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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

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 DISTRIBUTION
PROPOSAL**

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INTRODUCTION

1. By Order of the Court on December 17, 2015, the trustees ("Trustees") of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "Trust") were directed to submit a proposed distribution arrangement for approval by the Court by January 29, 2016. This Brief is filed in support of an application to approve of the Proposed Distribution Arrangement of the Trust (the "Distribution Proposal"). A copy of the December 17, 2015 decision is attached at **Tab 1**. A copy of the Distribution Proposal is attached at **Tab 2**.
2. The Trustees seek approval of the Distribution Proposal in the form that it is in at Tab 2 with the exception that the approval of the proposal for the definition of Beneficiaries set out in paragraph 4 shall be adjourned to a separate Court application.

PART I – STATEMENT OF FACTS

3. The Trustees prepared the Distribution Proposal attached at Tab 2 in accordance with the direction of the Court, and submitted it to the Court.
4. The Office of the Public Guardian and Trustee ("OPGT") has not brought a Rule 5.13 application in respect of the Distribution Proposal.
5. The Trustees seek the approval of the Court to the Distribution Proposal with the exception of the approval of the definition of beneficiary which is to be adjourned *sine die*. The OPGT advised in correspondence dated July 15, 2016 in respect of the Distribution Proposal:

"The OPGT will not oppose the application by the Trustees."

6. The Trustees have sought the approval of all parties to the Distribution Proposal and have prepared a form of Order for consideration. The proposed Order is attached at **Tab 3**.
7. To date, the parties have not consented to the terms of the proposed Order.
8. The Distribution Proposal is a comprehensive document with a proposed distribution along with supporting submissions, supporting precedents and should be read in conjunction with this Brief. The Distribution Proposal addresses the policies of the Trustees that are in place now for the beneficiaries of the Trust and their respective minor children (pages 1-5). The Distribution Proposal sets out the proposed distribution including addressing the Two Pools of Funds which the Court directed be addressed. The Distribution Proposal addresses the dangers of a complete capital distribution, and thus no proposal is made for a complete capital distribution.

9. The Distribution Proposal addresses the nature of a discretionary trust and the discretion of the Court to intervene in a discretionary trust.

PART II - ISSUES

- (a) Request the Court to adjourn *sine die* the approval of the definition of beneficiary.
- (b) Request the Court to approve the balance of the Distribution Proposal as attached.

PART III - SUBMISSIONS

Definition of Beneficiaries

10. The Trust was established to invest assets of the Sawridge First Nation to provide funds for the members of the Sawridge First Nation and for the future generations of members of the Sawridge First Nation ("SFN").
11. The Distribution Proposal sets out a method by which the Trust could be amended to remove the discriminatory elements of the definition of beneficiary such that the beneficiaries of the Trust will be the current members of the SFN. The OPGT and Catherine Twinn have advised that such an application to approve the definition of beneficiary will require extensive arguments. Thus, the determination of the definition of beneficiaries of the Trust is requested to be adjourned *sine die*.

Balance of Distribution Proposal

12. The balance of the Distribution Proposal is submitted to the Court for approval in accordance with the form of Order attached at Tab 3. Such Order was circulated to the parties in the hopes of achieving consensus but to date there has not been agreement among the parties on the form of Order.

Nature of a Discretionary Trust

13. The nature of a discretionary trust is described on page 7 of the Distribution Proposal. The Trustees submit that the nature of the Trust should not be altered.
14. It is the duty of the Trustees to consider when and how the discretion ought to be exercised and the decision of the Trustees in so doing must comply with the terms of the Trust and the power conferred on the Trustees by the Trust deed.
15. The Trustees developed policies for the payment of funds from the Trust. The Trustees thereby exercised their discretionary power to determine the policies to put in place and how funds would be paid under each policy.

16. The above policies have been approved by the Trustees to support the beneficiaries of the Trust after identifying the needs of the beneficiaries. The Trustees continue to investigate the needs of the beneficiaries and their dependents and continue to discuss new policies for payment of benefits.
17. It is submitted that the above policies have been formulated to consider virtually all of the needs of the beneficiaries, including minors. Any needs that are identified in the future and not covered in the within policies may be considered by the Trustees in their discretion and they may implement new or additional policies.
18. To date these policies are in place, but no payments have been made from the Trust due to the discriminatory nature of the definition of beneficiary.

Jurisdiction of the Court to Intervene

19. In relation to discretionary trusts, it is submitted that the Court should only intervene to direct payment of funds from the Trust where the Trustees have failed to give proper consideration as to whether their discretion ought to be exercised, or alternatively, when the discretion was exercised but the Trustees either acted outside the scope of the power conferred upon them in the Trust deed or took into account irrelevant or unreasonable considerations in making their decision. No remedy has been sought in respect of distribution of the Trust and there is no evidence of the Trustees acting outside the scope of their power or taking into account irrelevant or unreasonable considerations. The excerpts from Waters on Trusts and the cases referred to for support of the propositions in the Distribution Proposal are attached hereto at **Tabs 4, 5, 6, 7 and 8**.
20. The Distribution Proposal sets out, *inter alia*, that the Alberta courts have confirmed that if the Trustees are acting within the scope of their duties conferred upon them by the Trust deed, then their exercise of discretion should be "afforded considerable deference".

Lecky Estate v Lecky 2011 ABQB 802 at para. 50 at **Tab 5**

21. There is no evidence or allegation that the Trustees have failed to appropriately exercise their discretion in the development of policies and there have been no payments of benefits under the Trust pending the resolution of this litigation.

Treatment of Minors

22. This Court directed the Trustees of the Trust to propose a distribution scheme and has tasked the OPGT with ensuring the fair treatment of minors in the distribution of assets.

23. This Court is concerned with ensuring the equitable treatment of minor children of the beneficiaries. The above mentioned policies provide for the benefit of the beneficiaries and their children, including their minor children who are not beneficiaries. Only the Seniors Support benefit and the Cash Disbursement benefits do not provide for payment to minors.
24. The Distribution Proposal provides the background to the development of policies for payment of funds from the Trust to provide the Court insight into the exercise of the Trustees' discretion to date in developing policies for payment of funds from the Trust. It is submitted that the Distribution Proposal outlines the appropriate exercise of discretion by the Trustees who have considered the best interests of the beneficiaries and their children.
25. The Trustees request that the Court approve the Distribution Proposal which would allow the Trustees to follow the policies they have implemented, which are more fully described in the Distribution Proposal, and to adjust or make further similar policies for the benefit of the beneficiaries of the Trust and their dependents in the future.
26. The Trustees confirm that no distributions shall be made from the Trust until the beneficiary definition is determined in a separate court application.

PART IV – REMEDY SOUGHT

27. The Trustees respectfully request that the Court approve the Distribution Proposal with the exception of the definition of beneficiary set out in paragraph 4 of the Distribution Proposal which will not be approved by this Order and which will be directed to be determined in a separate application. A form of Order for approval is attached at **Tab 3**.

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

DENTONS CANADA LLP
REYNOLDS MIRTH RICHARDS & FARMER LLP

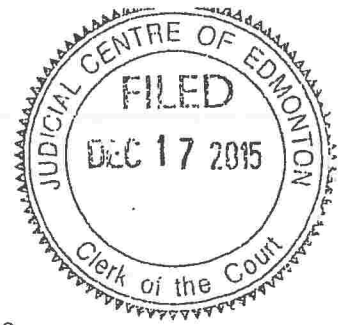
PER: _____

PER: _____

Doris Bonora
Marco S. Poretti
Solicitors for the Trustees

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Court of Queen's Bench of Alberta

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

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

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

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

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

II. Background

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

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

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

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

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

February 14, 2012 - The Public Trustee applied:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The 1985 Sawridge Trust

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

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

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

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

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

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

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

IV. The Current Situation

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

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

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

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

V. Submissions and Argument

A. The Public Trustee

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

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

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

B. The SFN

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

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

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

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

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

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

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

C. The Sawridge Trustees

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

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

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

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

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

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

VI. Analysis

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

A. Rule 5.13

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

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

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

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

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

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

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

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

4. Supervising the distribution process itself.

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

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

Task 1 - Arriving at a fair distribution scheme

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

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

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

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

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

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

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

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

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

Task 3 - Identification of the pool of potential beneficiaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] This information should:

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

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

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

Task 4 - General and residual distributions

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

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

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

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

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

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

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

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

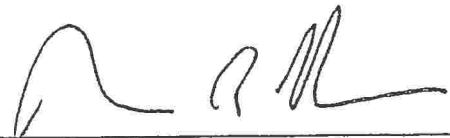
[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in *Sawridge #1* I had directed that the Public Trustee may inquire into SFN Membership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

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

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

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

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


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

Appearances:

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and
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for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
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for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
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For Catherine Twinn

Proposed Distribution Arrangement
of the Sawridge Band Inter Vivos Settlement ("Trust")

A. Introduction

The court has directed that the trustees of the Trust propose a distribution scheme for the Trust. The Public Trustee has been tasked with ensuring fair treatment of minors in the distribution of assets, identifying potential minor beneficiaries and high level review of the distribution process but such supervision is to be done at the highest level and only to ensure a fair and equitable distribution.

This proposed distribution scheme is provided for information as we understand that the Court has concerns and jurisdiction over the protection of minors.

The Trust was established to invest assets of the Sawridge First Nation to provide funds for the members of the Sawridge First Nation and for the future generations of members of the Sawridge First Nation. (Paul Bujold Questioning on Affidavit: page 75 line 7-13) (Tab "A")

The application before the court is to determine a definition of beneficiaries and this proposed distribution scheme will address the payment of funds from the trust and to whom such payments should be made.

B. Intentions of the Settlor

In the trust deed, the opening paragraph says that the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution are members of Sawridge Indian band No. 19... and the future members of such band... and for that purpose has transferred to the trustees property. (See Trust Deed Tab "B").

The intentions of the Settlor were to set aside funds to provide for the members of the First Nation over many generations. The Settlor was the Chief at the time and he certainly would have had the ability to decide to pay out capital distributions to his members if he thought that was in their best interests. His desire and vision was not to squander the resources of the First Nation but instead to invest the assets so that the resources would be available for many successive generations.

C. Proposed Scheme of Distribution

1. Introduction

The distribution of funds from the Trust must be according to the Trust Deed. The Trust Deed says that the funds will be paid out according to the discretion of the Trustees and based on the benefit to the beneficiaries of the Trust (paragraph 6 of the Trust Deed Tab "B"). In the Trust Deed the Trustees may make payments from the income or the capital of the Trust as they see fit in their unfettered discretion, and as is appropriate for one or more beneficiaries. In paragraph 8 of the Trust Deed, the Trustees are authorized to do all acts necessary, or desirable for the purpose of administering the Trust for the benefit of the beneficiaries. Thus it is clear that the administration of the Trust and the payment to beneficiaries is to be focused on the benefit of the beneficiaries and their families.

2. Distribution of Funds as per the policies of the Trustees

Since the 1985 Trust was established, no distributions have been made from the Trust. Payments have been made from the 1986 Trust. In 2009, the Trustees engaged the Four Worlds Center for Development Learning to prepare recommendations for the development and implementation of the Sawridge Trust's beneficiary program. After consultation with the Trustees and members of the Sawridge First Nation, a number of balancing principles were identified in the report done by the Four Worlds Center for Development Learning. One of the balancing principles was to balance the needs of present and future generations. Further, the beneficiaries identified that there was a need for limits on benefits and understood that there are finite limits to benefits that can flow from the trust in order to benefit all beneficiaries and the community over time.

Following the release of the Four Worlds Center report, the Trustees engaged in a process to develop policies for the payment of funds from the 1985 and 1986 Trusts. The Trustees were exercising their discretionary power to determine which policies to put in place, and how funds would be paid under each policy. To date the policies have been used to make payments from the 1986 Trust. The Trustees will use the same policies for the 1985 Trust once the uncertainty around the beneficiary definition is solved.

The Sawridge Trustees passed a number of policies that provide for benefits to the beneficiaries of both the 1985 and 1986 Trusts and to the dependents of beneficiaries of both trusts. The policies are as follows:

- a) **Health, Dental, Vision Care and Life Insurance benefit** - program provides for health, dental, vision care to the beneficiaries and their dependents and life insurance benefit to the beneficiaries;
- b) **Education Support Fund benefit** - this benefit provides payments for the beneficiaries or their dependents to provide for tuition and fee support, support for books and equipment, living expense supports while the beneficiaries or their dependents are attending a recognized education program;
- c) **Addictions Treatment Support Fund benefit** - this benefit provides for the beneficiaries, or their dependents to attend eligible treatment programs;

- d) **Child and Youth Development benefit** - benefit provides up to \$10,000 per annum to assist with costs associated with caring and educating a special needs dependent on a reimbursement or prepaid basis and up to \$8,500 per annum to assist with childcare costs for a dependent on a reimbursement or prepaid basis;
- e) **Compassionate Care and Death benefit** –this benefit provides payments to a beneficiary for travel costs for family members travelling to visit an ill or injured family member, reasonable accommodation costs, reasonable meal costs for the beneficiary and family, parking costs and child care costs for underage children. It also provides for home modifications, special equipment or dietary supplies or special medications not covered by the health plans. The death benefit provides the cost of transporting remains of the deceased, cost of burial or cremation, cost of the wake, the funeral and headstones, cost of transporting the beneficiary and family to the funeral, costs of accommodation, meals for the beneficiary and family, if the funeral is held at some distance;
- f) **Seniors Support benefit** - this benefit is to provide support for elders who have provided much to the building of the community and is a monthly supplement to other government programs received by the senior;
- g) **Personal Development and Alternative Health benefit** - this benefit provides the beneficiaries, or their dependents, including children, money up to \$2,000 per annum for fitness and nutrition, self-esteem building programs, payments for alternative health, herbs and supplements and fitness equipment, visits to traditional healers, including the costs of transportation and other expenses;
- h) **Income Replacement benefit** - this benefit provides an income replacement of up to \$5,000 per year for any beneficiary if they lose income as a result of attending a personal healing program or because of extended sick leave from work because of an illness;
- i) **Recognition of Beneficiaries and Dependents Educational Achievements** - this benefit provide a recognition of \$250 or suitable gift along with a framed certificate to a graduate of a recognized educational program to assist with finding employment or celebrating their achievement;
- j) **One Time Only "Good Faith" Cash Disbursement** - this benefit provides a one-time payment to every beneficiary of \$2,500, either immediately if they are an adult or upon the beneficiary attaining the age of 18.

A copy of each of the policies is attached as Tab "C". The brochures provided in respect of each of the policies which are provided to each of the beneficiaries are attached as Tab "D".

At the present time, these are the policies which have been approved by the Trustees to support the beneficiaries of both the 1985 and 1986 Trusts. The Trustees continue to investigate the needs of the beneficiaries and their dependents and continue to discuss new policies for payment of benefits as needs arise. The principles behind the payments relate to strengthening individuals

in the community and strengthening the community as a whole. These principles were identified as important to the First Nation.

3. Distributions Available to Minors

Of interest to the Court and to the Public Trustee is how minor children who are the children of beneficiaries are treated. If a minor is a member of the First Nation then they are entitled to all the benefits under all of the policies. The following policies provide for the benefit of the families and dependents of a beneficiary, including their minor children and dependents who are not members:

- a) The **Health, Dental, Vision Care benefit** - program provides for health, dental, vision care for beneficiaries and their dependents who are under 18 or under 25 if they are attending a post-secondary institution.
- b) The **Education Support Fund benefit** provides funding to an eligible dependent who is a natural or adopted child of an eligible beneficiary which child is under 25 years of age and registered in a full-time or part-time education program with an accredited educational institution.
- c) The **Addictions Treatment Support Fund benefit** provides a benefit to an eligible dependent which will include a natural or adopted child of an eligible beneficiary which child is under 25 and living at home with the eligible beneficiary.
- d) The **Child and Youth Development benefit** provides funding for a child of the beneficiary who suffers a permanent physical or mental disability, who is a natural child or adopted child of an eligible beneficiary, as well as for child care, if required, for all children of beneficiaries who are working or going to school.
- e) The **Personal Development and Alternative Health benefit** provides funding for an eligible dependent of a beneficiary which will include a natural or adopted child who is under 25 years of age and living at home with an eligible beneficiary. This policy provides for the payment of all manner of programs for children including sports and fitness programs.
- f) The **Income Replacement benefit** provides a benefit to an eligible dependent of a beneficiary who is a natural or adopted child who is under 25 years of age and living at home with the eligible beneficiary.
- g) The **Recognition of Beneficiaries and Dependents Educational Achievements benefit** provides for the dependents of a beneficiary to receive recognition for educational achievements. A dependent is defined as a natural or adopted child of an eligible beneficiary provided the dependent is living with the beneficiary or still considered to be a dependent of the beneficiary.
- h) The **Compassionate Care and Death benefit** - provides payments to a beneficiary or their children for expenses as set out in the policy.

The policies that do not provide for minors are the Senior's Support benefit and the Cash Disbursement benefit.

Thus it can be said that almost all of the policies provide a benefit to minor dependents (up to the age of 25 or older) of beneficiaries even though the dependent is not a beneficiary. Once the child is no longer dependent as defined in the policies, the child is no longer eligible until they apply and become a member of the Sawridge First Nation. It is submitted that virtually all the needs of a minor child are covered by the policies. If there are needs identified that are not covered above, the Trustees have an ability to implement new policies to cover such needs. The Trustees recognize the need to assess the needs of the beneficiaries and their families and the needs of the community and implement new or replacement policies that best meet the needs of the beneficiaries and their dependents and that best meets the needs of the community.

We must be mindful of the fact that the First Nation considers itself to be a community and a family that supports one another. The principles identified in the Four Worlds Report clearly show that there is a focus on both individual and community development.

The minors of the Sawridge First Nation have not been forgotten in the trust or in the benefits paid by the trust. The Trustees know that the First Nation can only be successful by nurturing and providing for the children who will be the members and leaders of the First Nation in the future.

The struggle of the Trustees in making payments under the policies is that almost 50% of the annual funding provided to the trusts from the companies has been paid in legal fees in this and related litigation. The trusts could provide greater support for its members if this litigation could be concluded.

4. Proposed Distribution Scheme: Proposal to provide for Present Beneficiaries and their families into the future

The Trustees are requesting that the Court approve a distribution scheme that would allow the Trustees to follow the policies set out above and future similar policies for the benefit of the beneficiaries of the trust and their dependents as such are defined in each policy.

Beneficiaries: The beneficiaries of the Trust will be the members of the First Nation as is set out in the Membership List maintained by the First Nation. The dependents of those beneficiaries will receive the benefits set out in the policies. The Trustees propose to ask the court to amend the definition of beneficiary in the trust as set out in Tab "E" attached by striking the necessary words from the definition to remove the discriminatory language.

Trust Payments: There will be distributions whether of income or capital in accordance with the policies set out above and future policies passed. These payments are in accordance with the trust deed. In this way the Trust can continue to provide for the needs of the current beneficiaries and their families and for the beneficiaries and their families in the future.

Two Pools of Funds : The court identified the need to establish two pools of funds. The Trustees propose to satisfy this requirement by identifying those funds which are necessary for the provision of payments under the policies on an annual basis for those beneficiaries and their families which are identified at any given time and by keeping invested the funds for future generations of beneficiaries and their families.

Pool Number One: At the present time, the Trustees prepare a budget of their expected requirements and provide that budget to the directors of the corporations whose shares

are owned by the Trust. The directors then provide the trust with the necessary funds to meet the budget. The Trustees always have the ability to request further funds from the directors if the need arises. This will in essence be pool number one.

Pool Number Two: The second pool will be the current and future investments of the Trust, which will be available for the current and future beneficiaries and their dependents according to the policies in place at any given time.

5. Complete Capital Distribution

We do not interpret the Court judgment as directing a full and complete capital distribution of the trust but in the event that such is interpreted by any party we set out the dangers of such an interpretation below.

Capital distributions have been examined extensively and have been viewed as a dangerous exercise of discretion for First Nations. First, there would need to be a liquidation of the Sawridge branded hotels and businesses that are currently owned by the Trust. It would destroy the vision of the Settlor of the trust. The ability to know the numbers of future generations is limited and thus it will be very difficult to determine the people who are to be provided for in the future.

