forward.

33
34 THE COURT: November 2nd. Okay. Thank you very much.
35 Sorry about that.

36
37 MS. BONORA: So, that you would have a -- yeah, you would
38 have a full week before.

39
40 THE COURT: Yes. Okay. Good. All right. Ms. Osualdini?

41

1 **Submissions by Ms. Osualdini**

2

3 MS. OSUALDINI: Good morning, My Lord. Just to add to the - the
4 timeline and some of the issues that we're facing. At the November 2019 case management
5 meeting where the parties came in to seek clarification on the scope of the application, you
6 might recall, My Lord, that you gave a direction that we would need to address the - the
7 substantive validity of the 82 to 85 transfer. And I believe the - the wording Your - Your
8 Lordship used was - was what was the situation immediately before the August 2016
9 consent order.

10

11 THE COURT: Right.

12

13 MS. OSUALDINI: So, the issue is on the application that the -- that's
14 -- that we're discussing are - are quite significant. They're substantive and that they have
15 the potential for final relief. So, as I'm sure Your Lordship can appreciate, proper
16 preparation needs to be put into this.

17

18 To cut to the case, My Lord, you know, just despite this urgency to have this matter move
19 forward, the Trustees only sought dates (INDISCERNIBLE). I was notified of them on
20 September 29th. And unfortunately, My Lord, I and Mr. Risling are booked for a fairly
21 long -- a longer trial at the latter part of October. And prior to that, we're going to be out of
22 town doing witness interviews. So, our October is very full. It doesn't leave us time to
23 properly prepare submissions, much less reply to the submissions. Because the timeline
24 being proposed would have us preparing rebuttal submissions while we're sitting in a trial,
25 which just simply isn't possible.

26

27 To add to that, our client, who is also a practicing lawyer, she has commitments in October.
28 And she's also not available on the November dates. I just learned that this morning, that
29 she has commitments. And so, that's creating an issue because our client certainly likes to
30 be involved to the extent she's able in the preparation of our -- in review of our submissions.

31

32 Unfortunately, given that we've left timing and scheduling submissions until early October,
33 a months notice just simply doesn't give us time to do that. When November was initially
34 discussed in the summer as a possible application date, that could have been possible if
35 scheduling had moved forward at that time. Because if we had been given notice in July of
36 - of a submission filing deadline, that could have been met. But at this point, with - with a
37 trial looming for our office, and both - both counsel who are involved in this matter being
38 involved in that trial, we'd -- we just simply don't have time.

39

40 And as I stated earlier, this is a -- this is a complex matter. This is a significant matter. And
41 the preparation time for that needs - needs to reflect that so that we can match a proper

1 defence for the beneficiaries of 1985 Trust.

2
3 And in terms of prejudice, it's - it's unfortunate that the Court's only availability in 2020 is
4 -- are those dates and that we don't have any other option until spring. However, if
5 unfortunately those -- that's the situation we're dealing with, (INDISCERNIBLE) prejudice
6 to the current beneficiaries of the Trust who stand to lose that interest on this application
7 to rush through submissions on their behalf, would create actual prejudice, which we're
8 concerned for. Thank you.

9
10 THE COURT: Okay. Thank you.

11
12 UNIDENTIFIED SPEAKER: Your Honour, is Shelby Twinn on the line?

13
14 THE COURT: I - I think she is. But I don't see her.

15
16 THE COURT CLERK: Yes, she is, Sir.

17
18 THE COURT: I am just wondering --

19
20 MS. TWINN: I'm here.

21
22 THE COURT: Would you like to say anything in terms of what
23 your position is with respect to going ahead in November?

24
25 **Submissions by Ms. Twinn**

26
27 MS. TWINN: Yes. So, I currently am working full-time and in
28 school full-time. And this feels a little bit rushed. I rely a lot on -- of -- help from other
29 people to understand and proceed through this. And I don't really have a break until
30 Christmas from full -- double full-time scheduling for myself. So, I'm just a little concerned
31 about the timing that I have left. I have mid-terms in the next couple weeks. It's just --
32 seems like a lot all of a sudden. And I'm a little worried about that because I don't have the
33 time. I don't have -- like, counsel to do it during their days. It's all on me.

34
35 THE COURT: Okay. Good. Thank you very much for that.

36
37 MS. TWINN: Thank you.

38
39 THE COURT: Is anything -- anyone else have anything that
40 they would like to add to this issue of scheduling?

41

1 MS. BONORA: Sir, just one last -- a couple of points. I appreciate
2 what Ms. Osualdini said about when we sought dates. We had to seek permission to -- for
3 case management to proceed. Once we obtained that permission then, of course, we sought
4 the dates and that's where we are at this point.

5
6 In respect of Catherine Twinn, while she was given permission to - to continue in this
7 action as though she were a Trustee, those were the words that were used -- she doesn't
8 necessarily represent -- she doesn't have a representative position in respect of other people,
9 so she is representing herself. And we are asking that we not be held up for just one person.

10
11 THE COURT: Okay. Good. Any -- anyone else have anything
12 to say? Madam clerk do you have a calendar?

13
14 THE COURT CLERK: I do, Sir. That's this year or 2021?

15
16 THE COURT: 2021.

