Court of King's Bench of Alberta

Citation: Twinn v Alberta (Public Trustee), 2025 ABKB 507

Date: 20250903
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Roland Twinn, Margaret Ward, Tracey Scarlett, Everett Justin Twin and David Majeski, As Trustees For the 1985 Sawridge Trust (Trustees)

Applicants

- and -

Catherine Twinn and Office of the Public Guardian and Trustee

Respondents

- and -

Sawridge First Nation

Intervenor

Case Management Endorsement
of the
Honourable Justice J.S. Little

I. Introduction

[1] In this case management application, the applicant Trustees seek a direction that they may make distributions to the beneficiaries of a trust that they administer called the 1985 Sawridge Band Inter Vivos Settlement, more commonly called the 1985 Trust or the 1985 Sawridge Trust.

[2] The Office of the Public Guardian and Trustee (OPGT) supports the application.

[3] Ms. Twinn opposes the application.

[4] The Sawridge First Nation (SFN) as Intervenor argues that such distributions would have the effect of dividing the Nation and ultimately supports Ms. Twinn's opposition.

[5] This application is one of a seven step process proposed by the Trustees. Filed June 28, 2024, the full application seeks an Order:

a. Confirming the validity of the 1985 Sawridge Trust;

b. Affirming that notwithstanding that the definition of "Beneficiary" set out under the 1985 Sawridge Trust is discriminatory, and includes certain non-members of the Sawridge Nation, the Sawridge Trustees may proceed to make distributions to the Beneficiaries of the 1985 Sawridge Trust, including to non-members of the Sawridge First Nation who qualify as beneficiaries of the 1985 Sawridge Trust;

c. Approving the Distribution Proposal to be submitted by the Sawridge Trustees;

d. Confirming that the OPGT has fully executed and satisfied its obligations imposed by the Court, as of the date the Order is filed;

e. Declaring that the indemnification and funding of the OPGT, as set out in the Order of Justice Thomas, pronounced June 12, 2012, and filed September 20, 2012, is ended; and

f. Confirming that the litigation has concluded and that nothing in the Order negates the Sawridge Trustees' ongoing duty to act in good faith in carrying out their duties and powers as defined in the 1985 Sawridge Trust, or the Beneficiaries' ongoing right to enforce the bona fides of the Sawridge Trustees in the exercise of their powers and duties as outlined in the 1985 Sawridge Trust Deed.

[6] By Order filed January 11, 2025, step (b) above was to be determined before the balance of the relief sought. It may seem counterintuitive to determine distribution before validity. Ms. Twinn makes this point in her written submissions. I address that issue below.

II. Background

[7] The background to this application is set out in the Court of Appeal decision respecting a related matter in this action reported at 2022 ABCA 368:

> [2] The late Chief Walter Twinn decided that the Sawridge First Nation should invest some of its oil and gas revenues in income producing assets for the long-term benefit of the Band members. Prior to 1982 there was some uncertainty as to whether or how First Nations could hold business assets. As a result, some individual Band members held assets in their own names in trust for the First Nation.
>
> [3] In 1982 it was resolved that ownership of these assets should be consolidated under one trust. Chief Walter Twinn therefore established the 1982 Sawridge Band Trust. The trustees were to be the Chief and Councillors of the Band. The beneficiaries were "all members, present and future, of the Band". The Trustees were given "complete and unfettered discretion" to distribute the income and capital of the Trust "for the benefit of the beneficiaries". The assets that had previously been held in trust by individual Band members were subsequently transferred to the 1982 Trust.
>
> [4] On April 17, 1985 s. 15 of the *Canadian Charter of Rights and Freedoms* came into effect. In anticipation, the federal government had introduced Bill C-31, which would restore band membership to women who had married non-First Nations men and their children. That could potentially increase the number of members of the Sawridge First Nation, and thereby dilute the expectations of any existing members of sharing in the income and capital of the 1982 Trust.
>
> [5] The Sawridge Band therefore resolved to create a new trust under which the beneficiaries would be limited to those Band members who qualified as members of the Sawridge Band prior to the enactment of Bill C-31. In other words, whereas the beneficiaries under the 1982 Trust were "all members, present and future, of the Band", under the 1985 Trust the beneficiaries would only be "all those who qualified as members in accordance with the *Indian Act* two days prior to Bill C-31". In furtherance of this objective, Chief Walter Twinn established the 1985 Sawridge Band Inter Vivos Settlement Trust. There were to be five trustees of the 1985 Trust, at least two of whom must be beneficiaries of that trust.
>
> [6] By Resolution dated April 15, 1985, the Trustees of the 1982 Trust transferred all the 1982 trust assets to the 1985 Sawridge Band Inter Vivos Settlement Trust. As of the date of the Resolution the same persons were beneficiaries under both the 1982 Trust and the 1985 Trust...
>
> [9] In 1986 the Sawridge First Nation created another trust. Few if any post-1985 assets were placed into the 1985 Trust, rather, they were all placed into the 1986 Trust. The definition of "beneficiaries" in the 1986 Trust was "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time". In other words, new members, including the Bill C-31 women and their children, were beneficiaries of the 1986 Trust.

[8] Accordingly there are now two trusts. Beneficiaries of the 1985 Sawridge Trust, which holds assets derived up to 1985, are those people who qualified as members of the Sawridge

Band under the *Indian Act* before the 1985 amendments. Beneficiaries of the 1986 Trust, which holds assets derived post-1985, are those who qualify as members of the Sawridge Band as that membership may be determined under federal laws from time to time.

[9] Pursuant to the January 22, 2018 Consent Order of Justice Thomas, the parties agreed that the definition of Beneficiary in the 1985 Trust was discriminatory "insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust".

[10] The preamble to that January 22, 2018 Order includes that "the parties have agreed to resolve this specific question [implications of the discriminatory definition] on the terms herein, and no other issue or question is raised before the Court at this time, **including any question of validity of the 1985 Sawridge Trust**" (parentheses and emphasis added).

[11] The Trustees make clear that they intend to argue in later stages that the 1985 Sawridge Trust is valid because it meets the "three certainties" test of validity and has been determined to be valid by the Court of Appeal. But the question of whether a discriminatory definition of beneficiaries is a bar to distribution is distinct from whether the trust itself is valid. My role in this application is to deal solely with the application framed by the applicant and in the sequence requested by the applicant. If that means that I must assume the validity of the 1985 Sawridge Trust for the purposes of this application, I do so.

[12] This has been protracted litigation with heavy sociopolitical undercurrents. As those undercurrents have moved, so may the approach or strategy of a party have evolved. For that reason, I take nothing from the comments of any party during oral argument or in its written submissions that another party's position does not now reflect the position of that party at an earlier stage in this litigation.

[13] Similarly, I take nothing from counsel for any party having taken what might be considered to be a different position in unrelated litigation. The role of counsel is to take instructions from his or her client and need not reflect the personal views of that counsel.

III. Parties' Positions

[14] The Trustees argue that there is no authority for the proposition that a private trust may not distribute to its beneficiaries on the ground that the definition of beneficiaries is discriminatory. They refer to their statutory obligations under s. 27(1)(a) of the *Trustee Act*, SA 2022, c T-8.1(the Act) to act in accordance with the terms of the trust. The terms of the 1985 Sawridge Trust require that a determination be made that a beneficiary be of a class of people who qualified as Indians under federal legislation at a particular date. No other judgment call is required to be made by the Trustees, nor any discretion exercised.

[15] The OPGT, appointed to represent the interests of minor children, including those who are beneficiaries of the 1985 Sawridge Trust, agrees that there is no basis for court intervention respecting distribution from a private trust on the ground that its definition of beneficiaries is discriminatory.