Capital distributions from the trust can also be viewed as a form of welfare and can lead to a dependency on payments resulting in the same effect as federal welfare payments: thus, reduced interest in education and diminished motivation and work ethic leading to reduced employment—all contributing to greater social problems. If beneficiaries begin relying on capital distributions as a source of income, a full and complete capital distribution could also leave beneficiaries in a position where reckless decisions are made upon a receipt of a windfall that cannot be sustained by future distributions from the trust.

A full capital distribution would also divert resources away from the social programs outlined in the proposed distribution scheme that were established for the income beneficiaries of the Trust. Capital is a reserve source of funds to supplement the valuable social programs supported by Pool Number One.

An expectation for capital distributions can also lead to greater conflict in the question of tribal enrollment and disputes arising regarding tribal citizenship.

A consideration which is particularly striking given the current economic outlook in Alberta is the uncertainty and unpredictability of natural resource markets. Retaining trust capital will help moderate future uncertainties and can add to Pool Number One established for income beneficiaries in the trust and their dependents. Maintenance of capital will also allow diversification of investments to also moderate risk throughout a recessionary economy.

Some benefits to capital distributions have been identified, such as the ability for beneficiaries to meet their urgent needs and to shift agency in the determination of how the money should be used away from the tribal governments to individuals and families. As well, capital distributions can be used strategically as a policy tool and can incentivize certain goals such as school enrollment. Although, we acknowledge these benefits, in most cases these benefits would also be achieved with small, one-time capital distributions, such as the One-Time Good Faith Cash

Disbursement. The benefits could be eroded with larger capital distributions, if larger distributions exacerbate the dangers we have noted above.

Nature of a Discretionary Trust.

a. Discretionary payments for the needs of beneficiaries

The distribution of Trust funds is to be paid to the benefit of the beneficiaries and their families. The Trustees have an unfettered discretion as to how to direct the distribution of income and capital from the Trust in the nature of a discretionary trust. A discretionary trust is described in *Waters on Trusts* as a trust "in which the creator of the trust... imposes the duty upon the trustees to distribute income or capital among the beneficiaries described in the trust instrument... as the trustees think fit" [Donovan W.M. Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Thomson Reuters Canada Limited: Toronto, 2012) at p 36 (*Waters on Trusts*).] It is the duty of the trustees to consider when and how the discretion ought to be exercised and the decision of the trustees must fall within the objects of the trust and the power conferred upon the trustees (*Waters on Trusts* at p 988). The trustees of a discretionary trust are also bound by the fundamental duties of a trustee, that is: not to delegate their duties; not to personally benefit from the trust property; to act with honesty and act with the prudence expected of a reasonable person administering their own affairs; and to decide on the exercise of their discretion in line with the best interests of the beneficiaries (*Ibid* at pp 906, 988).

b. Avoiding Capital Payments to beneficiaries which destroys the Trust

In circumstances where the trustees of a discretionary trust have unfettered discretion as to the distribution of income and capital, then their decision as to the quantum of the distribution, allocation of the distribution between income and capital and the recipients of the distribution should be deferred to by the court. The trustees have the duty to consider whether the discretion to distribute income or capital ought to be exercised; however, it may be the case that the trustees determine that it is in the best interests of the beneficiaries to annually distribute income to the benefit of the beneficiaries and their families but to postpone the collapse of the trust by distributing capital. As discussed below, the court should only interfere with the exercise of the trustees' discretion in exceptional circumstances.

c. Jurisdiction of the Court to direct payment of funds

The Court should only intervene to direct the payment of funds from the Trust when the Trustees fail to give proper consideration as to whether their discretion ought to be exercised. Or alternatively, when the discretion was exercised but the Trustees either acted outside the scope of the power conferred upon them in the trust deed or took into account irrelevant or unreasonable considerations in making their decision. No remedy has been sought in respect of distribution of the trust and there is no evidence of the Trustees acting outside the scope of their power or taking into account irrelevant or unreasonable considerations.

When considering the degree of control a court can exercise over a trustee that holds absolute discretion, *Waters on Trusts* notes that an axiomatic feature of a trustee's dispositive discretion in a discretionary trust is "that provided the trustees act with good faith (i.e., honestly, thoughtfully, objectively and fairly) in the exercise of their discretion, the court will not interfere or counter their decision" (*Ibid* at p 1203, fn 149). *Gisborne v Gisborne* [(1877), 2 App. Cas. 300 (H.L.)] is the

leading case from the House of Lords which represents the principle that the court should not interfere with the discretion of trustees unless there is some "*mala fides*", meaning bad faith or fraud. The Ontario Court of Appeal in *Fox v Fox Estate* extended the definition of *mala fides* to circumstances where the trustee's discretion is conducted in an undesirable manner or if the discretion is influenced by extraneous matters [28 O.R. (3d) 396 (1996) at para 12 (*Fox*)]. In *Fox*, the extraneous consideration impugned by the Court of Appeal was based on religious discrimination rather than a consideration of what would benefit the beneficiaries as specified in the trust deed.

Alberta courts have confirmed the principle adopted in *Fox* in *McNeil v McNeil* [2006 ABQB 636] and *Lecky Estate v Lecky* [2011 ABQB 802 (*Lecky*)]. Alberta courts have confirmed that if the trustees are acting within the scope of their duties conferred upon them by the trust deed, then their exercise of discretion should be "afforded considerable deference" (*Lecky* at para 50). *Waters on Trusts* summarizes the principle as established in Canadian law: the court will not intervene with the decision of the trustees who are exercising their discretion if they do not agree with the decision or would have not have made the same decision but will intervene if the decision was so unreasonable that no "honest or fair-dealing" trustee would have made it, if the trustee took into account irrelevant considerations with respect to the decision, or when the discretion was not exercised and the trustees could not show that proper consideration was given as to whether the discretion ought to be exercised (*Waters on Trusts* at pp 989-990).

F. Proposal to Provide for the protection of minors and reporting to the Public Trustee

The Trustees would propose to provide a report to the Public Trustee identifying the payments that have been made to beneficiaries from the 1986 trust since 2009. The report would not identify individuals, but would identify the amounts paid. This will allow the Public Trustee to assess whether the payments are being made in a fair and equitable manner.

G. Conclusion

We submit that the above proposed distribution scheme meets all criteria for this discretionary trust, meets the criteria set for the trust by the Court and allows the Public Trustee to satisfy its mandate. The Public Trustee is assured that the trust is providing benefits to minor dependents through their adult beneficiary or to the minor directly if the minor is a member. Parents can apply on behalf of a minor for the minor to become a member of the First Nation in order for the minor to become a beneficiary of the Trust. The child as an adult could on their own apply to become a member. The Sawridge Trust policies provide cradle to grave support programs which is a benefit to the future of the First Nation members.

1 A I was basing this on documents and conversations that I
2 have had with various individuals including the
3 trustees about the reason for the establishment of the
4 1985 Trust.

5 Q Okay. So which trustees did you discuss that with?

6 A All of them.

7 Q All of them, okay. Can you give me a bit of a summary
8 of what -- let's start with Catherine Twinn, what her
9 recollection was about the purposes or intention of the
10 Trust?

11 A What the purpose of the Trust was to provide for the
12 economic future of the members of the Sawridge First
13 Nation. That was pretty much understood by everybody.

14 Q But not Bill C-31 individuals?

15 A Well --

16 Q At that time?

17 A Right, right.

18 Q At that time, okay. So when you say the members, you
19 mean the members that existed prior to --

20 A In 1985.

21 Q -- Bill 31, okay. And anything else that Catherine
22 Twinn was able to advise you on or inform you about on
23 the background or the purposes of the Trust?

24 A Well, the concern, and I can't remember exactly where I
25 got the information, but I remember from looking at the
26 court record of the constitutional challenge on Bill
27 C-31, and some of the testimony of Walter, Chief Walter

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SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

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

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

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

- (A) the property described in the Schedule hereto and any accumulated income thereon;
- (B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;
- (C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and
- (D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

- (a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;
- (b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and
- (c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have
executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Robert J. Horn
NAME

A. Settlor Albert J. Horn

300 326, Slave Lake, Alta
ADDRESS

Robert J. Horn
NAME

B. Trustees:
1. Albert J. Horn

300 326, Slave Lake, Alta
ADDRESS

Robert J. Horn
NAME

2. Albert J. Horn

300 326, Slave Lake, Alta
ADDRESS

Robert J. Horn
NAME

3. Albert J. Horn

300 326, Slave Lake, Alta
ADDRESS

Schedule

One Hundred Dollars (\$100.00) in Canadian Currency.

Sawridge Trusts Board Policy

Name	Health, Dental, Vision Care and Life Insurance Benefit				
Category	Benefits	Number	B-09-1		
Proposed	10-05-05	Approved	10-05-26	Revised	15-12-16

The Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing eligible beneficiaries with health, dental, vision care and life insurance coverage;

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries and their dependants must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

HEALTH, DENTAL and VISION CARE INSURANCE

In order to achieve this objective, the Trustees have approved a health, dental and vision care insurance program under Great West Life Insurance proposed by the Silverberg Group (summary attached) which covers beneficiaries and their immediate and qualified dependents as of 1 January 2016. This plan will replace previous health insurance plans provided by the Sawridge Trusts under Great West Life, will replace any employee health benefit program presently offered by Sawridge First Nation to beneficiaries and dependants of the Sawridge Trusts and will replace any coverage provided by the Health Canada's Non-Insured Health Benefits (NIHB) for First Nations and Inuit Program.

Where possible, the Sawridge Trusts will enter into an agreement with the Sawridge First Nation in relation to the Sawridge Trusts' health, dental and vision care insurance program, so that if the Sawridge First Nation recovers any eligible amounts from the First Nation Non-Insured Health Benefit Program, or the Government in right of the Crown, with respect to any benefits paid by the Sawridge Trusts on behalf of Status Indians who are Sawridge Trust beneficiaries, that such amounts will be reimbursed or assigned to the Sawridge Trusts.

LIFE INSURANCE

The Sawridge Trusts will provide, to eligible beneficiaries only, a 10 Year Pay Universal Life Insurance policy for providing coverage of \$250,000 life insurance to beneficiaries between the ages of 0 and 60 years of age.

The Sawridge Trusts will be a permanent and irrevocable named beneficiary to receive \$50,000 from this policy upon the death of the insured the remaining \$200,000 being provided to a beneficiary of the insured's choice;

Sawridge Trusts Board Policy

Name	Health, Dental, Vision Care and Life Insurance Benefit				
Category	Benefits	Number	B-09-2		
Proposed	10-05-05	Approved	10-05-26	Revised	15-12-16

DEFINITION OF "IMMEDIATE AND QUALIFIED DEPENDENTS"

For the purposes of the Health, Dental and Vision Care Insurance Benefit, the immediate dependents of beneficiaries will be covered, even if they are not members of the Sawridge First Nation, provided that they are either living with the beneficiary and are under the age of 18 years of age or are attending a post-secondary institution and are under the age of 25 years of age and still consider the home of the beneficiary to be their own home.

SUPPLEMENTARY BENEFITS

In cases where the Insurance Benefit does not cover a specific service or item or in cases where the beneficiary use exceeds the limits of a particular benefit, the Trustees may consider an appeal for additional benefits paid directly from Trusts' equity to supplement the amount of the benefit not covered under the Insurance Benefit provided that, in the Trustees' estimation, the additional cost is reasonable and warranted.

SELF-INSURED PLAN

The Health, Dental and Vision Care Insurance Benefit is a self-insured plan paid for entirely through Trusts' equity and not part of a group insurance plan. The Benefit is administered for the Sawridge Trusts by Great West Life which charges an administration fee based on the number of beneficiaries and dependents covered by the Benefit.

NON-DEROGATION

Nothing in this Policy shall be construed so as to abrogate or derogate from the existing Aboriginal and Treaty rights of Sawridge First Nation beneficiaries as recognized and affirmed in Section 35 of the *Constitution Act, 1982*.

Sawridge Trusts Board Policy

Name	Education Support Fund Benefit				
Category	Benefits	Number	B-11-1		
Proposed	11-02-15	Approved	11-02-15	Revised	

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries and dependents of beneficiaries 25 years of age and under with support that will assist them in educating themselves;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Education Support Fund of \$100,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, student loans and lines-of-credit and scholarship or student bursary programs and through full or part-time employment.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

DEFINITION OF ELIGIBLE EDUCATION PROGRAMS

5. That, for the purposes of this benefit, eligible education programs include:
 - a. Recognised upgrading programs to improve opportunities for higher education.
 - b. Recognised technical and skills development training programs
 - c. Recognised university programs up to and including doctoral level study but not including post-doctoral studies.

DEFINITION OF EDUCATION SUPPORT BENEFIT CATEGORIES

6. Tuition and Fee Support:
 - a. Including a portion of tuition fees and other required fees to attend an educational program.
7. Support for Books and Equipment:
 - a. Including a portion of the cost of text books and laboratory and other equipment necessary for the study program, including computers.
 - b. Including a portion of any deposits required to cover the cost of damaged or lost equipment.
8. Living Expense Support:
 - a. Including a portion of rent or mortgage payments, utilities, telephone, tenant/home insurance, food, transportation, basic furniture and personal expenses.
 - b. Does not include any portion of the purchase of a vehicle, payment of credit card or other outstanding debts.

Sawridge Trusts Board Policy

Name	Education Support Benefit				
Category	Benefits		Number	B-11-2	
Proposed	11-02-15	Approved	11-02-15	Revised	

AVAILABLE FUNDING

9. Because funding is limited each year, funding will be made available on a first-come-first-serve basis and on the basis on total funding provided by other funding agencies and by the individual him or herself, that is, if the individual receives maximum funding available through federal government grants or other scholarship programs or if the individual is able to personally fund her/his education through parental contributions or self-employment, this person will not be placed as high in priority as someone who has no financial support programs available to them.
10. Funding will also be accorded in priority to those with high academic performance records.

ACCESSING FUNDING

11. Those wishing to receive funding for their education from the Trusts will first have to fill out and submit an application for funding available through the Trusts' Office. Applications will be reviewed by the Trusts' Administrator and a decision will be made based on available funding and past academic performance.
12. Successful applicants will be required to provide on-going proof of enrolment, attendance and academic performance in order to be considered for on-going financial support from the Trusts.

Sawridge Trusts Board Policy

Name	Addictions Treatment Support Fund Benefit				
Category	Benefits		Number	B-12	
Proposed	11-02-15	Approved	11-02-15	Revised	

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries with support that will assist them in dealing with addictions resulting from substance abuse, more specifically, alcohol and drug abuse;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Addictions Treatment Support Fund of \$40,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF ELIGIBLE ADDICTIONS TREATMENT PROGRAMS

5. Eligible treatment programs will include accredited programs provided by reputable professionals with a proven record of success in treating addictions.
6. Priority will be given first to certified treatment programs first in the Province of residence of the beneficiary; second to certified treatment programs within Canada; third to certified treatment programs with North America.
7. Only in special circumstances will consideration be given to treatment programs outside North America and only then with the approval of the Trustees.

ACCESSING BENEFITS UNDER THE ADDICTIONS TREATMENT FUND

8. Funding for addictions treatment services will only be provided in cases where the beneficiary or dependent has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment to follow through with the full treatment program.
9. While the Trusts recognize that relapses, in the case of addictions, are possible and even likely, the Trusts will not allow abuses of the Addictions Treatment Fund by beneficiaries who repeatedly relapse and have to attend a new treatment program. After the second use of the Fund, every beneficiary application for renewed treatment will require the approval of the Board of Trustees.
10. The Trusts' Administrator is authorized to approve treatment plans and payment for treatment services for the first two applications without having to obtain the approval of the Trustees provided that there remains sufficient funds in the current year's budget for the Addictions Treatment Fund.

Sawridge Trusts Board Policy

Name	Child and Youth Development Benefit			
Category	Benefits	Number	B-10	
Proposed	13-01-15	Approved	13-05-21	Revised

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the children of eligible beneficiaries who have special needs with support that will assist them in developing their capacities and to assist in the education of all children of beneficiaries;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide a Child and Youth Development Benefit for the special needs children of eligible beneficiaries and to provide assistance with child care costs for normal children as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans and government, school or community social service programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible child will include any child who also suffers from a permanent physical or mental disability either born to an eligible beneficiary, adopted through legal or customary adoption by an eligible beneficiary or for which an eligible beneficiary is the legal guardian.

DEFINITION OF CHILD AND YOUTH DEVELOPMENT BENEFIT

5. That the child and youth development benefit provide the following benefits:
 - a. An annual amount of up to \$10,000 to assist with the costs associated with caring or educating the special needs child on a reimbursement basis or on pre-paid services.
 - b. An annual amount of up to \$8,500 to assist with child care costs for a child on a reimbursement basis or on pre-paid services.

APPLICATION

1. That the beneficiary apply for the child and youth development benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant, the nature of the program the beneficiary wishes to attend and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts Board Policy

Name	Compassionate Care and Death Benefit				
Category	Benefits	Number	B-06-1		
Proposed	10-04-19	Approved	10-04-19	Revised	

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries under the two trusts, and

Whereas the beneficiaries may, from time to time, require the assistance of the Trusts to defray their expenses related to a prolonged or serious illness or death of an immediate family member, The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation, employer or personal insurance plans and that the Compassionate Care and Death Benefit will only pay the difference between these other benefits and the actual costs incurred. Benefits will only be paid as long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF IMMEDIATE FAMILY

2. That, for the purposes of this benefit, an immediate family member shall be defined as:
 - a. A child of the beneficiary or of her/his current, co-habiting spouse or common-law partner,
 - b. The current, co-habiting spouse or common-law partner of the beneficiary,
 - c. The father or mother or his/her partner of either the beneficiary or her/his current co-habiting spouse or common-law partner,
 - d. Brothers, sisters, stepbrothers or step sisters of either the beneficiary or her/his current, co-habiting spouse or common-law partner,
 - e. Grandparents or step grandparents of either the beneficiary or her/his current co-habiting spouse or common-law partner,
 - f. Grandchildren or step-grandchildren of either the beneficiary or her/his current, co-habiting spouse or common-law partner,
 - g. Son-in-law or daughter-in-law of either the beneficiary or her/his current, co-habiting spouse or common-law partner.

DEFINITION OF PROLONGED OR SERIOUS ILLNESS OR INJURY

3. That, for the purposes of this benefit, prolonged or serious illness shall be limited to:
 - a. A serious or life-threatening illness resulting in hospital confinement or intense home care of two or more weeks' duration,
 - b. A serious or life-threatening injury resulting in hospital confinement, intense home care of two or more weeks' duration or resulting in permanent physical handicap,
 - c. An illness, genetic condition or injury, including injury to an unborn foetus resulting in a permanent physical or mental disability.

Sawridge Trusts Board Policy

Name	Compassionate Care and Death Benefit				
Category	Benefits	Number	B-06-2		
Proposed	10-04-19	Approved		Revised	

DEFINITION OF COMPASSIONATE CARE BENEFIT

4. That the compassionate care benefit provide the following benefits if these are not covered by any other health program:
 - a. Reasonable travel costs to and from the location where the ill or injured is in care by personal vehicle or the most economical and reasonable means of public transportation for the beneficiary and her/his family.
 - b. Reasonable accommodation costs for the beneficiary and her/his family while visiting the ill or injured family member at the most reasonable and economical hotel, boarding house or public program accommodation including Ronald MacDonald House for parents with children afflicted with cancer, Sawridge Inns where these are available, bed and breakfast establishments and reasonably-priced hotels and motels.
 - c. Reasonable meal costs for the beneficiary and her/his family while visiting the ill or injured family member at restaurants and hospital and care facility cafeterias or food purchased and prepared by the beneficiary.
 - d. Parking costs while traveling to or from the location where the ill or injured family member is in care.
 - e. Child care costs for under-aged children remaining at home while the parents go to visit the ill or injured family member.
 - f. Home modifications, special equipment or dietary supplies, or special medications not covered by other health plans if the ill or injured family member is being brought to the beneficiary's home for long-term care, recuperation or rehabilitation. In this case, the beneficiary has to provide the Trustees with a detailed long-term plan, including costs, for the care of the ill or injured family member at home, medical recommendations for the equipment and/or dietary needs to care for this person at home, costs and plans for any home modifications in order to accommodate caring for this person at home and costs of any homccare professional help that may be needed.