17
18 UNIDENTIFIED SPEAKER: Sorry, there should be (INDISCERNIBLE).

19
20 THE COURT: Okay. This is good. I am very sensitive to the
21 concerns of the Trustees and the Sawridge band that this matter be dealt with. It has been
22 underway (INDISCERNIBLE) litigation for almost 10 years. And the - the fact of the
23 matter is, that this does need to come to a conclusion quickly. On the other hand, I am
24 sensitive to Ms. Osualdini's comments and Ms. Twinn's comments that scheduling is very,
25 very difficult for them.

26
27 And I think these issues are sufficiently important that we get the best possible
28 representations for all the parties so that I will have, available to me, submissions that can
29 permit me to make the best decision that I can.

30
31 So, what - what I am going to suggest is, before I make a ruling as to whether or not we
32 are going to proceed on November 9th and 10th, what I am going to do is to ask you get
33 your calendars out right now and tell me which two days during the week of January 4th
34 you are available.

35
36 THE COURT CLERK: Are we sitting that week, Sir?

37
38 THE COURT: January 4th, 2021.

39
40 THE COURT CLERK: Okay.

41

1 THE COURT: I think -- that is when -- that is when we start.
2
3 THE COURT CLERK: Okay. Good. Thanks.
4
5 THE COURT: Yes. I am pretty sure.
6
7 MS. BONORA: We're available, Sir.
8
9 THE COURT: Any of those days?
10
11 MS. BONORA: Any of those days.
12
13 THE COURT: Is - is anyone not available for the week of
14 January 4th?
15
16 MS. OSUALDINI: My Lord, I have an appeal scheduled on the
17 Friday, but I would be available the 4th, 5th or the 6th.
18
19 THE COURT: Okay.
20
21 MS. HUTCHISON: We're available on the 4th through the 6th, My
22 Lord.
23
24 THE COURT: Mr. Molstad? Your availability? I can't hear -- I
25 think you are muted, Mr. Molstad.
26
27 THE COURT CLERK: (INDISCERNIBLE).
28
29 MR. MOLSTAD: Can you hear me now, Sir?
30
31 THE COURT: I can, yes, indeed. Yes.
32
33 MR. MOLSTAD: Yeah. We're available that week, Sir.
34
35 THE COURT: Okay. And Shelby are you -- are you available
36 that week?
37
38 MS. TWINN: Yeah, that week will work for me.
39
40 THE COURT: Okay. Well, what I am going to do is, I am going
41 to -- right now, see whether I can talk to the trial coordinators to see if they can give me

1 two days, the 4th, the 5th or the 6th, some combination of those. I think since it is very
2 early in the term, they might be able to schedule something. I can't promise that. But I will
3 be able to get back to you later today on that. And so, the plan is, if we can arrange
4 something that week, I would adjourn it so as to accommodate everyone. If we can't, I will
5 think about whether or not I will force it on November 9th and 10th. But I will do
6 everything in my power to try to find two days, the 4th, the 5th or the 6th. My preference
7 would be the 5th and the 6th, just to give a day for everyone to get back thinking about the
8 matter and to prepare for the 5th and 6th.

9
10 So, that - that is what I would like to do. And I will speak to the trial coordinators and I
11 will have my assistant get back to you later today to confirm it. Is that suitable for
12 everyone? And in terms of timing deadlines, if we -- like, I would like this material,
13 obviously well before Christmas. So, if we pushed everything back a month, so some time
14 toward the end of November for the briefs to be filed -- say November 27th and the reply
15 briefs by the 11th of December. Do those dates seem reasonable to - to everyone?

16
17 MS. HUTCHISON: That works for our office, My Lord.

18
19 MS. OSUALDINI: That's fine with us.

20
21 MR. MOLSTAD: Ed Molstad speaking on behalf of Sawridge,
22 that's acceptable. That's agreeable.

23
24 THE COURT: Okay.

25
26 MS. HUTCHISON: That's agreeable for PTT, My Lord.

27
28 THE COURT: Okay. Then what we are going to do is, we are
29 just going to adjourn this application. I will have my assistant communicate with you later
30 today to let you know whether I have been able to find those two days in early January.
31 But I am -- I will press the trial coordinator to the extent that I can. See if I can't organize
32 that. All right.

33
34 MS. BONORA: Thank you so much. And thank you for your
35 efforts to try and get it heard in January.

36
37 THE COURT: Yes. No problem. Okay. So, we will adjourn.

38
39 UNIDENTIFIED SPEAKER: (INDISCERNIBLE).

40
41 THE COURT: And I will have my assistant be in touch with you

1 later today. Okay.

2

3 MR. SESTITO: Thank you, My Lord.

4

5 MR. MOLSTAD: Thank you.

6

7 THE COURT: Thank you very much.

8

9

10

11 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 in proceedings in Court of Queen’s Bench, held in courtroom 412 at Edmonton, Alberta, on the 8th day of October, 2020, and that I, Natalija Varevac, was the court official in charge of the sound-recording machine during the proceedings.

1 **Certificate of Transcript**

2

3 I, Christine Hanson, certify that

4

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

8

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

11

12 Christine Hanson, Transcriber

13 Order Number: AL2794

14 Dated: October 14, 2020

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