[16] Ms. Twinn argues that the Trustees are attempting to "validate, normalize, perpetuate and continue discrimination and other Charter flagrant violations as a permanent feature of the 1985 Sawridge Trust."

[17] The SFN builds on Ms. Twinn's argument that the rules for distribution under the 1985 Sawridge Trust are "structured to delegitimize female ancestry and emphasize racial purity" and cannot be condoned in modern Canadian society.

IV. Types of Trusts

[18] It is necessary to determine what kind of trust we are dealing with here.

[19] At common law, express trusts are created to effect an intention to have a person or persons hold property for the benefit of another or others (*Oosterhoff on Trusts: Text, Commentary and Materials,* 8th Edition, page 24) as distinguished from trusts that arise by implication of law.

[20] The 1985 Sawridge Trust clearly is an express trust.

[21] Express trusts are divisible into two types: trusts for persons and trusts for purposes. Trusts for persons are called private trusts. Trusts for purposes are called charitable trusts. (*Oosterhoff*, page 24).

[22] SFN refers to *Waters' Law of Trusts in Canada*, 5th, at page 356 which questions whether First Nations trusts seeded with taxpayer money are private or more in the nature of a public trust, such that they may be challenged on discriminatory grounds. The 1985 Sawridge Trust, however, is not seeded with taxpayer money but with resource revenues.

[23] SFN refers as well to ***Keewatin Tribal Council Inc***. *v* ***Thompson (City)***, 1989 CanLII 7267 (MB KB) where the court found that a trust established for various bands to hold property was a non-charitable purpose trust under Manitoba law. That case, however, dealt only with whether land held by a corporation for that trust was subject to municipal taxation or was exempt as being effectively a corporate vehicle for a tribe or body of Indians. Clearly it was. But I respectfully disagree with the learned judge that it was a form of non-charitable purpose trust. Based on the fact that the beneficiaries were named entities, by the *Oosterhoff* definition it would be a private trust because it is for named persons.

[24] Further, in Alberta, by virtue of section 77 of the Act, non-charitable purpose trusts cannot be contrary to public policy, ie discriminatory. But the 1985 Sawridge Trust may not qualify as a statutory non-charitable purpose trust here for other reasons as well:

> Section 77(1) A person may create a trust that
>
> (a) is for a non-charitable purpose that
>
> (i) is recognised by law as being capable of being a valid object of a trust, or
>
> (ii) is sufficiently certain to allow the trust to be carried out, is not contrary to public policy and is
>
> (A) for the performance of a function of government in Canada, or
>
> (B) a matter specified by regulation,
>
> and
>
> (b) does not create an equitable interest in any person. (underlining added)

[25] The 1985 Sawridge Trust names people, such that they have a beneficial interest as beneficiaries, and does not perform a government function.

V. Nature of Discrimination

[26] Even assuming that the 1985 Sawridge Trust, as Ms. Twinn and SFN argue, is not one that fits neatly into either of the binary categories as a private or charitable trust, it is necessary to look at the nature of the discrimination.

[27] In her brief, Ms. Twinn traces the history of the definition of Indian in Canadian law. There is no need here for me to replicate the level of detail she provides. But briefly, until 1850 there was no definition: Indigenous people themselves determined membership in their communities by criteria including birth, marriage, adoption, residence, and other intangibles such as character, value, and skills.

[28] From 1850 until Confederation, legislation set out four classes of persons, including all people intermarried with Indians and living with them. That was later amended to exclude non-Indian men who married Indian women, to address a concern that those men were obtaining an advantage by gaining access to property and other rights.

[29] By 1857, the *Gradual Civilization Act* provided that Indian men who were enfranchised, meaning that they lost their Indian status, conferred that same loss on their wives and children. Over time, that principle was extended to Indian women who married non-Indians. And there were other legislative provisions in the *Indian Act* whereby marriage by a woman affected her Indian status and that of her children differently from how an Indian man and his children were affected.