LIMITATION OF COMPASSIONATE CARE BENEFIT

5. That the compassionate care benefit be limited to a maximum of \$6,000 per beneficiary per annum with a maximum lifetime benefit of \$60,000.
6. As part of the total compassionate care benefit allowed, that the Trustees may provide an immediate cash disbursement of up to \$300 within the maximum permitted to cover emergency incidental expenses associated with the incident.
7. That this benefit will only be made available so long as the Trusts have sufficient financial resources to cover this cost.

Sawridge Trusts Board Policy

Name	Compassionate Care and Death				
Category	Benefits	Number	B-06-3		
Proposed	10-04-19	Approved		Revised	

DEFINITION OF DEATH BENEFIT

1. That the death benefit include:
 - a. The cost of transporting the remains to the deceased former home or to the home of the beneficiary.
 - b. The cost of burial or cremation, including the purchase of a plot, the cost of the funeral, headstones and the cost of a post-funeral reception.
 - c. The cost of transporting the beneficiary and her/his family to the funeral, if this is at some distance away from the beneficiary's home.
 - d. The cost of accommodation and meals for the beneficiary and her/his family, if the funeral is being held at some distance away from the beneficiary's home and requires an overnight stay.

LIMITATION OF DEATH BENEFIT

2. That the maximum death benefit be \$12,000 per family with a maximum of \$24,000 annually based on submitted receipts.
3. That the Trustees may provide an immediate cash disbursement of up to \$1000 per beneficiary to cover emergency incidental expenses associated with the funeral and burial or cremation of the former family member but that amount will be subtracted from the total benefit paid for this incident.

LIMITATION OF BENEFIT

4. That the compassionate care and death benefit will only be paid one time, regardless of whether the beneficiary is eligible for both the Trusts or for only one Trust or the other.
5. That the compassionate care and death benefit will only be paid to adult beneficiaries or to recognized guardians or caretakers of minor beneficiaries.
6. That the compassionate care and death benefit will not pay for lost time from work or business not for any costs associated with employment or business income.
7. That this benefit will only be made available so long as the Trusts have sufficient financial resources to cover this cost.

APPLICATION

8. That the beneficiary apply for either the compassionate care benefit or the death benefit by calling or emailing the Trusts office and providing the necessary information relating to the incident and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts Board Policy

Name	Seniors' Support Benefit				
Category	Benefits	Number	B-07-1		
Proposed	10-04-19	Approved	10-04-19	Revised	15-12-16

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries under the two trusts, and

Whereas the Trustees desire to provide a benefit that will support the elders who have provided so much toward the building of the community,

Whereas the elders may require additional financial support to benefits provided by Federal and Provincial Governments and community agencies,

The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation or employer programs or personal retirement and insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A SENIOR

- a. That, for the purposes of this benefit, a senior shall be defined as a beneficiary who has achieved 65 years of age.

DEFINITION OF SENIORS' SUPPORT BENEFIT

3. That the seniors' support benefit provide the following benefits: A monthly cash disbursement of \$2,500 per eligible beneficiary paid directly to the senior person.

APPLICATION

4. That the beneficiary apply for seniors' support benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts Board Policy

Name	Personal Development and Alternative Health Benefit				
Category	Benefits	Number	B-08-1		
Proposed	14-02-25	Approved	14-02-25	Revised	15-12-16

Whereas the Trustees of the Sawridge Band Intervivos Settlement and the Sawridge Trust (hereinafter referred to as the Trusts) are committed to providing benefits that will support the well-being of the beneficiaries and their dependants under the two trusts, and
Whereas the Trustees desire to provide a benefit that will support beneficiaries and their dependants in their personal growth and development, and will provide some funding for alternative health treatments, The Trustees hereby resolve:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries and their dependants must first take advantage of other benefits available through government, First Nation or employer programs or personal insurance plans.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

- a. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
- b. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF PERSONAL DEVELOPMENT AND ALTERNATE HEALTH BENEFIT

1. That the personal development and alternate health benefit provide the following benefits:
 - a. An annual allowance benefit of up to \$2,000 per person.
 - b. The allowance will not be paid directly to the eligible beneficiary except upon the submission of receipts or invoices for
 - i. personal or family counselling provided a recognized traditional healer or elder,
 - ii. recognized fitness or nutrition counselling programs,
 - iii. recognized self-esteem building programs,
 - iv. vitamins, minerals, medicinal herbs, special food supplements,
 - v. fitness equipment.
 - c. In the case of invoices for services provided sent directly to the Sawridge Trusts office, the allowance will be paid directly to the service provider not the beneficiary.
 - d. In the case of visits to traditional healers, the beneficiary will provide an itemized list of the expenses incurred for the visit.

Sawridge Trusts Board Policy

Name	Personal Development and Alternative Health Benefit				
Category	Benefits	Number	B-08-2		
Proposed	14-02-25	Approved	14-02-25	Revised	15-12-16

- e. The allowance may also be used to cover the cost of part of the transportation costs required to attend the personal development or alternative health program on the same basis as provided for the purchase of services under this program. Transportation costs may be reimbursed upon the submission of receipts for gasoline purchase or upon the submission of receipts for public transportation, provided that the cost is related to accessing the personal development program.

APPLICATION

3. That the beneficiary apply for the personal development and alternative health benefit by telephoning, writing or emailing the Trusts' office and providing the necessary information relating to the age of the applicant, the nature of the program the beneficiary or dependant wishes to attend and the beneficiary's entitlement to the Trusts Administrator.

Sawridge Trusts Board Policy

Name	Income Replacement Benefit				
Category	Benefits	Number	B-13		
Proposed	11-10-18	Approved	11-10-18	Revised	11-12-07

WHEREAS the Trustees of the Sawridge Band Inter-Vivos Settlement and the Sawridge Trust (Sawridge Trusts) are desirous of providing the beneficiaries with support that will assist them in dealing with addictions resulting from substance abuse, more specifically, alcohol and drug abuse;

NOW THEREFORE BE IT RESOLVED that the Sawridge Trusts agree to provide an Income Replacement Benefit of \$40,000 annually for the benefit of eligible beneficiaries and eligible dependents as follows:

SUPPLEMENTARY BENEFIT

1. That this will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.
2. That benefits will only be paid so long as the Trusts have sufficient resources to cover this cost.

DEFINITION OF A BENEFICIARY

3. That, for the purposes of this benefit, a beneficiary shall be defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.
4. That, for the purposes of this benefit, an eligible dependent will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and is living at home with the eligible beneficiary.

DEFINITION OF ELIGIBILITY

5. That, for the purposes of this benefit, would only provide up to 80% or 90% of total income with a monthly maximum of \$2,500 and an annual maximum of \$5,000 per individual on a first-come-first-served basis.
6. That would only be available to those already gainfully employed who would lose income as a result of attending a personal healing program or on extended sick leave from work because of an illness.
7. That would only be provided to deal with addictions, mental health or long-term health issues with the assistance of qualified professionals. The issue of dealing with traditional healers has not been addressed satisfactorily at this time.
8. That would be supported by the Personal Development, Health Benefits (for personal and mental health counselling and short-term disability) and the Addictions Treatment Support Fund Benefit (for addictions treatment) and could be limited only to those who attend an accredited treatment program.
9. That would not be repeated.

ACCESSING BENEFITS UNDER THE INCOME REPLACEMENT BENEFIT

10. That individuals wishing to access this benefit first provide the Trusts' Administrator with a treatment plan developed with a certified professional or, in the case of short-term disability, a doctor's note indicating that the person cannot work including the period during which the individual will be off work.
11. That individuals also provide the Trusts' Administrator with pay slips for one full month to prove level of income.

Sawridge Trusts Board Policy

Name	Recognition of Beneficiaries and Dependants Educational Achievements				
Category	Benefits		Number	B-15	
Proposed	14-10-27	Approved	14-10-27	Revised	

Benefit

The Trustees of the Sawridge Trusts are desirous of supporting and encouraging the educational achievements of the beneficiaries and their dependants. In recognition of the completion of an educational program by any beneficiary or her/his dependants, the Sawridge Trusts will:

1. Issue a certificate to said beneficiary or dependant recognizing the educational achievement signed by the Trustees.
2. Note the accomplishment of the beneficiary or dependant in the Sawridge Trusts Newsletter or a notice to all beneficiaries.
3. Provide the graduate with a token of recognition by issuing a cheque for \$250 to assist the graduate with finding employment or celebrating their achievement.

Eligibility

This benefit will be provided to any beneficiary of the Sawridge Trusts and their dependants. For the purpose of this benefit, a dependant means the married or common-law spouse or natural or adopted children of the beneficiary, provided that these dependants are living with the beneficiary or are still considered to be dependants of the beneficiary, that is, still consider their permanent address to be that of the beneficiary.

Recognized Educational Programs

Trustees will recognize the completion of a recognized secondary or post-secondary educational program, including: graduation from high school or a high school upgrading program, graduation from a university degree program, graduation from a technical certificate program, graduation from an apprenticeship program, or graduation from a professional upgrading program that increases the beneficiary or dependants employability or qualification in her/his chosen field.

Application

Upon receiving proof of graduation of a beneficiary or her/his dependant, the Trusts' Administrator will have a framed certificate of recognition prepared and will either issue a cheque for \$250 in the name of the graduate or will provide suitable gift according to the graduate's choice.

This benefit will be applied retroactively for a period of one year from the date of the approval of this policy by the Trustees.

Sawridge Trusts Board Policy

Name	One Time Only "Good Faith" Cash Disbursement				
Category	Benefits	Number	B-04		
Proposed	09-09-26	Approved	09-10-26	Revised	10-06-15

Introduction

The Sawridge Trusts Board of Trustees agrees to a "One Time Only Good Faith Cash Disbursement" to be made to each of the identified and approved adult beneficiaries of either Trust according to the following terms:

Benefit

A single cash disbursement of two thousand five hundred dollars (\$2,500) will be issued by cheque drawn on the Trusts' accounts made payable to each adult beneficiary who is 18 years of age and older.

Only one payment of \$2,500 will be made to each beneficiary for this benefit regardless of whether the beneficiary is a member of one or both Trusts.

Minor beneficiaries under 18 years of age will not be eligible for this benefit until they reach the age of 18 years of age and apply. Payments will be honoured automatically when these beneficiaries reach the age of majority, subject to available funds.

The Sawridge Trusts Tipi

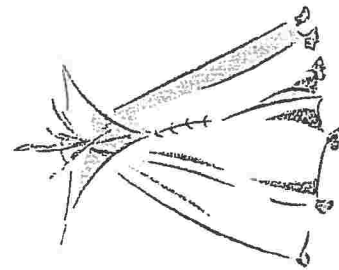
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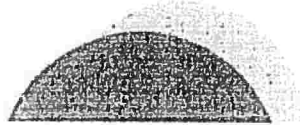
Through the sharing of these virtues, our ancestors build a strong people able to live at peace with ourselves, with our community and with nature.

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The benefits developed by the Sawridge Trusts try to help develop these capacities to make the best use of the resources provided by the Creator for our people.



47-Health Support Benefit Pamphlet.pdf



HEALTH SUPPORT BENEFIT



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Toll Free: 1-888-988-7723

Facsimile: 780-988-7724

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Health Support Benefit

ramps and glucose monitoring equipment. It also covers basic/major/orthodontic dental care, prescriptions and out-of-country emergency medical care.

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Sawridge Trusts have contracted J.T. Moland Insurance Consultants to set up three health support programs for beneficiaries.

Health Insurance

The health insurance will cover the difference between what is paid through Alberta Health Care and Non-Insured Health Benefits. It covers health care costs like hospital, ambulance, chiropractors, physiotherapists, speech therapists, psychologists/social workers, hearing aids, prostheses, wheelchair

Life Insurance

The life insurance will provide \$250,000 of fully-paid, permanent life insurance for each beneficiary between 18 and 60 years of age. This insurance will pay out \$200,000 to the person designated by the beneficiary and \$50,000 to the Trust to fund future life insurance plans.

Member Assistance Plan

The member assistance program will provide telephone and in-person counselling and referral and will help people by providing support after they receive treatment and counselling. The program is available to all beneficiaries and their families.

Who is Eligible

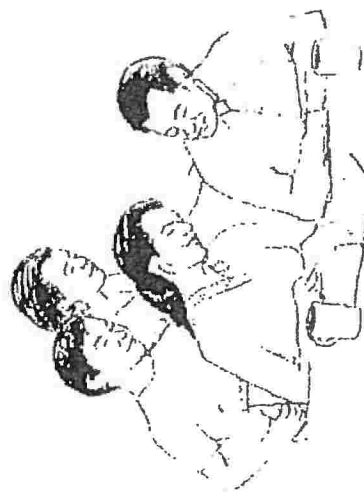
For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts.

How to Access the Benefit

J.T. Moland will be contacting all the identified beneficiaries to enrol them in the program, to provide them with a medical card and to provide detailed benefits information. Once the card is provided, beneficiaries can begin accessing health benefits.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.



The Sawridge Trusts Tipi

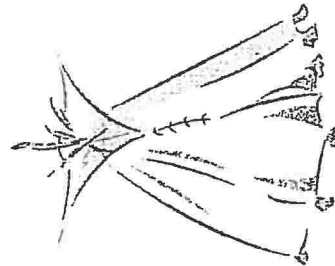
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The benefits developed by the Sawridge Trusts try to help develop these capacities to make the best use of the resources provided by the Creator for our people.



47-Counselling Benefit Pamphlet.pdf
20 March 2014

COUNSELLING BENEFIT



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Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

COUNSELLING BENEFIT

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. Where a not her similar benefit exists, it must be accessed first.

This is also a supplementary benefit, that is, beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Counselling Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants receiving counselling from accredited professionals.

Eligible counselling programs will include services provided by accredited counselling professionals including psychiatrists, psychologists, social workers, marriage and family therapists, art therapists, and psychiatric nurses.

Counselling benefits will also include

career counselling by professional career counsellors.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis up to a maximum annual expense of \$7000**. Decisions will be governed by the total funding provided by other funding agencies and by the commitment of the individual to a treatment regime.

Who is Eligible

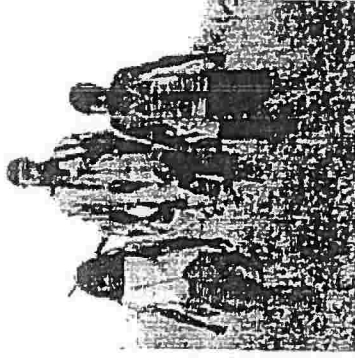
For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Funding for counselling benefits will

only be provided in cases where the beneficiary or dependent has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment follow through with the full treatment program.



Source: Nancy G. Photography

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts website at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

The Sawridge Trusts Tipi

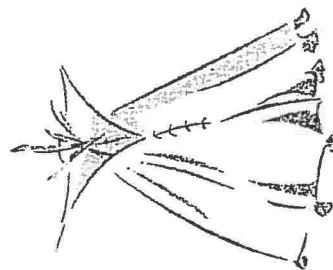
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47-Education Support Benefit Pamphlet.pdf
10 March 2011



EDUCATION SUPPORT BENEFIT FUND



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Education Support Benefit Fund

clude:

- Tuition and Fee Support: including a portion of tuition fees and other required fees to attend an educational program.
- Support for Books and Equipment: including a portion of the cost of text books and laboratory and other equipment necessary for the study program, including computers and including a portion of any deposits required to cover the cost of damaged or lost equipment.
- Living Expense Support: including a portion of rent or mortgage payments, utilities, telephone, tenant/home insurance, food, transportation, basic furniture and personal expenses.

This benefit does not include any portion of the purchase of a vehicle, payment of credit card or other outstanding debts.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis**. Decisions will also be governed by the total funding provided by other funding agencies and by the individual him or herself. If the individual receives maximum funding available through federal government grants or other scholarship programs or if the individual is able to personally fund her/his education through parental contributions or self-employment, this person will not be placed as high in priority as someone who has no financial support programs available to them.

Funding will also be accorded in priority to those with high academic performance records.

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. Where another similar benefit exists, it must be accessed first.

This will be a supplementary benefit, that is, that beneficiaries must first take advantage of other benefits available through government, First Nation programs, student loans and lines-of-credit and scholarship or student bursary programs and through full or part-time employment.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Education Support Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants attending authorised post-secondary education programs.

For the purposes of this benefit, eligible education programs include:

- Recognised upgrading programs to improve opportunities for higher education.
- Recognised technical and skills development training programs
- Recognised university programs up to and including doctoral level study but not including post-doctoral studies.

Costs that may be covered by this benefit in-

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Those wishing to receive funding for their education from the Trusts will first have to fill out and submit an application for funding available through the Trusts' Office. Applications will be reviewed by the Trusts' Administrator and a decision will be made based on available funding and past academic performance.

Successful applicants will be required to provide on-going proof of enrolment, attendance and academic performance in order to be considered for on-going financial support from the Trusts.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

The Sawridge Trusts Tipi

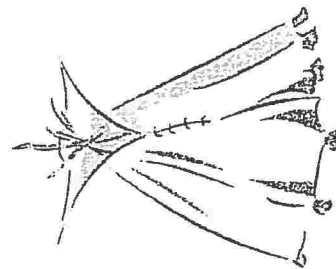
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The benefits developed by the Sawridge Trusts try to help develop these capacities to make the best use of the resources provided by the Creator for our people.



47-Addictions Treatment Support Benefit Pamphlet.pdf
10 March 2011



ADDICTIONS TREATMENT SUPPORT BENEFIT FUND



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Facsimile: 780-988-7724

E-mail: benefits@sawridgetrusts.ca

ADDICTIONS TREATMENT SUPPORT BENEFIT FUND

America and only then with the approval of the Trustees.

Available Funding

Because funding is limited each year, funding will be made available on a **first-come-first-serve basis**. Decisions will be governed by the total funding provided by other funding agencies and by the commitment of the individual to a treatment regime.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

For the purposes of this benefit, an eligible dependant will include any natural child or any child adopted through legal or customary adoption by an eligible beneficiary or a spouse of an eligible beneficiary who is under 25 years of age and who is registered in a full-time or part-time education program with an accredited educational institution.

How to Access the Benefit

Funding for addictions treatment services will only be provided in cases where the beneficiary or dependant has first developed a treatment plan with the Trusts' Administrator and other professionals and has made a commitment to follow through with the full treatment program.

While the Trusts recognize that relapses, in the case of addictions, are possible and even likely, the Trusts will not allow abuses of the Addictions Treatment Fund by beneficiaries who repeatedly relapse and have to attend a new treatment pro-

gram. After the second use of the Fund, every beneficiary application for renewed treatment will require the approval of the Board of Trustees.

The Trusts' Administrator is authorized to approve treatment plans and payment for treatment services for the first two applications without having to obtain the approval of the Trustees provided that there remains sufficient funds in the current year's budget for the Addictions Treatment Fund.



More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. Where another similar benefit exists, it must be accessed first.

This will be a supplementary benefit, that is, beneficiaries must first take advantage of other benefits available through government, First Nation programs, and health insurance programs.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Addictions Treatment Support Benefit

The Sawridge Trusts have established a limited annual fund to cover the costs of beneficiaries and their dependants attending authorised alcohol and drug treatment programs.

Eligible treatment programs will include accredited programs provided by reputable professionals with a proven record of success in treating addictions.

Priority will be given first to certified treatment programs first in the Province of residence of the beneficiary; second to certified treatment programs within Canada; third to certified treatment programs with North America.

Only in special circumstances will consideration be given to treatment support benefits supplied North

The Sawridge Trusts Tipi

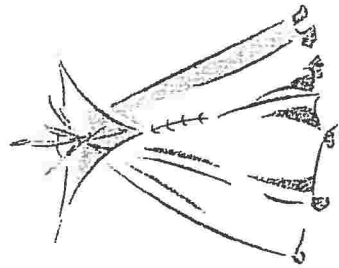
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47-Child and Youth Benefit Pamphlet.pdf
17/06/2013



CHILD AND YOUTH BENEFIT



214, 10310-124 Street NW
Edmonton, AB T5N 1R2

Office: 780-988-7723
Toll Free: 1-888-988-7723
Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

Child and Youth Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Child and Youth Benefit provides an annual amount of up to \$10,000 to assist with the costs associated with caring or educating the special needs child on a reimbursement basis or pre-paid services basis.

The Benefit also provides annual amount of up to \$8,500 to assist with child care costs for a child without any special need on a reimbursement basis or pre-paid services basis.