[30] It is this kind of legislated sex-based discrimination that Ms. Twinn argues deprives certain Indigenous people of the tangible and intangible economic, educational, and health benefits available to others with Indian status.

[31] I accept that argument insofar as the public rights of Indians as Canadian citizens and members of Bands are concerned. But the application of that argument to the 1985 Sawridge Trust is less persuasive.

VI. Public Policy Considerations Respecting Discrimination

[32] Courts are not shy about finding public policy to be a consideration in the interpretation or enforcement of charitable trusts. One example is ***Canada Trust Co***. v ***Ontario Human Rights Commission*** [1990] OJ No 615 (CA), where the court struck out discriminatory provisions related to sex, race, and religion in a charitable trust, on the basis that they contravened public policy. The terms of the trust prohibited scholarships to non-white, non-Protestants. The Court of Appeal noted, however, that "[o]nly where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void." (Page 49)

[33] But courts resist interfering with a person's right to dispose of his or her property based on what objectively are discriminatory criteria. In ***Spence*** v ***BMO Trust Company***, 2016 ONCA 196, a father's will included a statement that he was not leaving anything to his daughter because he had had no communication with her for some time and she had shown no interest in him as a father. She brought external evidence that the break in their relationship had occurred years earlier because she had married a man outside of her race. That evidence was considered in the lower court and the will set aside on the basis that the evident racial discrimination was against

public policy. The Ontario Court of Appeal reviewed a number of cases where courts had invalidated testamentary gifts on public policy grounds where the gifts were conditioned:

> These include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, e.g., conditional bequests that seek to induce celibacy or the separation of married couples; ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent; iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law. (para 55, footnotes omitted)

[34] Finding, first, that extrinsic evidence ought not to have been admitted, the Court of Appeal held also that it was only in circumstances where the discrimination required the beneficiary to act a certain way or the administrator to act in a manner that was contrary to public policy that a court should intervene in a private distribution of wealth.

[35] There is nothing in the terms of the 1985 Sawridge Trust that require potential beneficiaries to act in a manner contrary to public policy nor, despite the arguments of the SFN, that requires the trustees to act in a manner contrary to public policy. They are bound by the definition of beneficiaries in the 1985 Sawridge Trust and have no discretion to vary that definition to prejudice or favour anyone not included in it.

VII. Mitigating the Effect of Discrimination of the 1985 Sawridge Trust

[36] Chief Walter Twinn established the 1982 Trust because it was not clear that Indians could hold title to property. He found a legal mechanism to have that property held by a trust for the benefit of his people, then just defined as members of the Band. When he determined that as a result of the coming into force of equality provisions in the Charter there would be more people entitled to be members of the Band and thereby entitled to benefit under the trust, he made the conscious decision to freeze the definition of the people who could benefit from the trust by reference to the definition used in the *Indian Act* before proposed changes to that Act, to make it Charter compliant, would expand membership in the Band.

[37] As the settlor of a private trust, adopting the reasoning of the Ontario Court of Appeal in ***Canada Trust Co.*** that discrimination in a private trust is not litigable, he was entitled to so define its beneficiaries. Indeed, in his capacity as Chief of a constituency as then defined by the *Indian Act*, it is arguable that he was obliged to do so.

[38] But he also created a new trust to look after the interests of that expanded group of people, which would include both those people defined by reference to the old *Indian Act* provisions and the new. Ms. Twinn points out that those provisions since have been amended numerous times, validating Chief Walter Twinn's concerns. Freezing the definition of beneficiaries based on valid federal legislation cannot be the kind of offensive discrimination which should cause the court to interfere with a conscious decision of the leader of a people who was trying to protect their interests, particularly while creating a new vehicle for what he knew would be a larger group of people defined by different criteria.

[39] Defining beneficiaries based on legislation which limits entitlement to particular Indigenous people, recognizing that a change was coming that would expand entitlement to a greater number of Indigenous people, while discriminatory, is not discrimination analogous to an

entitlement that requires beneficiaries to refrain from certain behaviour or make choices such as celibacy, residence with a particular parent, membership in a certain religion, or the commission of a crime.