Who is Eligible

For the purposes of this benefit, a beneficiary is defined as anyone who meets the requirements and has been accepted by the Trustees as an eligible beneficiary to either the Sawridge Band Intervivos Settlement or the Sawridge Trust.

An eligible child will include any child either born to an eligible beneficiary, adopted through legal or customary adoption by an eligible beneficiary or for which an eligible beneficiary is the legal guardian.

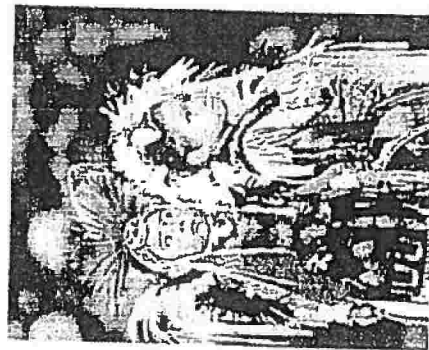
How to Access the Benefit

In order to access this benefit, beneficiaries will have to fill out an application form provided by the Sawridge Trusts. Beneficiaries can obtain the application form by requesting it by email or mail from the trusts' Administrator. Once the completed form is submitted to the Trusts' Office, determination will be made as to the eligibility of the child for whom benefits are being requested and payment arrangements will be made if the child is eligible.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Adminis-

trator at the telephone numbers and address provided on the back of this pamphlet.



The Sawridge Trusts Tipi

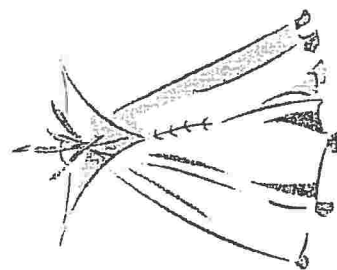
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47-Compassionate Care and Death Benefit Pamphlet.pdf
19 August 2010



COMPASSIONATE CARE AND DEATH BENEFIT



801, 4445 Calgary Trail NW
Edmonton, AB T6H 5R7

Office: 780-988-7723
Toll Free: 1-888-988-7723
Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

the beneficiary or her/his current cohabiting spouse or common-law partner;

- ♦ grandchildren or step-grandchildren of either the beneficiary or her/his current, cohabiting spouse or common-law partner; or

- son-in-law or daughter-in-law of either the beneficiary or her/his current, co-habiting spouse or common-law partner.

How to Access the Benefit

In either case, illness or death, first call the 'Trusts' Administrator at the numbers on the back of this pamphlet to inform him of the incident and he will inform you of the requirements. If he cannot be reached, leave a message and your call will be returned as soon as possible.

1. Keep all receipts for expenses—meals purchased, gasoline and oil purchased, parking costs and hotel costs at the time of the incident.

2. Submit these receipts by mail or in-person to the Trusts' Administrator at the address on the back of this pamphlet along with information about the incident on a separate piece of paper including:

- Name of Eligible Beneficiary
- Date(s)
- Persons involved
- List of Expenses Claimed

More Information
You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

This benefit provides for travel, meals and accommodation costs for the beneficiary and her/his immediate family in the event of a **serious or life-threatening illness** resulting in hospital confinement or two weeks or more of intensive home care of a family member—as defined under **Who is Eligible** section below—for an eligible beneficiary. The maximum amount covered is up to \$6,000 per incident and up to a lifetime maximum of \$60,000.

Travel costs are covered from the home of the eligible beneficiary to the place where the family member is being treated. If hotel accommodation is required for the beneficiary and his family at this location, this cost is also covered. If a Sawridge Inn exists at this location, arrangements will be made for the beneficiary to stay at the Sawridge Inn and costs will be billed directly to the appropriate third-party payer. If not at this location, accommodation will be arranged in

The Sawridge Trusts Tipi

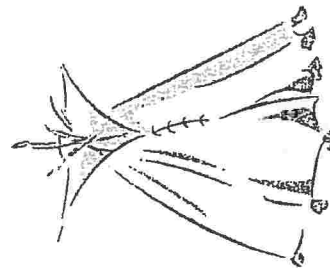
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47-Senior's Support Benefit Pamphlet.pdf
10 March 2011



SENIORS' SUPPORT BENEFIT



801, 4445 Calgary Trail NW
Edmonton, AB T6H 5R7

Office: 780-988-7723

Toll Free: 1-888-988-7723

Facsimile: 780-988-7724

E-mail: benefits@sawridgetrusts.ca

Senior's Support Benefit

Without extra financial support from the family or the community, many seniors are faced with a poorer diet and a very restricted social life.

While living costs for most seniors go down once they no longer are working, for many indigenous seniors, these costs may not go down because they often assist in raising their grandchildren.

The Sawridge Trusts Seniors' Support Benefit is meant to provide some relief to these disadvantaged persons in our community.

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

Monthly Income Benefit

A monthly cash disbursement of \$2,000 effective 1 April 2011 is made to each Senior to assist them by supplementing other senior's income benefits like the Old Age Pension and Canada Pension Plan. This benefit is meant to assist with cost-of-living, transportation and home maintenance expenses.

Seniors Economically Disadvantaged

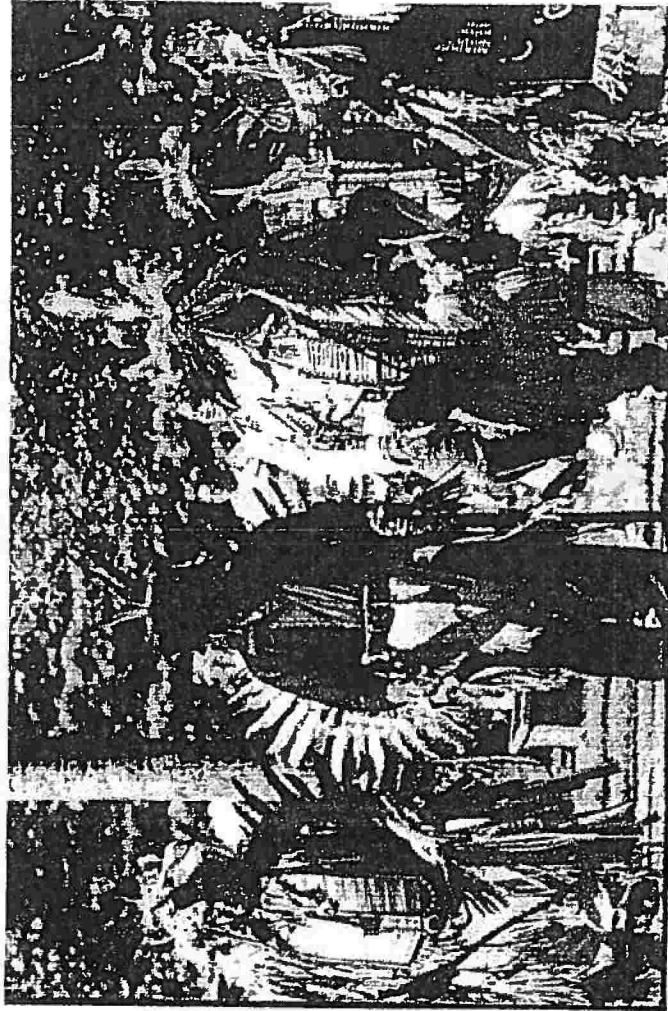
Many seniors in Canada are economically disadvantaged. Indigenous seniors are among the most disadvantaged in this group.

Once they are no longer able to work, seniors must either rely on money that they have saved while they were working or employee pensions. If the senior has no savings or pension, Old Age Pension and the Canada Pension Plan is the only money left to support the senior's living costs.

the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts and who has attained the age of 65 years.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.



Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by

The Sawridge Trusts Tipi

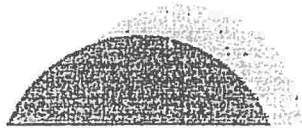
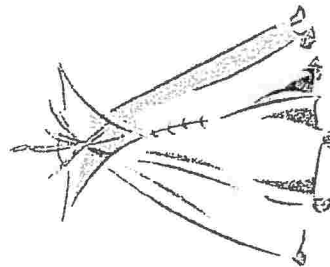
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PERSONAL DEVELOPMENT
AND ALTERNATIVE
HEALTH BENEFIT



214, 10310-124 Street NW
Edmonton, AB T5N 1R2

Office: 780-988-7723
Toll Free: 1-888-988-7723
Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

Personal Development and Alternative Health Benefit

tional healer or elder,

- treatment services from a recognized mental health or addictions treatment centre,
- recognized fitness or nutrition counselling programs,
- recognized self-esteem building programs,
- vitamins, minerals, medicinal herbs, special food supplements,

• visits to alternative health practitioners such as naturopaths, osteopaths, homeopaths, chiropractors, massage therapists, reiki therapists, acupuncturists, kinesiologists, shiatsu therapists, herbalists, traditional indigenous healers, sweat lodges, and the like.

- in the case of visits to traditional healers, the beneficiary will provide an itemized list of the expenses incurred for the visit.

Who is Eligible

For the purposes of this benefit, an eligible person includes anyone who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts as well as their dependants.

How to Access the Benefit

The annual allowance will not be paid directly to the eligible beneficiary. The beneficiary will first have to submit receipts for eligible expenses listed under The Benefit above for reimbursement.

To claim the benefit, the beneficiary should:

1. Get a receipt for every expense they intend to claim from the person, store or company providing a service.

Supplementary Benefit

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Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

If services requested under the Personal Development and Alternative Health Benefit duplicate other benefits provided by the Sawridge Trusts through other programs, reimbursement for these services will not be provided under the Personal Development and Alternative Health Benefit until these other benefits have been expended first.

The Benefit

In order to promote the health and well-being of the beneficiaries and their dependants, the Sawridge Trusts will provide an annual allowance of up to \$2,000 per person. Benefits will be paid upon submission of receipts for expenditures or by payment of invoices from the supplier up to the maximum amount under the benefit.

Eligible expenditures include:

- personal or family counselling provided by a

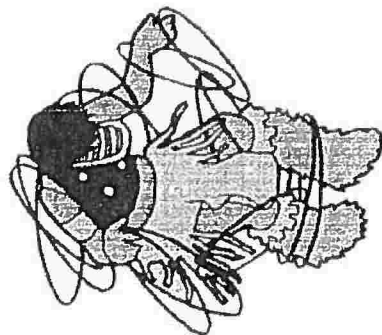
2. Submit these receipts by mail or in-person to the Trusts' Administrator at the address on the back of this pamphlet along with a separate piece of paper including:

- Name of Eligible Beneficiary
- A Description of the Service Claimed
- List of Expenses Claimed and Dates Services Were Provided

Arrangements can also be made for the Trusts to pay the service provider directly provided that eligibility of the service and of the beneficiary has been determined ahead of time and provided that the service provider is willing to bill the Trusts directly.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge



Trusts website at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

The Sawridge Trusts Tipi

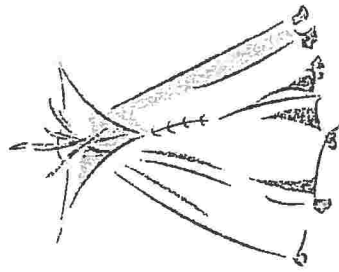
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47-Income Replacement Benefit Pamphlet.pdf
14 March 2013

INCOME REPLACEMENT BENEFIT



214, 10310-124 Street NW NW
Edmonton, AB T5N 1R2

Office: 780-988-7723
Toll Free: 1-888-988-7723
Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

Income Replacement Benefit

received in the month immediately preceding the illness requiring time-off up to a maximum of \$2,500.00 per month. The benefit is only provided for two (2) months and up to an annual maximum of \$5,000.00 per person.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts who has attained the age of 18 years and who is employable.

How to Access the Benefit

The beneficiary will first have to submit a physician's note to the Trusts' Administrator indicating when the time-off period begins and ends and the reason for the sick leave being requested. In addition, the beneficiary will have to provide copies of pay slips for the past month indicating the level of income immediately preceding the period of sick leave.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Adminis-

Supplementary Benefit

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Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

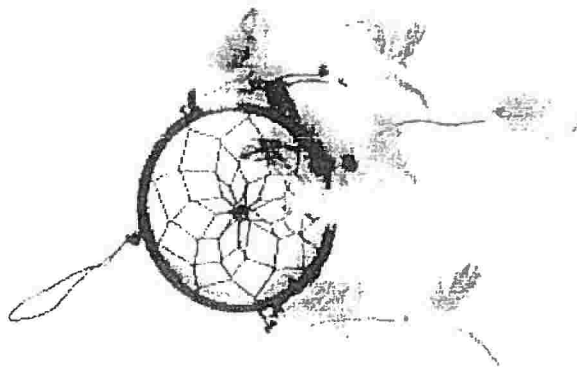
The Income Replacement Benefit is meant to replace income for beneficiaries who have to take time-off from work in order to recover and obtain treatment for physical or mental health conditions, including addictions.

The benefit only covers those persons who are regularly employed but who are not covered for sick leave by their employer or by Employment Insurance Sick Benefits and who have no other source of income during times of illness.

47-Income Replacement Benefit Pamphlet.pdf

The benefit will provide up to 80% of the salary

trator at the telephone numbers and address provided on the back of this pamphlet.



The Sawridge Trusts Tipi

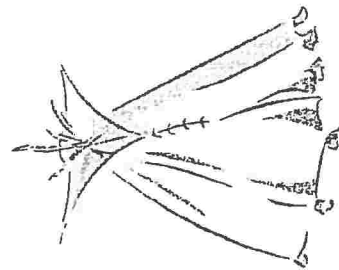
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47-Cash Disbursement Benefit Pamphlet.pdf



CASH DISBURSEMENT BENEFIT



801, 4445 Calgary Trail NW
Edmonton, AB T6H 5R7

Office: 780-988-7723
Toll Free: 1-888-988-7723
Facsimile: 780-988-7724
E-mail: benefits@sawridgetrusts.ca

Cash Disbursement Benefit

age will not be eligible for this benefit until they reach the age of 18 years of age and apply. Payments will be honoured automatically when these beneficiaries reach the age of majority, subject to available funds.

Payments to newly identified beneficiaries will be made as soon as that beneficiary has been authorized by the Board of Trustees and registered with the Trusts' Office.

While other cash disbursements may be made available to beneficiaries in the future, it is not the intent of the Trusts to make regular cash disbursements at this time.

Who is Eligible

For the purposes of this benefit, an eligible beneficiary is any person who has been confirmed by the Board of Trustees of the Sawridge Trusts as a beneficiary under the rules of the Trusts and who has attained the age of 18 years.

How to Access the Benefit

Beneficiaries do not need to do anything



to receive this benefit. It will be issued automatically by the Trusts' Office.

If you are eligible for this benefit and have not received payment, you can contact the Trusts' Office at the address on the back of this pamphlet for more information.

More Information

You can obtain more information on this and other Trusts' benefits by going to the Sawridge Trusts web site at www.sawridgetrusts.ca or by emailing, faxing or calling the Trusts Administrator at the telephone numbers and address provided on the back of this pamphlet.

Other Benefits

The Sawridge Trusts have developed or are developing a number of benefits that support the growth and development of beneficiaries. You may be interested in receiving information on:

- Compassionate Care and Death Benefit
- Senior's Support Benefit
- Personal Development Benefit
- Educational Support Benefit

Supplementary Benefit

All Sawridge Trusts are supplementary benefits. They are meant to support other benefits provided by Sawridge First Nation, the Federal Government, the Provincial Government and the community. Where another similar benefit exists, it must be accessed first.

Sawridge Trusts benefits are only available as long as the Trusts have the resources to support these benefits.

The Benefit

The Sawridge Trusts have established a "One Time Only Good Faith Cash Disbursement" to be made to each of the identified and approved adult beneficiaries of either Trust.

A single cash disbursement of \$2,500 will be to each adult beneficiary who is 18 years of age and older.

Only one payment of \$2,500 will be made to each beneficiary for this benefit regardless of whether the beneficiary is a member of one or both Trusts.

47-Cash-Disbursement-Benefit-Pamphlet.pdf
Minor beneficiaries under 18 years of

Introduction

Under the Inter Vivos Settlement Agreement dated 15 April 1985, the following is the definition of a beneficiary:

~~“Beneficiaries” at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 454 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as “Beneficiaries” for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement;~~

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 – DISTRIBUTION
ARRANGEMENT APPROVAL

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

DATE ON WHICH ORDER WAS PRONOUNCED: August 24, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER- DISTRIBUTION ARRANGEMENT APPROVAL

UPON NOTING that the decision of this Court on December 17, 2015 directed the Sawridge Trustees to prepare and file for approval a Proposed Distribution Arrangement; UPON HEARING representations from counsel for the Sawridge Trustees regarding the Distribution Arrangement which is attached hereto as Schedule "A"; AND UPON REVIEW OF Schedule "A"; AND UPON NOTING that the Trustees are not seeking the Court to approve the definition

of beneficiaries as set out in the Distribution Arrangement at this time and that such approval of the definition of beneficiaries shall be heard in a separate application;

IT IS HEREBY ORDERED THAT:

1. The Distribution Arrangement attached as Schedule "A" is approved, with the exception that, the definition of beneficiary set out in paragraph 4 in the Distribution Arrangement is not approved by this Order and is specifically directed to be determined in a separate application. Thus, the proposal set out in paragraph 4 entitled "Beneficiaries" as set out in Schedule "A" is reserved to a separate Court application.
2. There shall be no distributions from the 1985 Trust until the Beneficiary definition is determined in the separate court application referenced in paragraph 1 above.

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

Hutchison Law

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

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

B. Discretionary Trusts

The discretionary trust is one in which the creator of the trust, whether by will or *inter vivos*, imposes the duty upon the trustees to distribute income or capital among the beneficiaries described in the trust instrument or oral declaration as the trustees think fit. This trust is known in the United States and sometimes in Canada as "a sprinkling trust", meaning that the trustees are to distribute or "sprinkle" the trust property among the beneficiaries.

C. Protective Trusts and Spendthrift Trusts

A "protective trust" is an English term which is not widely used in Canada because no Canadian *Trustee Act* contains provision for a statutory protective trust as it exists in English legislation.⁷² However, the precedent books in Canada supply suitable wording whereby such a trust can be created. It refers to the situation where the creator of the trust requires the beneficiary's income interest to come to a close upon the beneficiary's bankruptcy or his attempted alienation of his interest. This is the "protected" interest.

The "spendthrift trust" is an American institution, developed by case law in some states and by statute in others, under which the beneficiary is unable to transfer his future entitlement to income or capital to another.⁷³ The protective trust therefore differs from the spendthrift trust in that, while it is possible for the beneficiary under either of these trusts to alienate, in favour of creditors or others, assets which he has already received from the trustees, if he attempts to alienate his beneficial interest (meaning his entitlement to future income) to third parties or he becomes bankrupt, the protective interest comes to a close. Under the spendthrift provision, the beneficial interest in income or capital continues, but all acts of alienation of that interest to third parties are invalid and the creditors in bankruptcy have no right to attach his interest.⁷⁴

The terms "protective trust" and "spendthrift trust" occasionally appear in Canadian cases with other meanings, the most common of which seems to be a trust controlling disbursements to a beneficiary for fear that the beneficiary might waste the assets. The term "protective trust" or "spendthrift trust" is used even though there

⁷² *Trustee Act, 1925* (Eng.), s. 33. See the discussion in *Underhill and Hayton* at 287-93.

⁷³ See further, E.N. Griswold, *Spendthrift Trusts*, 2nd ed. (1947); *Scott and Ascher*, vol. 3, §15.2; W.H. Wicker, "Spendthrift Trusts" (1974) 10 *Gonzaga L.R.* 1; Adam J. Hirsch, "Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives" (1995) 73 *Wash. U.L.Q.* 1; Anne S. Emanuel, "Spendthrift Trusts: It's Time to Codify the Compromise" (1993) 72 *Neb. L. Rev.* 179. See also the *Uniform Trust Code, 2000* (U.S.A.).

⁷⁴ There is no case law in Canada which validates the spendthrift trust, and no legislation has been introduced validating it. Nevertheless, the protective trust (which is valid in Canada) is sometimes described as a "spendthrift trust". It is true that both trusts are concerned with the beneficiary who in lay terms is a spendthrift, but it is incorrect to describe the protective trust as a spendthrift trust. The reason for this will be apparent from the text.

17

Distinction Between the Powers and Duties of Trustees

I. POWERS AND DUTIES 905

II. ADMINISTRATIVE POWERS AND DUTIES 906

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I. POWERS AND DUTIES

Once a trustee is appointed and accepts the office, he becomes subject to the duties and takes over the powers of his office. The majority of these duties and powers assume that the trustee is vested with, and administering, the trust property, and as far as an original trustee is concerned there may well be some delay in such vesting. For example, though a testamentary trust takes effect upon the testator's death, the deceased's personal representatives must first administer and wind up the estate before distributing assets to will beneficiaries, and the trustee who is to hold certain assets on trust for one or more of those beneficiaries must also await administration of the estate and the winding up. Nevertheless, not only is the trustee vested with his duties and powers on his accepting office, but some of his duties, as for example his so-called duty of loyalty to the trust beneficiaries, could well make him responsible to the beneficiaries for his conduct even before he receives title to, or possession of, the trust assets. For example, a trustee may not join with third parties and enter into dealings, designed in any way for his own benefit, in expectation of his acquiring title to the trust assets.

Given then that the trustee is vested with his duties and powers on accepting the office, the question arises regarding what are those duties and powers. These will be discussed in detail in the following pages, but a preliminary problem is the distinction between the duties and the powers of trustees. In practice it is often difficult to determine where the border lies between duty and power.

The primary distinction between a duty and a power is not difficult to grasp. A duty is an obligation; a power is an authority to act. A duty of the trustee compels him to act, or prohibits him from acting, in a certain way. A power in the trustee enables him to act in a certain way, but leaves him with the discretion as to whether or not he should so act. When a duty is owed, or a power is possessed, by a person who is not a trustee or other fiduciary, duty and power can easily be distinguished.

As a fee simple owner of a house, I have a duty to pay property taxes. As the donee of a power of appointment exercisable among my children, I can appoint or not appoint, as I choose. That is to say, not only can I choose which among my children is to have benefit from the property, and how much each appointee is to have, I can also give the matter no thought and appoint to no one. The position of a trustee or other fiduciary is different. The whole purpose of the office of trustee is the administration of property on behalf of others, and therefore the office holder must be compellable to perform his task. In other words, the essence of the trustee's position is obligation, an obligation owed to the trust beneficiaries. It is this situation which focuses attention upon the relationship between a trustee's powers and his duties. For example, if the settlor gives a power of appointment to the trustee, does the trustee have exactly the same freedom as the donee of a power who is not a trustee? Is the trustee permitted to give no thought to the matter?

The obligation which lies at the base of trusteeship has resulted in there being three fundamental duties applicable to all trustees. First, no trustee may delegate his office to others; second, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; third, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called the "substratum" duties, to which the duties associated with the particular trust are added. For example, in a trust for sale the trustee has the duties of assembling all the assets making up the trust property, of selling those assets, and of holding the proceeds of sale upon the trust terms. If those terms provide for a retention of the capital over a period of time, the trustee will also have the duty of investment of the proceeds of sale.

II. ADMINISTRATIVE POWERS AND DUTIES

The powers of the trustee will also be governed by the particular nature of the trust. For example, if the trust fund consists in part of land and the trust property is to be administered as an investment, the trustee will no doubt be given a power of sale, a power of mortgaging, and a power of leasing. Each of these activities is associated with active estate management, as are powers of insuring, of repairing at the estate's expense, and of discharging all taxes upon the property. As between successively entitled trust beneficiaries, the trustee may well have to determine whose interests are ultimately to share the burden of these outgoings, and in what proportion, but the trustee must have the immediate power to keep the property intact and to meet all financial claims of third parties against the trust.

Each of these powers of administration, for such they are, is an authority to the trustee to act, if need arises, in the manner set out by the power. However, in exercising each power the trustee is subject to the "substratum" duties. For example, if a power of sale needs to be exercised he cannot get another to carry out the sale and subsequently wash his hands of any responsibility on the grounds that he has nothing to do with the choice of purchaser or the actual sale. Neither can a trustee sell the property in question to himself, or to a beneficiary or stranger with no

arrangement that the trustee will then buy it back from the beneficiary or stranger. Finally, if the trustee sells the trust property he must not only be honest, but show a reasonable level of care and skill in his conduct of the operation. For example, he should not convey title before he has received the agreed remuneration, and if he does do so and loss ensues to the trust, he will be liable to make it good out of his own resources.

An administrative power may commence as such, and then, on the occurrence of an event, become a duty. For instance, the settlor conveys land to the trustee and gives him a power of sale to be exercised if, prior to the beneficiary attaining the age of twenty-five, the trustee in his discretion is made an excellent offer for the land. Prior to sale the income of the property is to be paid to the beneficiary. If the property remains unsold when the beneficiary attains twenty-five, the land is then to be sold and the proceeds paid to the beneficiary. In order that the trustee shall not be compelled to sell whatever the state of the market at that time, however, the settlor confers upon the trustee a power to retain for a reasonable period after the date of the beneficiary's twenty-fifth birthday.

In such a case the trustee possesses a power of sale, and then, when the beneficiary attains twenty-five, the trustee becomes subject to a trust for sale with power to retain. The authority, if not previously exercised, now becomes a duty, but with an attached authority. Nevertheless, because he is a trustee, the trustee is also throughout subject to the three "substratum" obligations or duties previously mentioned. It is the particular action required of him, that is, to sell, which is first an authority and then subsequently a duty.

III. DISPOSITIVE POWERS AND DUTIES

The significance of the "substratum" obligations when a trustee has a power to act becomes particularly significant, however, when the power or powers in question are not administrative, but dispositive. A dispositive power is the authority to allocate trust property, either income or capital or both, to a beneficiary or among two or more beneficiaries. For example, the trustee may be given a power to make capital payments to an elderly life tenant should income prove insufficient to provide a reasonable standard of living. Another example might concern a trust of property for the children of X, the income to be accumulated until the youngest attains twenty-five years. X, as trustee, is empowered on that event occurring to distribute the property among the children as he shall judge best, having regard to their then existing and future likely needs. Any property not distributed by the trustee is to pass to Y's child. This is a power of appointment, to which earlier reference was made, and the question is whether the "substratum" obligations imposed upon a trustee limit the freedom of activity which another donee of the power, who is not a trustee, would enjoy.

The answer can probably best be given in this way. Powers to make capital payments, to advance capital to those contingently entitled to shares of capital, or to pay out accumulated or accumulating income towards maintenance, are commonly given to trustees. In each of these cases the trustee must adhere to that "substratum"

IV. LIABILITY OF TRUSTEES IN THE EXERCISE OR NON-EXERCISE OF DISCRETION

In the discharge of their duties trustees, as we have seen, must demonstrate both honesty (or good faith) and the standard of care which would be shown by the reasonable and prudent business person. What is the position if the trust instrument confers upon the trustees a power which they may exercise at their own discretion? Do they have more than a duty to act honestly in the thought which they give to the exercise of this power, and the manner in which they exercise it? That is to say, are they to be the sole judges of what is reasonable?

The conferment of discretion arises in this way: the trustees are given a power to act which, wholly or partly, they have a discretion to exercise as they see fit. For instance, the power of encroachment upon capital in favour of a life tenant, should that person be in need, gives them the discretion whether or not to exercise the power and, if they exercise it, to decide how much they draw from capital for the purposes contemplated. On the other hand, trustees have a duty to invest, but may have been given the discretionary power to select such investments as they think best. In this case they have to act, but are free to choose how they carry out their task. When the trustees have a duty, or a power, which they must exercise in a given manner on the occurrence of given circumstances, they have no discretion. They have an obligation which they must discharge, and they will be in breach of trust if they do not discharge the task or they discharge it with anything less than honesty and the standard of care of the reasonable and prudent business person. Whether an apparent power is, in fact, a duty, or there is an element of discretion open to the trustees in the exercise of the power, is a matter of construction of the trust instrument.³³⁸

The settlor or testator may create a power which by its nature is discretionary, or he may add that it is to be exercised at the discretion or at the absolute and uncontrolled discretion of the trustees. In the latter situation, he is attempting to underline that he wishes no interference with the trustees, and, since the beneficiaries have no such power to intervene in any event,³³⁹ his meaning can only refer to the courts. Indeed, all trustee discretions involve the question of how far the courts are thereby excluded. If, for instance, the trustees have a duty to sell but a power to postpone sale at their discretion, or a power of encroachment on capital to be exercised "in their absolute and uncontrolled discretion", such powers can only mean – or so it appeared to some nineteenth century courts who were confronted with this problem³⁴⁰ – that decisions are to be made by the trustees within their personal

Re Barrow (1980), 29 O.R. (2d) 374, 113 D.L.R. (3d) 184 (Ont. H.C.), appeal dismissed (1981), 129 D.L.R. (3d) 767 (Ont. C.A.), leave to appeal to S.C.C. refused (1982), 41 N.R. 536 (S.C.C.). Cf. *Quinn v. Manitoba (Executive Director of Social Services)*, [1981] 5 W.W.R. 565, 124 D.L.R. (3d) 115 (Man. C.A.).

Assuming that the trustees are not acting in such a way that they are in breach of trust. Though the point at which they can be said to be in breach is the very matter in dispute with which these pages are concerned.

Gisborne v. Gisborne (1877), L.R. 2 App. Cas. 300 (U.K. H.L.) is the leading authority. The English cases are assembled in *Underhill and Hayton* at paras. 897 *et seq.* and in *Lewin* at 1098 *et seq.*

conception of what is reasonable and proper. The creator of the trust, it was noted, does not intend the courts to make the discretionary decisions. If the settlor or testator had added such words as "absolute and uncontrolled" to the conferment of discretion, the courts were inclined to see this as yet a further degree of removal of the courts from determining what was reasonable and desirable.

On the other hand, the principle of law is that no settlor or testator can take away from the courts their ultimate jurisdiction. There has to be a limit to the extent to which the court can be excluded. Indeed, it is this same principle which has brought exculpatory clauses into question: how far may the trust instrument exclude the trustees from responsibility for what they have done or failed to do? In the present context, the question becomes: how far can the instrument be permitted to make the trustees the only arbiter of what is the proper exercise of a power, or whether it should be exercised at all?

The nineteenth century courts were inclined to see the grant of discretion, especially of uncontrolled discretion, as making the trustees subject only to the duty to demonstrate good faith in the exercise of the power.³⁴¹ And the view has prevailed in the courts to this day that in all cases of the conferment of discretion the trustees are to make the decisions and not the courts.³⁴² Consequently, the courts are not willing to make these decisions on an application to the court by the trustees unless the discretion is surrendered to the court,³⁴³ and when the trustees seek to surrender their discretion as to what they should do in relation to future events as they occur, the courts have refused to make any such decision, giving as their reason that this task lies within the trustees' duty. The task was expressly given to them.³⁴⁴

Nevertheless, this does not solve the problem as to the point at which the beneficiaries may properly ask the courts to rule on the propriety of what the trustees have or have not done, or what they intend to do. When discretion is expressly conferred without the addition of such words as "absolute" or "uncontrolled", some courts have taken the view that the trustees must show not only good faith, but that their decision was "properly" made.³⁴⁵ And, as the conferment of such discretion has become more familiar in the present century, the courts have tended increasingly

³⁴¹ This was the case, e.g., in *Gisborne v. Gisborne*, *ibid.*, in which, however, the will gave "uncontrolled authority" to the trustees. Previous decisions of lower courts had intervened on a variety of grounds which may be summed up as improper conduct on the part of the trustees. Where a simple discretion is given (i.e., not "absolute", "uncontrolled", etc.), the authorities vacillate considerably as to what more than mere honesty is required. See also *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (Eng. Ch. Div.). The courts take the same approach whether the discretion is conferred by the instrument or by statute: *Sayers v. Philip* (1973), 38 D.L.R. (3d) 602 (Sask. C.A.).

³⁴² *Re Boukydis*, 60 O.L.R. 561, [1927] 3 D.L.R. 558 (Ont. C.A.); *Re Mattick* (1967), 60 W.W.R. 62 D.L.R. (2d) 539 (B.C. S.C.) at 543 [D.L.R.].

³⁴³ *Talbot v. Talbot* (1967), [1968] Ch. 1, [1967] 2 All E.R. 920 (Eng. C.A.). Cf. *Re Steed*, [1960] 1 Ch. 407, [1960] 1 All E.R. 487 (Eng. C.A.).

³⁴⁴ E.g., see *Re Edwards* (1975), [1975] W.W.D. 95 (Sask. Q.B.).

³⁴⁵ This term was employed by Jessel M.R. in *Tempest v. Lord Camoys*, *supra*, note 341, at 574 (of absolute discretion).

to stress this additional requirement that a "proper" or "not unfair" exercise of the discretion be proved by the trustees, even when the discretion is made absolute.³⁴⁶

It will be evident, however, that the courts are in a difficult position. The rule of behaviour required of trustees in the discharge of their duties is good faith and the care of the reasonable business person. Yet, as we have suggested, the conferment of discretion appears to make the trustees their own judges of what is reasonable. In attempting to uphold the court's necessary jurisdiction on the one hand, and the trust creator's intention on the other, different courts have described the extent of the court's power of intervention in different ways. Some have spoken only of the requirement of "good faith",³⁴⁷ while others have said the courts will not permit a "wrongful," "improper," or "unfair" exercise of the power, or refusal to exercise it.³⁴⁸ Essentially, however, all courts are attempting to discover and formulate in language the elusive mid-way position between imposing the reasonable person test as if there were a duty to accomplish certain ends, and conceding a sheer licence to the trustee to do what he likes.

Nor is this process helped by the ambiguity of such terms as "good faith," "improper" and "unfair." For instance, as has been previously suggested, what exactly does "good faith" mean? A trustee is in bad faith if he intentionally exercises a discretionary power for his own wrongful benefit; but could it be argued, and have courts so intended, that bad faith includes the situation where the trustee abuses his discretion by exercising it in a manner, or not exercising it for a reason, which lies outside the purpose or scope of the discretion?³⁴⁹

One solution is to say that the decision belongs to the trustee, and not the court; but the court can supervise the *manner* in which the decision was made.³⁵⁰ Obviously, the power can only be exercised within its terms. A power to advance property to the settlor's children does not permit advancement to her nephew.³⁵¹ Beyond that,

E.g., *Re Courage's Will* (1975), 10 Nfld. & P.E.I.R. 511 (Nfld. T.D.), *Re Wright* (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (Ont. H.C.). See also *Re Blow* (1977), 18 O.R. (2d) 516, 82 D.L.R. (3d) 721 (Ont. H.C.); "absolute and uncontrolled" were shown to be irrelevant where the trustee has simply failed to consider as he should the exercise of the power.

The *Gisborne v. Gisborne* approach, followed in both England and Canada.

In *Tempest v. Lord Camoys*, *supra*, note 341, at 580, Cotton L.J. spoke in terms of the "wrong or unreasonable". In *Re Roper's Trusts* (1879), 11 Ch. D. 272, a simple discretion, Fry J. in a very short judgment appeared to think the court has the right to intervene when the discretionary decision is not "sound". In *Re Locker's Settlement Trusts* (1977), [1977] 1 W.L.R. 1323, [1978] 1 All E.R. 216 (Eng. Ch. Div.), Goulding J. continued to say that, though the discretion conferred is "absolute and uncontrolled", the court will intervene if there is trustee *mala fides*. Nevertheless, given the width of considerations that *mala fides* comprehends (see M.C. Cullity, *supra*, note 335), it seems likely that *mala fides* includes actionable unfairness. The adjectives "absolute" and "uncontrolled" appear today to add nothing. See, however, the Court's examination of "absolute discretion" in *Fox v. Fox Estate*, *supra*, note 366.

See *Ingraham v. Hill* (1920), 53 N.S.R. 442, 51 D.L.R. 98 (N.S. C.A.), and M.C. Cullity, *supra*, note 335.

There is a useful analogy here to the judicial review of administrative action.

Canada Trust Co. v. Fasken (1990), 69 D.L.R. (4th) 575, 37 E.T.R. 216 (Ont. H.C.), affirmed (1993), 98 D.L.R. (4th) 288, 49 E.T.R. 112 (Ont. C.A.): an attempt to appoint property to which the power did not apply; *Breadner v. Granville-Grossman*, [2001] Ch. 523: attempt to exercise power one day after it expired.

the court may conclude that the trustee has breached one of the duties which condition all of his trustee activities. It might be that he did not demonstrate the care or prudence that is required, as where the decision was made without making a reasonable effort to obtain and review the pertinent factors.³⁵² More likely, it may be arguable that the trustee breached his duty of loyalty as it applied to the power.³⁵³ Apart from requiring good faith, the duty of loyalty generally requires the trustee to make the decision with regard to the best interests of the beneficiary. In the context of a dispositive power, the trustee is specifically authorized to judge between and among interests, possibly favouring the interests of one beneficiary ahead of others, and possibly favouring the interests of someone who is not a beneficiary of the trust over those of someone who is.³⁵⁴ For this reason, the duty of loyalty as it applies to dispositive powers requires the trustee to act in consideration of the purpose for which the power was given.³⁵⁵

Courts in England have set aside discretionary decisions which were dishonest or reached by the consideration of factors outside the scope or purpose of the power, and they have intervened when trustees have done nothing about the exercise of the discretion. In other words, the criteria to be applied to the trustee are these: he must be honest; beyond that, if honesty has a narrow meaning, he must act within the confines of the authority that was given to him; and he must perform the duty, fundamental to the trustee's office, that he give his mind to whether and, if so, how he ought to exercise the discretion. A power given to a trustee as a trustee always imposes upon him the duty to consider whether in the circumstances he should exercise it, and the nature of the power, such as a power to maintain out of accumulating income, may require him to have the circumstances under constant review.

³⁵² *Nichols v. Wevill Estate* (1995), (sub nom. *Nichols v. Central Guaranty Trust Co.*) 13 B.C.L.R. (3d) 137, 9 E.T.R. (2d) 292 (B.C. S.C.). This reasoning is also part of the basis of the decision in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), additional reasons at 2002 CarswellOnt 3579 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2004 CarswellOnt 691 (Ont. C.A.), affirmed (2004), 42 B.L.R. (3d) 34 (Ont. C.A.), reviewing the decision of a corporate board in relation to its power to make contracts.

³⁵³ For a case in which the exercise of a discretion was tested against all of these standards, see *Yates v. Air Canada*, 2004 BCSC 3 (B.C. S.C.).

³⁵⁴ There may be a trust in favour of A, and a power to appoint to B, who is therefore merely the object of a power and not a trust beneficiary in the technical sense. B has only a hope that the power will be exercised in his favour. But clearly, such an exercise may be proper, even though it is not in the interests of a trust beneficiary.

³⁵⁵ *Vaucher v. Paull* (1914), [1915] A.C. 372 (U.K. H.L.) at 378; *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (Ont. H.C.) at 307; *Klug v. Klug*, [1918] 2 Ch. 67 (Eng. Ch. Div.); *McPhail v. Doullton* (1970), [1971] A.C. 424 (U.K. H.L.) at 449, 457; *Re Hay's Settlement Trusts*, [1982] 1 W.L.R. 202 at 209; *Turner v. Turner*, [1984] Ch. 100; *Re Beatty*, [1990] 1 W.L.R. 1503 at 1506; *Hayim v. Citibank NA*, [1987] A.C. 730 (Eng. Prob. Ct.) at 746; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372, 46 E.T.R. 173 (Ont. Gen. Div.); *Abacus Trust Co. (Isle of Man) Ltd. v. Barr*, [2003] Ch. 409, [2003] 1 All E.R. 600 (Ch. Div.); *Fox v. Fox Estate*, *infra*, note 366; *Wong v. Burt*, [2005] 1 N.Z.L.R. 91 (C.A.), at para. 27-33.