[40] The situation in the present case is analogous to that found in ***Taylor et al*** v ***Ginoogaming First Nation,*** 2019 ONSC 328. There, payments were to be made from a trust based on band membership as of a fixed date. That definition of membership was found to be discriminatory. The band sought advice and direction. Justice Nieckarz, after reviewing case law including ***Canada Trust Co*** and ***Spence***, together with a number of cases involving distributions to Indigenous people as defined by references to the *Indian Act* over different periods of time, found that the discrimination which might prevent distributions based on public policy must be of a sort that discriminated against members of a certain group by virtue of characteristics within that group, such as non-payment of interest to minors otherwise entitled to distributions (***Blueberry Interim Trust, Re***, 2011 BCSC 769), or determinations by the trustees to withhold distributions to only certain members otherwise entitled to payments (***Barry*** v ***Garden River Band of Ojibways*** (1997 ACWC (3d) ONCA). She held that:

> In light of the foregoing, I find that the payments provided for in Article 12.5 are not extended to any individuals who became a member of Ginoogaming after December 15, 2001, even if they should have otherwise been a member on that date but for the discriminatory provisions of the *Indian Act*. (para 51)

[41] In other words, discrimination by virtue of characteristics within a defined group or discrimination by the trustees in making distributions within a defined group is the kind of discrimination in a private trust that may permit intervention by the courts. Defining the group by reference to federal legislation at a given date does not.

VIII. Conclusion

[42] Both Ms. Twinn and the SFN in their briefs and in their oral submissions decry the treatment of First Nations people, as evidenced in part by provisions of the *Indian Act* that even today perpetuate sexism and racism and, in the case of the 1985 Sawridge Trust, inevitably create division within the SFN:

> They [the Trustees] say there is no case law preventing them from administering Charter flagrant rules which courts have consistently pronounces as assimilationist. The Trustee approach is problematic because it continuously divides Sawridge Trust beneficiaries using racist and colonial rules, played out in an ongoing cat and mouse litigation process that decapitates the long term interests of reconciliation within the Sawridge First Nation as between its members and Trust beneficiaries. The Threshold application seeks to validate the 1970 *Indian Act* divisive rules, to the detriment of long-term collective interests of the Sawridge people. The application promotes a continual doctrinal slippage away from the recognition of constitutional rights and freedoms. (Twinn brief at para 266, parentheses added)

[43] But trust law in and of itself is not capable of addressing these concerns. Chief Walter Twinn as leader and as settlor of both the 1985 Sawridge Trust and the 1986 Trust was well aware of the implications of his actions. He intentionally created two trusts and two classes of beneficiaries. As a member of both groups, he chose how to define the beneficiaries. He did so

by reference to an admittedly discriminatory, colonial statute. But that was the action of a person defined by that discriminatory, colonial statute. It was not the action of the state.

[44] His decision does not invalidate the right and obligation of the trustees of both trusts to honour the terms of those trusts, including the making of distributions to the beneficiaries as defined in their respective trust agreements.

[45] The Trustees may make distributions to the beneficiaries of the 1985 Sawridge Trust as they are defined in it.

[46] Thank you to all counsel for their extensive briefs and their oral advocacy.

Heard on the 16th day of June, 2025.
Dated at the City of Edmonton, Alberta this 3rd day of September, 2025.

J.S. Little
J.C.K.B.A.

Appearances:

Doris C.E. Bonora, K.C. - KPMG
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for the Applicant Trustees

Janet Hutchison – Hutchison Law
Jonathan Faulds – Field LLP
for the Respondent - Office of the Public Guardian Trustee

Catherine Twinn
Self-represented Respondent

Crista Osualdini - McLennan Ross
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David Schulze – Dionne Schulze
Nicolas Dodd – Dionne Schulze
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