In Canada, working with the English precedents, common law courts have had the same difficulties.³⁵⁶ However, it is arguable that Canadian courts have been less reluctant than the English courts to intervene where they consider that wrongful exercise or non-exercise of discretionary powers has taken place, whether or not the discretion conferred is "absolute and uncontrolled".³⁵⁷ An alternative argument is that the grounds upon which intervention will take place are probably the same, and that differences appear to exist because of the ambiguity of terms employed and the difficulty of formulating a precise rule with necessarily general language.³⁵⁸

Whatever the respective merits of these arguments, however, the following seems now to be established in Canada. First, it must be ascertained as a matter of construction to what task the discretion is attached.³⁵⁹ For instance, a discretionary trust may impose the duty upon the trustees to distribute the whole of the trust fund, but confer upon them a discretion as to the members of the class of beneficiaries who are to receive payments, and how much each is to receive. Again, a trustee may have a duty to maintain, and this requires him to act as the law defines maintenance, but at the same time he may have a discretion as to the times at which, and the manner in which, he makes payments for this purpose.³⁶⁰ Sometimes the line between duty and discretion is not easy to discover, but a trustee who interprets himself to have a discretion when in fact he has a duty does so at his peril. Second, the court will not intervene simply because the beneficiaries or any other complainants do not agree with the decision of the trustees in the exercise of their discretion. Nor will it intervene merely because it would not have come to the same decision itself. The court will intervene,³⁶¹ however, if (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they

³⁵⁶ See for a collection and analysis of the authorities; *Re Floyd* (1960), [1961] O.R. 50, 26 D.L.R. (2d) 66 (Ont. H.C.). Also *Re Sievert* (1921), 51 O.L.R. 305, 67 D.L.R. 199 (Ont. C.A.); *Re Rutherford*, [1933] O.R. 707, [1933] 4 D.L.R. 222 (Ont. C.A.).

³⁵⁷ The English and Canadian authorities are exhaustively surveyed and discussed by M.C. Cullity, *supra*, note 335 (U. of T.L.J.). And see *Re Blow*, *supra*, note 346, where Rutherford J. concluded that non-exercise was a ground of judicial intervention quite distinct from the *Gisborne v. Gisborne* and bad faith grounds.

³⁵⁸ See, e.g., *Re Williams* (1946), [1947] O.R. 11, [1947] 1 D.L.R. 882 (Ont. C.A.): good faith, *Gisborne v. Gisborne* followed; *Re Banko*, [1958] O.R. 213, 12 D.L.R. (2d) 515 (Ont. C.A.) at 217 [O.R.]: duty to act *bona fide*. Having examined the judicial language of various English and Canadian authorities—including Middleton J. in *Re Bell* (1923), 23 O.W.N. 698 (Ont. H.C.) at 699, and McRuer C.J.H.C. in *Re Banko*—it was the view of Spence J. in *Re Floyd* (1960), [1961] O.R. 50, 26 D.L.R. (2d) 66 (Ont. H.C.), that the trustee must act "honestly and fairly". See also *Re Mattick* (1967), 60 W.W.R. 503, 62 D.L.R. (2d) 539 (B.C. S.C.) at 544 [D.L.R.], and *Sayers v. Philip* (1973), 38 D.L.R. (2d) 602 at 607 (Sask. C.A.).

³⁵⁹ *McNeil v. McNeil*, 2006 CarswellAlta 1147, 65 Alta. L.R. (4th) 313, 27 E.T.R. (3d) 262 (Alta. Q.B.).
³⁶⁰ *Re Butler*, [1951] O.W.N. 670, [1951] 4 D.L.R. 281 (Ont. H.C.); *Re Evans* (1902), 3 O.L.R. 401.
³⁶¹ Even if the discretion conferred is absolute and uncontrolled, the court is not prevented from intervening when the power is exercised "improperly": *Re Butler*, *ibid*.

had to make;³⁶² or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.³⁶³

Trustees may be subject to court intervention under (1), above, and their decision be set aside if there has been an improper preference of one class of beneficiaries over another. For instance, a trustee is not in good faith or has not dealt properly between the objects of his discretion if his decision obviously prejudices the income beneficiary to the gain of the capital beneficiary. But in this instance the trustee who so exercises his fiduciary powers has also broken the separate and distinct rule of equity that as a trustee he must act impartially as between the income and capital beneficiaries. The conferment of a discretion does not waive the application of this rule. If he wishes that rule not to apply, the settlor or testator must go on to say so. But, for example, a power to advance capital to the income beneficiary clearly authorizes partiality. Consequently, it cannot categorically be said that an act or omission which is not impartial constitutes bad faith or lack of fair dealing as required by criterion (1). It all depends on the total language of the instrument.³⁶⁴

As for (2), this is illustrated by the cases in which an exercise of a power has been set aside because the trustees considered factors which they ought not to have considered, or indeed if they failed to consider factors which they ought to have considered.³⁶⁵ A clear example is *Fox v. Fox Estate*.³⁶⁶ The trustee was the testator's widow; she was also a life beneficiary as to 75 per cent of the trust. Her son was the life beneficiary of the rest, and also the capital beneficiary of the whole property, should he survive his mother. The widow had a power of appointment over the capital in favour of her grandchildren. She exercised this power, as to the whole capital, so depriving the son of any income or capital interest. That was within the terms of the power; but it was found that she was motivated, at least in part, by her disapproval of the son's marriage. The exercise of the power was set aside, and the widow was removed as trustee.

³⁶² Whether a consideration is irrelevant is an issue of fact, and the law often gives little guidance. E.g. it is a familiar subject of discussion in American literature as to whether trustees with a discretionary power to distribute income or capital may take into account the income of the beneficiary from other sources. In *Re Mattick*, *supra*, note 358, Smith Co. Ct. J. treated it as a matter of construction of the power, and in this decision he followed *Re Luke*, [1939] O.W.N. 25, [1939] 1 D.L.R. 764 (Ont. H.C.), and *Re Sanderson* (1857), 3 Kay. & J. 497, 69 E.R. 1206. The court followed and applied *Re Luke* in *Hinton v. Canada Permanent Trust Co.* (1979), 5 E.T.R. 117 (Ont. H.C.), affirmed (February 1980), (Ont. C.A.) (unreported). See also M.C. Cullity, *supra*, note 333 (*Special Lectures*) at 23-25 and, *supra*, chapter 13, note 156.

³⁶³ *Boucher v. Boucher Estate* (1990), (sub nom. *Williams v. Bastarache*) 108 N.B.R. (2d) 220 (N.B. Q.B.); *McNeil v. McNeil Estate*, *supra*, note 359.

³⁶⁴ See *Martin v. Banting* (2001), 37 E.T.R. (2d) 270 (Ont. S.C.J.), affirmed (2002), 46 E.T.R. (2d) 195 (Ont. C.A.).

³⁶⁵ *Re Hastings-Bass*, [1975] Ch. 25 (C.A.), 41; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372, 40 E.T.R. 178 (Ont. Gen. Div.).

³⁶⁶ (1996), 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (Ont. C.A.), leave to appeal refused (1996), 1996 S.C.C.A. No. 241, 207 N.R. 80 (note) (S.C.C.). *Klug v. Klug*, [1918] 2 Ch. 67 (Eng. Ch. Div.) is a similar case. This is a classic case; also each member of the C.A. gave a slightly differently constructed judgment concerning the trustee's conduct. See also *Edell v. Sitzer* (2001), 55 O.R. (3d) 198, 5 E.T.R. (2d) 10 (Ont. S.C.J.), affirmed (2004), 9 E.T.R. (3d) 1 (Ont. C.A.), leave to appeal refused (2005), [2004] S.C.C.A. No. 372, 2005 CarswellOnt 96, 2005 CarswellOnt 97 (S.C.C.).

In England, this possibility recently gave rise to a whole line of cases. In most of them, trustees had made decisions based on a misunderstanding of the taxation situation.³⁶⁷ They sought to set aside their decisions retroactively on the theory that they had failed to take into account a relevant matter—namely, the true taxation situation. This was said to be the effect of the “rule in *Re Hastings-Bass*.”³⁶⁸ The English Court of Appeal has now said that this was a misunderstanding of that case.³⁶⁹ A fiduciary decision can be retroactively set aside when it was made for the wrong reasons, but only when this rises to the level of a decision made in breach of fiduciary obligation. This is a much narrower ground for the availability of relief than the later discovery that the taxation consequences of the decision were different from those expected.³⁷⁰ In Canadian courts no adoption or consideration of the *Hastings-Bass* decision appears to have taken place.

As with situation (1), the liability of trustees under criterion (3) is also established by the independent rule that a trustee, as a trustee, has the fundamental duty to give his mind to whether he ought to exercise a power.³⁷¹ But no settlor or testator is likely to exclude this duty, which arises from the fiduciary nature of the trustee’s office.³⁷²

³⁶⁷ There is a thorough review of the cases in *Sieff v. Fox*, [2005] 1 W.L.R. 3811 (Eng. Ch. D.).

³⁶⁸ *Supra*, note 365.

³⁶⁹ *Pitt v. Holt*, [2011] EWCA Civ 197. In August 2011, the U.K. Supreme Court granted leave to appeal.

³⁷⁰ The same interpretation of the relief now available is taken in L. Smith, “Can I Change My Mind? Undoing Trustee Decisions” (2008) 27 E.T.P.J. 284, which in addition discusses rescission and rectification of trustee decisions. *Pitt v. Holt*, *ibid.*, also addresses the question of rescission of trustee decisions for mistake, holding (at para. 210) that “there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction.” This test excludes the possibility of rescission for mistakes as to the taxation consequences. Note that *Pitt* was not followed on this point in *Re R.*, [2011] JRC 117 (Royal Court of Jersey), holding that a dispositive decision can be set aside for mistake so long as the mistake was of “so serious a character as to render it unjust on the part of the donee to retain the property.” In that case, a catastrophic mistake as to taxation consequences allowed the decision to be set aside. In *British Columbia*, outside of trust law and albeit in the context of a rather trivial error, it was held that a mistake as to taxation consequences did not allow a gift to be rescinded: *Richert v. Stewards’ Charitable Foundation*, 2005 CarswellBC 315, 15 E.T.R. (3d) 92 B.C. S.C.), affirmed 2006 CarswellBC 72, 49 B.C.L.R. (4th) 138 (B.C. C.A.). See also *Re Motorola New Zealand Superannuation Fund*, [2001] 3 N.Z.L.R. 50 (H.C.), which contains discussion of the ability of trustees to correct their own errors.

³⁷¹ E.g., *Sayers v. Philip*, *supra*, note 358: the trustee said and did nothing when requested to exercise his discretion (a statutory power of maintenance in favour of minors). There was “a suggestion” that the testatrix had not wished any part of her estate to fall into the hands of the children’s father; if this was the only ground for refusal to make payments, the court considered such a refusal to amount to non-exercise. See also *Turner v. Turner* (1983), [1984] Ch. 100, [1983] 2 All E.R. 745; *Hedley Estate v. Grant* (1998), 74 O.T.C. 234 (Ont. Gen. Div.).

³⁷² In this section we have been considering the substantive rules of law by which trustees’ exercise of their discretion is subject to judicial review. In chapter 20, Part II N, we consider the closely related subject of applications to the court by trustees in respect of their discretions, with a particular focus on the problem arising where trustees cannot agree.

reside. The question is whether the trustees can release property from the trust, acting under their power, by transferring it to other trustees in London, England.¹³⁵ Is it an impermissible delegation by the original trustees? If not, what beneficial interests may be created under such a trust? If there is any doubt on either question, can the original settlor give his trustees power both to create new trusts under the power of maintenance (or of advancement or appointment) and to set up what beneficial interests they consider appropriate?

One guide to Canadian thought in this area is *Rutherford v. Rutherford*.¹³⁶ A testator left a remainder interest in his residue to his son, A, in the manner that the trustees held it "for the use of" A, his wife and children with full discretion to pay the whole or part of the income and capital to A or his wife for "their proper support and maintenance and for the proper support, maintenance and education of their children." The trustee and A entered into a deed whereby the trustee declared it held the entire trust fund for A's "own use absolutely". A thereupon covenanted that he would settle the property upon himself for life, remainder to his wife and two children. A few days later A died, and the question concerned the validity of this exercise of the testamentary power. Ferguson J. held that it was invalid. A discretion to make payments for maintenance and support did not justify paying over the entire trust fund. The decision is justifiable in the sense that the trustee did not have a sufficiently broad power to enable it to do what it had purported to do. On the other hand, if a dispositive discretion is sufficiently widely drafted, then a court is likely to conclude that if the trustees have the power to transfer property outright to a beneficiary, it should be possible to settle property on a new trust for that beneficiary. This was the decision in *Hunter Estate v. Holton*.¹³⁷ Indeed, the ever-changing requirements for sound estate planning, particularly for the purposes of tax planning, are causing such clauses to be increasingly familiar.¹³⁸

VI. DISCRETIONARY TRUSTS

Trustees have administrative powers, and often a testator will state in his will in setting up a trust that the trustees are to have full discretion in the exercise of a

Though it is sometimes called a "sub-trust", that term is more apt where the beneficial interest under one trust is itself the trust property under the new sub-trust. Conversely, where trust property is advanced by trustees out of one trust to create a new settlement, there is no doubt that the trustees of the new trust are quite independent of the original trust, and are responsible to their beneficiaries only. For an example of a power which makes clear that the resettled property is transferred out of the first trust completely, see Kessler and Hunter, *Drafting Trusts and Will Trusts in Canada*, 3rd ed. (2011) at para. 11.7.

(1961) O.R. 108, 26 D.L.R. (2d) 369 (Ont. H.C.).

(1992), 7 O.R. (3d) 372, 46 E.T.R. 178 (Ont. Gen. Div.). Even though a dispositive discretion is wide enough to permit the creation of a new trust, the power to do so is held in a fiduciary capacity.

As a result, it could not be exercised, for example, merely because the first trustee wished to be relieved of the trust: *Hedley Estate v. Grant* (1998), 74 O.T.C. 234 (Ont. Gen. Div.).

Kessler and Hunter, *supra*, note 135, at 200, recommend for the avoidance of doubt that a trust should, where appropriate, include distinct powers of appointment, resettlement and advancement; and after "should not rely on one to do the work of the others."

particular power. This does not really add anything to the trustees' power since under trust law they are free to exercise all their powers as they think best for the good of the beneficiaries and the purpose of the trust. However, the testator may wish to demonstrate, by speaking of discretion, over what property and for what purpose it is he wishes the power to be exercised. In *Sea v. McLean*,¹³⁹ for instance, the trustees were empowered to sell such portions of the testator's real estate as in their discretion seemed necessary to discharge the testator's debts. This explains the reference to discretion.

Dispositive powers, also by their very nature, give a discretion to the trustees, and, as we have seen, the scope of the discretion will be determined both by the nature of the power in question¹⁴⁰ and by the testator or settlor. He will decide in favour of whom the power may be exercised, and possibly place a ceiling on the amount that may be paid out to them.¹⁴¹

Discretionary trusts, or "sprinkling trusts" as they are known in the United States, occur when the trustees are vested with property and are required to allocate it as they think fit among a class of beneficiaries.¹⁴² As we have seen, the trustees may be required to distribute all of the property, income and capital, among the members of the class;¹⁴³ alternatively, there may be provision for any property left over at a certain time to revert to the testator's estate or go on as a gift over to another or others.¹⁴⁴ In this second case, there is no obligation to distribute to the class, only a power of appointment in their favour, with a (defeasible) trust for the takers in default.¹⁴⁵ This distinction may be important if there is to be a termination under *Saunders v. Vautier*.¹⁴⁶ In the first case, where there is an obligation to distribute to the class, then if all the members of the class are or become adult, and are of sound mind, they can terminate the trust prematurely, even though the trustees have not as yet determined the proportions or even decided to give every beneficiary some

¹³⁹ (1887), 14 S.C.R. 632 (S.C.C.).

¹⁴⁰ E.g., advancement, maintenance. But see *Re Blow* (1977), 18 O.R. (2d) 516, 82 D.L.R. (3d) 727 (Ont. H.C.) at 524 [O.R.], at 730 [D.L.R.]: an "uncontrolled discretion" to encroach on capital for the benefit of a life tenant means that, given *bona fide* exercise, the testator intends that the remaindermen may ultimately receive nothing. *Sed quaere* if this is not the effect of such a power, exercised without any adjective. See also *Re Chechik* (1976), 72 D.L.R. (3d) 271 (Man. Q.B.): "uncontrolled discretion" to encroach on capital – such language affects the construction of both how much may be advanced and the grounds for encroachment.

¹⁴¹ For an analysis of judicial control of trustee discretions generally, see, *supra*, chapter 18, Part IV.

¹⁴² The term "sprinkling" assumes a discretionary trust in favour of a class of persons, among whom the trust income or capital, or both, is to be distributed. This is an obligation which the trustees must perform, as opposed to a power. See, *supra*, Part I, and chapter 17.

¹⁴³ E.g., *Ingraham v. Hill* (1920), 53 N.S.R. 442, 51 D.L.R. 98 (N.S. C.A.); and *Martin v. Borden* (2001), 37 E.T.R. (2d) 270 (Ont. S.C.J.), affirmed (2002), 46 E.T.R. (2d) 93 (Ont. C.A.).

¹⁴⁴ Or a member of the class. The principle is the same. This person or persons is called the "takers in default" because they take in default of exercise of the power of appointment. See, for example, *Breadner v. Granville-Grossman*, [2001] Ch. 523.

¹⁴⁵ *Supra*, text accompanying note 9.

¹⁴⁶ On which see chapter 23.

thing.¹⁴⁷ This is because, together, they account for all possible beneficial interests. On the other hand, if there is a taker in default, that person will also need to join if the trust is to be collapsed prematurely.¹⁴⁸ However, whether or not the trustees must distribute the *whole* property in some manner among the members of the class, they clearly hold a dispositive discretion.¹⁴⁹

The discretionary trust normally requires the trustees to dispose of the trust property to whom among the class they think fit,¹⁵⁰ in the amounts and when they think fit. Sometimes they also have a discretion as to the form in which disposition is to be made, and even though discretionary trusts normally involve funds so that they will issue cheques, this will allow them to transfer shares or stock, for instance. It would seem that, even without an express discretion as to the form of disposition, they have an implied discretion stemming from the nature of the trust to make dispositions in the form of re-settlements on new trusts.¹⁵¹ The property which is to be distributed will be decided upon by the settlor or testator. It may be the income of the capital, or income and capital.¹⁵² If the object of the trust is to provide

¹⁴⁷ Although such beneficiaries can terminate the trust by agreement, they cannot keep the trust on foot and at the same time direct the trustees in the exercise of their discretions: *Re Brockbank*, [1948] Ch. 206 (Eng. Ch. Div.).

¹⁴⁸ *Re Smith*, [1928] Ch. 915 (Eng. Ch. Div.). The taker in default is the trust beneficiary. The members of the discretionary class are only objects of a power, but their potential interest apparently means that they too must join in any termination of the trust (*Schmidt v. Rosewood Trust Ltd.*, [2003] 2 A.C. 709 (England P.C.), at para. 41). See chapter 23, Part II F.

¹⁴⁹ Two things are axiomatic:

(1) that provided the trustees act with good faith (i.e., honestly, thoughtfully, objectively and fairly) in the exercise of their discretion, the court will not interfere or counter their decision. The leading case on this subject is *Gisborne v. Gisborne* (1877), L.R. 2 App. Cas. 300 (U.K. H.L.), which has consistently been followed in Canada. See, e.g., *Singer v. Singer* (1916), 52 S.C.R. 447, 27 D.L.R. 220 (S.C.C.); *Earle v. Lawton* (1908), 4 N.B. Eq. 86 (N.B. S.C.); and *Re Williams* (1946), [1947] O.R. 11, [1947] 1 D.L.R. 882 (Ont. C.A.); *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496, 10 E.T.R. (2d) 229 (Ont. C.A.), leave to appeal refused (1996), [1996] S.C.C.A. No. 241, 207 N.R. 80 (note) (S.C.C.); but see also M.C. Cullity, (1975) U. of T. L.J. 99;

(2) the trustees must be unanimous in their decisions as to the exercise of their discretion, unless the settlor or testator has provided to the contrary. See *Re McLaren* (1922), 51 O.L.R. 538, 69 D.L.R. 599 (Ont. C.A.). See further, *supra*, chapter 18, Part IV. The British Columbia Law Institute, "A Modern Trustee Act for British Columbia", Report No. 33, October 2004, has recommended reversal of the rule, i.e., that trustees may act by majority subject to a contrary intent (see s. 12 of the draft Act).

The trustees may also be empowered to add further beneficiaries to the class, or to both add and delete beneficiaries. Such a clause is familiar in offshore trusts, but it is now appearing in Canadian onshore trusts. See Donovan Waters, "The Power in a Trust Instrument to Add and Delete Beneficiaries" (2012) 31 E.T.P.J. 173.

Instead of paying out a sum, or transferring assets, to a beneficiary (or his guardian) as an outright disposition, the trustees create a trust for the beneficiary, on such terms as they consider appropriate, and pay or transfer to the trustees of this trust. See *Hunter Estate v. Holton*, *supra*, note 137; Kessler and Hunter, *supra*, note 135, at 196.

Any property, realty or personalty, may be the subject-matter of the trust. In *Re Williams*, *supra*, note 149, apparently the only reported Canadian case of a protective trust, income only was available. The importance of this case is that it set up a series of protective and discretionary trusts of a simple, but ingenious nature. See Waters, *Restraints on Alienation and Anticipation*, 1971, a study prepared for the Ontario Law Reform Commission in connection with the Trusts Law project, and available

maintenance for the members of the class, the trust discretion will normally be over the income of the trust fund, possibly with an added power to encroach on capital should need arise. If the object of the trust is to enable the trustees to make payments or transfers to members of the class, so as to secure the maximum advantage to these members under present and future taxing statutes, it will normally be both the income and the capital of the trust fund which is to be distributed.

American trust law commonly distinguishes between discretionary trusts and "support trusts", but this does not mean the discretion to be exercised is any different. This distinction is concerned rather with the object of each trust. A "supportive trust" is obviously concerned with the maintenance of the members of the class,¹⁵³ while a "sprinkling trust" may or may not provide the trustees with a purpose that they are to have in mind.¹⁵⁴ In practice the object of the discretionary trust is either to protect the beneficiaries from themselves, or from a heavier tax liability than might otherwise have been incurred in the transmission of the wealth of the settlor or testator.¹⁵⁵ When the beneficiaries are minors, the need of a discretionary trust for maintenance purposes is evident. Such persons are not being protected from themselves; they have no power to hold property for themselves. Beneficiaries who are of age may well require protection; at least that is the view of many settlors and testators of those to whom they wish to donate property. One difficulty is that Anglo-Canadian common law (unlike United States law) does not allow the creation of an inalienable trust interest which is unavailable to creditors.¹⁵⁶ The danger, of course, is that a beneficiary might sell his income interest for a capital sum, or have it taken by his creditors or his trustee in bankruptcy. The traditional solution, still in statutory form in England,¹⁵⁷ is to give the protected beneficiary an income interest, but to provide that the interest is defeasible on certain events, notably any attempt to transfer it, or a bankruptcy. At that time, a new trust arises, which is a discretionary trust for the

in all Canadian law school libraries. For the effect of a protective trust in an English will, see *Phelan v. Smith*, [1942] 1 W.W.R. 657, [1942] 2 D.L.R. 234 (Man. C.A.).

¹⁵³ E.g., *Rose v. Edsall* (1872), 19 Gr. 544 (Ont. Ch.).

¹⁵⁴ See, e.g., for an American approach to the use of these trusts, J.C. Williams, "Trusts for Groups of Children and Grandchildren" (1975) 114 *Trusts and Est.* 140.

¹⁵⁵ It may also be that the use of a discretionary trust allows the beneficiary to retain access to some funds. For example, a disabled person may have an entitlement to governmental benefits, which entitlement will be lost if the person has assets above a certain threshold. If the person is a beneficiary (or object of a power) under a discretionary trust, his interest may be incapable of clear valuation (since it is a mere hope). The intended result is that the entitlement to government benefits can be retained, while the person may still derive substantial benefits from the trust. See *Ontario (Ministry of Community & Social Services) v. Henson* (1987), 28 E.T.R. 121 (Ont. Div. Ct.), affirmed (1989), 36 E.T.R. 192 (Ont. C.A.); *Ozad v. Director of Income Maintenance Branch* (December 24, 1998), Doc. 785/D, [1998] O.J. No. 6498 (Ont. Div. Ct.); and *Guy v. Northumberland (County) Department of Social Services* (2001), (sub nom. *Guy v. Ontario Works (Administrator)*) 201 D.L.R. (4th) 731 (Ont. Div. Ct.). See also Kessler and Hunter, *supra*, note 135, at 348-51; L.A. Frolik, "Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?" (1985) 46 *U. Pitt. L. Rev.* 335; and M. Champine, "Using Discretionary Trusts to Benefit Disabled Persons" (1993) 69 *U. of Detroit Mercy L. Rev.* 581.

¹⁵⁶ Quebec law, however, does. See, *infra*, chapter 28, Part III D 3.

¹⁵⁷ *Trustee Act*, 1925, s. 33.

protected beneficiary and his family.¹⁵⁸ In this way, the beneficiary, who is to be maintained from a certain fund until he attains what the settlor or testator regards as an age of greater wisdom, is thus protected from himself. The trustee in bankruptcy of a beneficiary can only claim those sums or that property which the trustees have actually transferred to the beneficiary. Since the trustees may determine which of the members of the class is to have anything under the trust, it follows that the beneficiary is entitled to nothing until it is given to him.¹⁵⁹

The popularity of the discretionary trust in England prior to 1969 was due to the fact that there was no "passing" of the trust capital for the purposes of the then Finance Acts when a trust beneficiary died, unless he were the penultimate surviving member of the class. As long as there were two or more beneficiaries left in the class, therefore, estate duty was not leviable on the capital, or indeed upon any property which had already been paid by the trustees to the deceased beneficiary. The provisions of the *Finance Act*, 1969, introduced the notional periodic passings of the capital, and this has much reduced the usefulness of the device to English estate planners.¹⁶⁰ Later, for similar reasons, the discretionary trust became extremely popular in Australia.¹⁶¹ In Canada the same phenomenon has not occurred; there was no burdensome inheritance tax or estate duty, and in general higher rates of income tax will normally be found to arise with respect to property taxed in the hands of the trustees, rather than in the hands or the name of beneficiaries. Nevertheless, because of the flexibility it offers, both to settlors and after the trust takes effect to their trustees, the discretionary trust remains in this country a basic and widely employed estate planning instrument for the purposes of the family unit.¹⁶²

¹⁵⁸ As do all discretionary trusts, this raises the difficult drafting issue of how much discretion should be given to the trustees, and conversely how precisely the rights of beneficiaries should be set out. For example, Kessler and Hunter, *supra*, note 135, at 75-76, propose a different kind of protective trust, in which the protected beneficiary's interest is terminable at the trustee's discretion. Cf. *Re Williams*, *supra*, note 149.

¹⁵⁹ This also occurs with a maintenance trust in favour of a single beneficiary if there is a gift over or reversion of any income or capital, as the case may be, which is not given by the trustees to the person to be maintained.

¹⁶⁰ For a comment, see H.E. Brunt, "Where have all the discretionary trusts gone?" (1979) 36 *The Gazette* (Law Society, England) 1092. In England, estate duty was replaced by "capital transfer tax" in 1975, which was replaced by "inheritance tax" in 1986.

¹⁶¹ See further, S.E.K. Hulme, (1976) 5 *Australian Tax Rev.* 134; and L. Shannon and P. Ziegler, "Trust of an Interest in a Discretionary Trust: Is it Possible?" (1986) 60 *A.L.J.* 387. See also L.G.S. Trotman, "The Use of Discretionary Trusts in Tax Planning" (1988) 3 *Canterbury L. Rev.* 291.

¹⁶² See M.P. Roy, "Discretionary Trusts: Civil Law Perspectives" (2003) 51 *Can. Tax J.* 1647. In two articles, "Using Discretionary Trusts in Estate Planning", and "The Discretionary Trust in the Age of 'equity and fairness'", [2012] *J. of Int'l Tax, Trusts & Corporate Planning* [forthcoming], Donovan Waters examines the character and structuring of the discretionary trust, and the impact of recent statutory court powers in many Commonwealth common law jurisdictions to set aside, or invade the funds of these trusts.

Court of Queen's Bench of Alberta

Citation: Lecky Estate v. Lecky, 2011 ABQB 802

Date: 20120215
Docket: ES01 096832
Registry: Calgary

Between:

**The Personal Representatives
The Lecky Foundation
Caroline Frances Lecky, Jonathan Robert Sirling Lecky, Christopher Hartpole Lecky,
Edward Alexander Macmillan Lecky and William Anton Hardinge Lecky**

Plaintiffs

- and -

Euphemia Sarah Ann Lecky

Respondent

Corrected judgment: A corrigendum was issued on February 15, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

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of the
Honourable Madam Justice C. A. Kent**

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1. Background.

[1] These applications concern the estate of John MacMillan Stirling Lecky (Mr. Lecky), who died on February 25, 2003 at the age of sixty-three. Mr. Lecky was an entrepreneur and a philanthropist. During his lifetime, Mr. Lecky obtained both an economics degree from the University of British Columbia, and a law degree from Cambridge University. He began his career as an investment banker in Montreal and went on to become a successful businessman. He founded an oil and gas company, Resource Service Group, and was the owner of Okanagan Helicopters as well as the Bow Valley Club. He was the chairman and principal shareholder of the charter airline Canada 3000, a company which was at one time the second-largest airline in Canada, but became bankrupt immediately following the September 11, 2001 terrorist attacks. Mr. Lecky was also an avid sportsman.

[2] At the time of his death, Mr. Lecky was married to Euphemia "Effie" Sarah Ann Lecky (Mrs. Lecky), and was the father of five children from a previous marriage to Frances Marie-Jeanne Lecky - Caroline (who died in August 2010), Johnathan, Christopher, Edward and Anton. Mr. Lecky was also the stepfather of Poppy, Thomas, and Fred, the three children of Euphemia Lecky from a prior marriage.

A. The Will (attached as Appendix A)

[3] At the time of his death, Mr. Lecky had considerable assets, which are now the object of these proceedings. In his Will, Mr. Lecky names two categories of beneficiaries:

- 1) His wife, Euphemia Sarah Ann Lecky (the primary beneficiary of the Will); and
- 2) The Lecky Foundation.

In accordance with the terms of a Settlement Agreement reached by the parties, Mr. Lecky's children from his first marriage have become a third category of beneficiaries of the Will:

- 3) Caroline Frances Lecky (deceased),
Johnathan Robert Stirling Lecky,
Christopher James Hartpole Lecky,
Edward Alexander MacMillan Lecky,
William Anton Hardinge Lecky (the Lecky Children).

[4] The Personal Representatives and Trustees of the Will (referred to as "the Trustees") are appointed by Mr. Lecky in clause 2(a) of the Will. They are jointly:

- 1) Mrs. Lecky;
- 2) William J. Fowles, Mr. Lecky's lawyer and drafter of the Will; and
- 3) John K. Chan, a chartered accountant and long-serving employee of Mr. Lecky.

- 1) the *amount of the income to be paid* to Mrs. Lecky under the Residual Trust (in which case the Trustees are not required to pay Mrs. Lecky all the income from the Trust); or
- 2) the *timing, manner and amount of each payment* (in which case the Trustees must pay all of the Residual Trust's income to Mrs. Lecky, but may decide when and how much is paid, as long as the total income is paid).

[47] The Trustees say that the requirement to take into account the distributions from the Spousal Trust, as specified in Clause 5(c), could be given no meaning if they were required to pay Mrs. Lecky all the income from the Residual Trust. The Lecky Foundation and the Lecky children are in agreement. They take the position that it is within the discretion of the Trustees to determine whether, when and to what extent income from the Residual Trust ought to be paid to Mrs. Lecky. In their view, the Trustees are under no obligation to pay annually all of that trust's income to Mrs. Lecky.

[48] Mrs. Lecky submits that the Will grants discretion to the Trustees solely to the extent that they may determine the timing, manner and amount of each payment and that based on the language of the Will and the surrounding circumstances, the Trustees are ultimately required to pay her all of the income of the Residual Trust.

A. The Legal Principles

[49] On this application the Court is tasked with interpreting John Lecky's Will to determine the nature and scope of the duties imposed and the powers conferred upon the Trustees. However, the Court cannot exercise discretion on behalf of Trustees. The Court's primary function is to interpret the Will while the function of Trustees is to exercise the discretion vested in them.

[50] As discussed in *McNeil v. McNeil*, 2006 ABQB 636, 408 AR 144 [*McNeil*] at paragraphs 85 and 87, once the nature and scope of those duties and powers have been determined by the Court, it is solely the task of trustees to decide how best to employ the powers bestowed upon them in fulfilling their duties under the Will. The policy reason for this is patent: a testator's intention that his executors and not the court exercise their judgment in administering his estate is to be respected. So long as they act within the scope of their discretion, the Trustees are to be afforded considerable deference.

[51] It is well-established that the Court's main objective in the interpretation of a will is to discover the subjective intent of the testator at the time he or she made the will: see *e.g. Daniels v. Daniels Estate* (1991), [1992] 120 AR 17, 85 DLR (4th) 116, leave to appeal to SCC refused, [1992] 4 WWR 1xix [*Daniels*]. Determining the testator's intent is nevertheless circumscribed by rules regarding the admissibility of evidence.

[52] The jurisprudence dealing with wills and estates has distinguished between two types of evidence: 1) evidence of surrounding circumstances; and 2) direct evidence of the will-maker's



***300 Charlotte F. Gisborne, Louisa Mann,
H. A. Trevelyan and J. H. Trevelyan v. Walter
Joseph Gisborne, Abraham Bass and Others**

Image 1 within document in PDF format.

House of Lords
17 April 1877

(1877) 2 App. Cas. 300

The Lord Chancellor (Lord Cairns), Lord Penzance ,
Lord O'Hagan , Lord Blackburn and Lord Gordon .
1877 April 17

Analysis

Will—Trustees' Discretion—Two Funds—Form of Decree.

Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the Court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the Court will not exercise its ordinary power. The fund so specially provided will be left to the exercise (*bona fide*) of the discretion of the trustees.

A testator (whose wife had, in her own right, property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income, of my real and personal estate and investments, &c., as they shall think expedient to or for the clothing, board, &c., for the

*301 personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee:—

Held, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will.

The absolute discretion and "uncontrollable authority" of the trustees being thus recognised, a declaration in the decree that "their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources will make up," &c., was ordered to be struck out.

But this varying of the decree of the Court below was not to affect the costs of the appeal.

Directions given as to how this part of the decree was to be framed.

THIS was an appeal against a decision of the Lords Justices, which had reversed a previous decision of Vice-Chancellor *Hall* ¹.

The first Appellant was a lady who, since her husband's death, had been judicially declared a lunatic, and the other Appellants were the committees of her person and estate. The Respondents were the executors and trustees and beneficiaries of her late husband's property under his will. The question raised depended on the construction of certain parts of that will, and was, in substance, whether the cost of the maintenance of the lunatic was a primary charge on the husband's property, or upon the property to which she was entitled in her own right under the settlement made on her marriage in June, 1861, and which was said to be of the annual value of £662.

On the 11th of October, 1860, the husband, who had for some time previously been paying for the maintenance of

his wife at an asylum the sum of £6 6s. a week, made his will. By that will he gave his furniture, books, wines, &c., to his executors and trustees, "upon trust to permit my dear wife to have the use and enjoyment thereof during her life:" after her death such articles as were unconsumed to be sold, and the produce thereof to sink into the residue of his personal estate. He devised all his real estate and bequeathed his personal estate unto his brother, Walter Joseph Gisborne and *Abraham Bass*, their heirs, executors, &c., respectively, upon trust to deal with the investments as might in their *302 discretion be found necessary. "And upon farther trust that my said trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate, and of the investment and securities for the time being, as they shall think expedient, to or for the clothing, board, lodging, maintenance, ease, and support, or otherwise for the personal and peculiar benefit and comfort of my dear wife, *C. F. G.*, during her life, whether competent or incompetent to give an acquittance or discharge, at such time and times, and in such proportions and manner in all respects as my said trustees shall think most conducive to her comfort, enjoyment, and convenience, without being liable to account for such payment or application, or pay the same income, or any part thereof, to any other person or persons for the purposes aforesaid, without seeing to its application." There were then directions as to investments and accumulations, and if at the death of the wife there was any unapplied income it was to sink into the residue of the personal estate. And after her death the real and personal estate to be converted into money for the benefit of certain persons specially named; and then legacies were given, the sum of £100 a-piece to the executors for their trouble, and some small legacies to servants. And as to the residue to divide and apportion the same into four equal shares, one to his brother, Walter Joseph Gisborne (one of the executors and trustees), and the rest to other persons specially named.

There was not in the will any allusion to the marriage settlement, or to the property to which it applied. The testator was not at the time of his death entitled to any real estate, but he left personal estate to the value of above £35,000.

On the 6th of June, 1872, *J. H. Trevelyan* (since deceased) as the next friend of *Charlotte Frances Gisborne* (formerly *Trevelyan*), a person of unsound mind, though not then so found by inquisition, instituted a suit against the two executors and trustees of the will of the Rev. *James Gisborne*, praying that it might be declared that *C. F. Gisborne* was entitled to have a provision made for her in the words of the will out of the income of the testator's real and residuary personal estate during her life, and that that annual *303 income was the primary fund for that purpose. This bill was afterwards amended by making the persons interested in remainder under the will parties to the suit. The answer of the executors was filed on the 15th of November, 1872. An inquisition in lunacy was taken on the 23rd of November, and the lady was found lunatic, and an order in lunacy was made allowing the sum of £696 per annum for her support, but without prejudice to any question as to the fund from which the sum was to be raised. Committees were appointed, and they were authorized, pending the suit in Chancery upon the construction of the will, to pay the money out of the funds of the settlement, and should there be any deficiency, the executors of the will were (also without prejudice to any question as to primary liability) to make it up out of the testator's assets.

The cause came on for hearing before Vice-Chancellor *Hall*, on the 10th of November, 1874, when the annual income of the testator's estate was declared the fund primarily liable for the total amount of the maintenance of *C. F. Gisborne*. On appeal, the Lords Justices, by an order dated the 15th of March, 1875, reversed this decision, and instead thereof declared that the trustees had an absolute discretion to apply the whole, or any portion, of the income of the testator's estate for the maintenance of his widow. The present appeal was then brought.

Mr. Davey, Q.C., and *Mr. J. R. Brooke*, for the Appellants:—

There could be no doubt that the intention of the testator was to employ the income of his property for his wife's maintenance. He never even alluded to the property to which she was entitled under the settlement, but he provided for her comfort by his directions to his trustees, and he shewed that he thought they might exhaust the

annual income of his property in obeying his directions, for he spoke doubtfully about the surplus that might then remain to sink into the residue. He did not intend that his residuary legatees should be benefited at the expense of his wife, or of his wife's estate. The fact that he did not mention the income to be derived under the settlement, favoured that construction of his will, and the decisions of the Courts in previous cases were in support of it; for they all proceeded on the principle that *304 what would be most beneficial to the lunatic, in case of recovery, ought to be done: *Re Ashley* ²; *Methold v. Turner* ³; *Rudland v. Crozier* ⁴. And that principle became not the less but the more applicable, where the trustee of one of the funds (the one not the property of the lunatic) was also residuary legatee of that fund, and would be personally benefited by throwing the primary liability on the other fund. In *Foljambe v. Willoughby* ⁵ the same principle was applied where two distinct funds were given for the maintenance of an infant. *Coventry v. Higgins* ⁶, *Winch v. Brutton* ⁷, *Ransome v. Burgess* ⁸, and *Nickisson v. Cockill* ⁹, were also cited.

Mr. *Chitty*, Q.C., and Mr. *E. Rodwell*, and Mr. *Hemming*, Q.C., and Mr. *Dundas Gardiner*, who appeared for the various Respondents, were not called on to address the House.

THE LORD CHANCELLOR (Lord Cairns):—

My Lords, I cannot, after hearing the able argument for the Appellants in this case, entertain any doubt as to the correctness of the decision of the Lords Justices, nor do I think that any one of your Lordships entertains any doubt upon the subject.

My Lords, the question, however much it may be discussed, must really come back to and turn upon the construction of the will which we have before us. No doubt various cases have occurred in the Court of Chancery (to some of which reference has been made) in which, either from the trustees submitting to the Court the question of how they ought to exercise a power or a trust reposed in them, or from questions having been raised by the parties interested as to whether a trust for maintenance

or a similar trust had actually arisen and ought to be acted upon, decisions have been arrived at by the Court which I should be very unwilling to throw the least doubt upon; but those decisions appear to me not at all to touch the present case where, as I shall *305 submit to your Lordships, you have the trustees made the absolute masters of the question, where you have them armed with a complete and uncontrolled discretion, and where they come before you stating that they are prepared to exercise that discretion within the limits within which it is confided to them by the will.

Now, my Lords, the will in this case is that of a husband, the state of health of whose wife was perfectly well known to him, and appears to have been before his mind at the time he was making his will. That wife, by a settlement made upon the marriage, was entitled to property producing an income of a considerable or substantial amount. All those facts must have been perfectly well known to the testator at the time when he made his will, and in that state of facts he gave the residue of his property to the trustees of his will, and after directing its conversion and investment, he continued in these words:—[His Lordship read the words of the will, see *ante*, p. 302.]

My Lords, larger words than those, it appears to me, it would be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have “uncontrollable,” that is, uncontrolled, “authority.” Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal. What is the subject-matter with regard to which they are to exercise this discretion and this authority? The subject-matter is the payment, or the application, not merely of the whole of the income of his real and personal estate, but of such portion only as they deem it proper to expend. It is for them to say whether they will apply the whole, or only a part, and if so what part. And how are they to decide, if they do not apply the whole; what is the part which they are to apply? They are to decide upon this principle, that it is to be such part as they shall think expedient, not such part as shall be sufficient, not such part as shall be demanded by or for the person to be benefited, but such part as they shall think expedient; and upon the question of what is expedient it is their discretion which is to decide.

and that discretion according to which they are to decide is to be uncontrolled.

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And, my Lords, if the trustees come before your Lordships and say to you, "We have considered the matter, and we find this lady is in receipt of an income of her own of £500 a year (or whatever the sum may be); we have taken that into account—we think that, under those circumstances, it is expedient that she should have in addition to that £500 a year such a farther sum as the Master in Lunacy has said would be adequate to provide for every comfort which, according to her state of health, she can fairly enjoy—that is the additional sum which we think it expedient should be provided out of the income of which we are the trustees; that is the portion only of the annual income of our residuary estate which we think it expedient should be applied to the maintenance of this lady." If they came before you and said this, I am obliged to ask myself, and I am obliged to ask your Lordships, what right have I or what right have you to say that that is an exercise of the discretion of the trustees which, in the face of the statement that their discretion and authority is to be uncontrollable, you are entitled to control?

My Lords, it is nothing to say to me if the Court of Chancery had under its management two funds, to one of which the lunatic was absolutely entitled, and which represented her own absolute property, and the other of which was, if I may use the expression, evanescent, and which, so far as she might not benefit by it, would pass away and would not belong to her estate, that in that state of things the Court of Chancery would save the money which was her own property and maintain her out of the other fund. I answer, that may well be the case, that may be the principle (and I make no objection to the principle, I highly approve of it), by which the Court of Chancery, where it has to exercise its discretion, deems it expedient to proceed in the exercise of that discretion. But am I entitled, in dealing with a will such as is now before your Lordships, to set up against the discretion of the trustees, which is pronounced by this will to be uncontrolled and uncontrollable, the rule which the Court of Chancery adopts for the exercise of its own discretion in a similar or in an analogous case? My Lords, to do so would simply be to reverse the words used by the testator, and to say that the discretion which is given to the trustees by this will, and which is stated to be uncontrollable, shall be controlled

*307 and be subjected to that rigid and unbending rule upon which the Court of Chancery acts, (for reasons of which I entirely approve,) upon those occasions when it has to perform the functions which, in this instance, the trustees, and not the Court, have to perform.

Now, my Lords, that is the whole of this case. It appears to me that the Lords Justices have been correct in their exposition of the construction of the will; and agreeing with them in the construction, I must agree with them also in the conclusion at which they have arrived.

My Lords, I cannot but think, when I look at the modification which the Lords Justices have made of the decree of the Vice-Chancellor, that some words have crept into that part of their decree *per incuriam*, because I find that after declaring that the Defendants *Gisborne* and *Bass*, "the trustees of the will of the testator, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for the maintenance of his widow," the modified decree proceeds to add, "and the Defendants, the trustees, by their counsel, concurring, their Lordships approve that the trustees should exercise such discretion by paying and applying such portion only of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff," "will make up the sum of" £400 odd, or £600 odd, as the case may be. My Lords, in a case like this, where the Court of Chancery recognises that the trustees and not the Court, are to be the judges of the *quantum* to be allowed, where the trustees are willing to exercise the discretion which they claim to exercise, and where the Court allows and declares their right to exercise that discretion, I do not understand it to be the habit of the Court to go on and express any opinion as to whether the exercise of the discretion by the trustees is a wise or an unwise exercise of that discretion. I understand that in such a case the Court of Chancery steps aside and recognises the trustees as the persons to exercise the discretion, and in its decree does nothing more than, with regard to payments which may be necessary, act upon the exercise of the discretion of the trustees so made. I shall submit to your Lordships that, without affecting in any manner the costs of this appeal, the decree ought *308 to be varied in this way: After declaring that the Defendants, the trustees of the will, have an absolute discretion to pay and apply the whole or any portion of the income of the testator's estate for

the maintenance of his widow, the decree should proceed thus, "and the Defendants, by their counsel, stating that they are prepared to exercise such discretion by paying and applying such portion of the income of the real and personal estate of the testator as with the income from other sources of the Plaintiff *Charlotte Frances Gisborne*, will make up" the sums specified in the decree, "or other the sum from time to time to be allowed in the lunacy for the clothing" &c., "or otherwise for the personal and peculiar benefit and comfort of the Plaintiff, *Charlotte Frances Gisborne*, it is by consent of the Defendants, the trustees, ordered that the Defendants, the trustees, pay such portions to the Plaintiffs, the committees of the person and estate of the Plaintiff, *C. F. G.* "

My Lords, with that variation I submit to your Lordships, and to your Lordships, that the decree be affirmed, and that the appeal be dismissed; and, unless the parties are prepared to submit to your Lordships any consent to a different judgment, I should propose to your Lordships that the ordinary rule be followed, and the costs be paid by the appellants.

LORD STANFORD:

My Lords, I desire to add but very few words upon the meaning of the trust in the testator's will, agreeing, as I do, with all that has been said by my noble and learned friend upon the subject.

The controversy really resolves itself into a very simple question. It is the choice between two opposite propositions, which I will shortly state. On the one side it is contended that the words of the will containing this trust must be so read as that your Lordships should conclude that the testator's intention was that his wife should be maintained, and her personal and peculiar benefit and comfort secured, entirely out of the proceeds of his estates. It is said that that is the intention of the trust; that though to the trustees every discretion is left as to the amount which would be required for that purpose, they are to take that amount out of the testator's estate. That, my Lords, is the view which is presented on the one side. On the other side the view presented is this: that the testator being minded, above all things, in making his will, to

provide for the maintenance and comfort of his wife, and being cognizant of the fact that she had an income of her own, but probably adverting to the fact that all incomes are precarious, and not knowing what that income might be, either by way of increase or decrease upon the amount at which it stood when he made his will, he determined to provide, placing full confidence in his near relations, whom he appointed trustees, that whatever happened they should take care that out of his income, together with all other sources, a sufficient amount should be provided to secure the personal and peculiar benefit and comfort of his wife which it seems to have been his main object to ensure.

It seems to me, my Lords, that the latter is the natural and reasonable construction of this trust; and I am unable to see any words upon which the former construction can be properly supported. I find no words here from which you can conclude that the testator intended that any other sources of maintenance were to be disregarded, and that absolutely out of his own estate his wife should be supported; because all that he says is that the trustees are, in their discretion and of their uncontrollable authority, to pay and apply the whole or such portion of the income of the estate as they think expedient to the maintenance and support, or otherwise for the personal and peculiar benefit and comfort of his wife. Reading these words in their natural sense, I cannot conceive that any sort of restraint or any sort of condition is imposed upon the trustees. The object to be attained is the support of the wife and her comfort, but the means of obtaining that support are left entirely to the discretion of the trustees. The words are as strong as language can make them. If the testator had desired that a particular fund should be resorted to, he might have said so. If he had desired that any particular sum should be applied, he might have said so; but he seems to have desired solely the attainment of his object: and, subject to that object being attained, he seems to have left it absolutely uncontrolled in the discretion of the trustees how that object should be attained.

My Lords, that being so, it seems to me that the trustees exercised a reasonable discretion in first applying the lady's own income and in supplementing that income in the way which has been done, and which has been approved of. On these grounds, my Lords, I can see no reason for finding fault with the order made by the Lords Justices. I entirely agree with my noble and learned

friend that the latter portion of the order, which appears to introduce into the case some exercise of authority by the Court, had far better be omitted, and that it had better stand in the way that has been suggested.

LORD O'HAGAN:—

My Lords, all the learned Judges who have considered this case seem to have agreed that the authorities cited at the Bar give little aid towards the decision of it. I quite concur with them. The differing intentions of testators are as numerous as testators themselves, and their modes of expressing those intentions are of corresponding variety. We can very rarely, therefore, find a judgment upon the terms of one will which has any governing application to the terms of another. We must look to the frame of the instrument before us, and gather from it, as well as we can, the purpose of the testator, which must strictly regulate our decision.

I venture to differ from the learned Vice-Chancellor in his view of the importance of the contingent beneficial interest of one of the trustees, as bearing on the argument. The testator knew all the circumstances of the parties and the character of the brother, whom he made his trustee, and in whom he vested a discretion so unlimited. He manifestly relied upon that brother's integrity and affection to secure the comfort of his wife, without any corrupt regard to his own possible advantage; and his interest, whatever it was, cannot affect our decision. I think, also, that the principle which decides as between two funds in favour of a lunatic, according to his greater interest in one of them, has no relevancy to this case. It must be ruled by the intention imputable to the testator—that intention, if clear, must prevail against such a principle, however that principle may be applicable in other circumstances. As was said by the Lord Chancellor in *In re Ashley* ¹⁰ *311 the ruling must be in favour of the view which is for the benefit of the lunatic, if it be not opposed to the will. The real question is, What was the will? what the extent of the discretion thereby vested in his trustees by the testator?

On that question, I feel constrained to hold that the judgment of the Lords Justices ought to be affirmed. The words “in their discretion and of their uncontrollable

authority” are as large in their operation as words well can be: they govern the subsequent portions of the clause which they commence, and taken in connection with the words which follow—“as they shall deem expedient”—they appear to me to make the power of decision absolute, and to authorize the trustees to consider and judge, conclusively, as to expediencies of every kind. It seems to me, also, that a reasonable question of expediency did arise with reference to the possession of property by the lunatic, of which the testator was well aware, as affecting the duty of the trustees in determining on the amount of the contribution to be made from the estate which they administer; and on that question their decision has not been, in my opinion, at all unreasonable. I see no reason for limiting the discretion of the trustees, or in any way quarrelling with the mode in which it been exercised.

I am therefore of opinion that the decree appealed from should, with the modification which has been proposed by the noble and learned Lord on the woolsack, be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. In the unfortunate circumstances in which the testator's wife was at the time when he was making his will, it was a very sensible thing of his adviser to say: The best thing you can do is to select your trustees carefully and prudently, so as to have trustees in whom you can place perfect confidence, and then give them uncontrolled discretion as to how the income shall be applied for the benefit of your wife and for her personal comfort. If that was the advice that was given to him, it seems to me that the words he has used sufficiently carry out that intention. I do not intend to go into any *312 criticism of the words, except to say that they seem to me to express as strongly as any words I could myself devise, even now, when I have understood that there is a difficulty about it, that there was to be uncontrollable authority and discretion in the trustees to apply such portion of the income as they might think expedient for the benefit of the wife and her personal comfort. And, my Lords, what they have done and are prepared to do is certainly within the scope of that authority. As far as my opinion, speaking as an individual, goes, I think it is a very discreet arrangement on their

COURT OF APPEAL FOR ONTARIO

McKINLAY, CATZMAN AND GALLIGAN J.J.A.

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BETWEEN :)	
)	
WALTER FOX)	
)	Bernard L. Eastman, Q.C.
Appellant)	and Cindy Cohen for the appellant
(Applicant))	
)	Rodney Hull, Q. C. and Ian Hull
- and -)	for the respondent Miriam Fox
)	
MIRIAM FOX, Executrix of)	Sandra A. Forbes for the respondents
the Estate of Ralph Fox,)	Ralph James Fox and Shayne Melissa Fox
deceased, and in her personal)	
capacity, RALPH JAMES FOX)	
and SHAYNE MELISSA FOX)	
)	Heard: October 10 and 11, 1995
Respondents)	
)	

GALLIGAN J.A. :

Walter Fox is a lawyer. He is the only child of Miriam Fox and the late Ralph Fox. Ralph made his will in 1961 when Walter was 20 years of age and still a student. Ralph died in 1969, two years after Walter was called to the bar. Walter married a few months before his father's death. He has two children from this marriage, a son and a daughter. Both were born after Ralph died. By his will Ralph appointed Miriam as his sole executrix.

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advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

The discretion conferred upon the trustee is absolute.

After a review of a number of leading cases, the trial judge concluded that because she did not find *mala fides* on Miriam's part, the exercise of her discretion had been a proper one.

The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is *Gisborne v. Gisborne* (1877), 2 A.C. 300 (H.L.). It stands for the proposition that so long as there is no "*mala fides*" on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

The courts, however, have not always equated *mala fides* with fraud. I am spared an extensive review of authority by a very learned paper written by Professor Maurice Cullity, *Judicial Control of Trustees' Discretions* (1975), 25 U. of Toronto L.J.

99. I think it can safely be said in the light of Professor Cullity's analysis of the authorities that some conduct which does not amount to fraud will be categorized as *mala*

fides so as to bring it within the scope of judicial supervision. I am in respectful agreement with Professor Cullity when he expresses the opinion, at p. 119, that the term *mala fides* is sufficiently broad "to make the use of the term undesirable." Nevertheless, the term is still used. While I am not bold enough to attempt to define its outside limits, I think the cases do support Professor Cullity's conclusion at p. 117 that the courts may interfere if a trustee's decision is influenced by extraneous matters. I make particular reference to the judgment of Steele J. in *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 at p. 379:

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass* ... at p. 41 Ch., p. 203 All E.R., as being applicable to the court's review of the exercise of such power:

To sum up the preceding observations, in our judgment, where by the terms of a trustee ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. [Emphasis added.]

In this case, in my view, the fact that her son intended to marry a gentile was completely extraneous to the duty which the will obviously imposed upon Miriam, namely to be concerned about the welfare of her grandchildren. This extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term.

The circumstances bear some similarity to those in *Klug v. Klug*, [1918] 2 Ch. at p. 67 (Ch. D.). In that case a trustee refused to exercise a discretion allowing her to pay money for the advancement or benefit of her daughter because her daughter had married without her consent. In those circumstances Neville J. held at p. 71:

...[I]t is the duty of the Court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct that a sum be raised out of the capital sufficient to pay...

The duty which rested with the trustee was to pay monies for the advancement or benefit of the children if the trustee saw fit to do so. While Neville J. did not specifically state that the mother's displeasure at her daughter's marriage was an extraneous circumstance, it seems to me that the situation was analogous to this one. In the context of all the facts, disapproval of the marriage was extraneous to the child's advancement or benefit. The court interfered with the trustee's discretion in that case and I think this court ought to do the same.

There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in *Canada Trust Co. v. Ontario Human Rights Commission* (1990), 74 O.R. (2d) 481 at pp. 495-96:

To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.

To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

Court of Queen's Bench of Alberta

Citation: McNeil v. McNeil, 2006 ABQB 636

Date: 20060905
Docket: 0501 07369
Registry: Calgary

Between:

Marie Amanda McNeil

Applicant

- and -

Bruce Harold McNeil, Frederick P. Mannix,
Bruce Harold McNeil and Frederick P. Mannix,
as Executors and Trustees of the Estate of Frederick Harold McNeil,
Deceased and the Estate of Frederick Harold McNeil

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E.C. Romaine

Introduction

[1] The applicant, a contingent beneficiary of a residuary trust set up under the will of her father, challenges the decision made by the trustees to discontinue distributions to her from the trust and not to establish a reserve for her benefit. The primary issue is whether this Court should intervene in the trustees' exercise of their discretion.

Facts

[2] The applicant, Marie Amanda McNeil ("Marie"), is a beneficiary under a residuary trust established by the will of her late father Frederick Harold McNeil ("Frederick"), who died on September 26, 1995. The trustees of the residuary trust (the "Trustees") appointed under the will are Marie's brother Bruce McNeil ("Bruce") and Frederick P. Mannix ("Mannix").

[3] Marie was diagnosed with multiple sclerosis in 1989. Since then, she has suffered many of the symptoms of this progressive disease.

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- (c) Although a portion of the payments made to Marie was to cover the premiums payable on her life insurance, she unilaterally and without advising the Trustees cancelled the policy sometime in 1997 and applied that portion of the estate payments to other expenses;
- (d) It was not until Marie's Affidavit of May 12, 2005 and her cross-examination thereon in October 2005 that she disclosed that she had used the proceeds of the investment portfolio Marion had gifted to her to pay out a mortgage loan on her Burlington condominium. According to Marie, this loan was taken out to pay to her husband a portion of the equalization payment she had agreed to in the separation agreement, as well as for renovations to the condominium and to contribute to her RRSP;
- (e) Marie's purchase of the Turks and Caicos property, her sale of the Burlington condominium and her plans to maintain two homes, one of them not in Canada, all were pursued without any discussion with or disclosure to the Trustees, despite the substantial contribution the estate had made to renovations to the Burlington home. It is still difficult to determine what Marie intends to do about her living accommodations. While her counsel indicated in December 2004 that Marie was abandoning her plans to build a home in the Turks and Caicos, there are contrary and inconsistent statements about this in the more recent affidavits and cross-examinations. Also troubling is that it remains difficult to determine the value of the property from the inconsistent information provided by Marie;
- (f) Marie still has not provided satisfactory information on her total financial picture. Though she has recently provided some further information, she previously had failed to disclose details of gifts from Marion and other family members, a full picture of her assets and debts, the true amount of her Mary Kay Cosmetics retirement income and her consulting income from Mary Kay Cosmetics. She has also failed to provide adequate receipts, a complete personal net worth statement in the form requested or meaningful budget information. These failures to respond, along with problems with and deficiencies in the responses that have been received, have concerned the Trustees.

Issues

[77] I agree with the statement of issues formulated by the Trustees. The essential question is whether the Trustees, in exercising their discretion under the will, have misinterpreted the will such that it is appropriate for this Court to intervene in the exercise of such discretion.

[78] The specific questions under this issue are:

- (a) What did Frederick intend with respect to whether and to what extent the Trustees should consider:
 - (i) non-estate resources and means available to Marie for meeting her living expenses, including her assets, her disposition of any assets (by gift or by expenditure), and her sources of income and other financial support;
 - (ii) what, in their assessment, are reasonable amounts for living expenses; and
 - (iii) whether payments from the estate should permit or enable savings or other accumulation of assets;
- (b) What did Frederick intend with respect to whether and to what extent the Trustees may request from Marie disclosure of her financial circumstances, including her income, expenses, assets, liabilities, dispositions of assets (by gift or by expenditure), and her rights to spousal support and matrimonial property?

[79] A collateral issue is whether and to what extent evidence concerning Frederick's intent from sources other than the will is admissible.

[80] The next issue is whether Bruce's status as a residuary beneficiary disqualifies him from serving as a personal representative and Trustee.

[81] The final issue is whether the Trustees, having made their decision about a reserve, are able to revisit it, particularly in view of additional information provided by Marie.

Analysis

Trustees' discretion

[82] When a beneficiary challenges a personal representative's or trustee's exercise of discretion, the first task of the Court is to determine from the will the nature and scope of the duties imposed and powers conferred upon such personal representative or trustee. Each case must be decided on the basis of the particular will under review. The question is what the testator intended; see, for example, *Kmiec v. Kmiec* (1992), 45 E.T.R. 94 at paras. 10 and 14-16 (Ont. Gen. Div.).

[83] It is the duty of the Court to ascertain the testator's intention through the utilization of common sense and a determination of the plain and ordinary meaning of the wording of the will itself; see, for example, *Lucas-Tooth v. Lucas-Tooth*, [1921] A.C. 594.

[84] When, as in this case, the discretion afforded to the trustees is broad and relatively unfettered, the Court should be reluctant to intervene unless it can be shown that the trustees acted in bad faith, are guilty of obvious misconduct, were not authorized to act in the manner

they did under the will, or took into account irrelevant considerations. See, for example, D.W.M. Waters, *Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005) ("Waters") at p. 933, 1098; *Re Y. (C.F.)*, (2001), 291 A.R. 303, 2001 ABQB 470 at para. 16; *Re Powell Estate*, 2002 PEISCTD 81 at para. 16; *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 at 379 (Ont. Gen. Div.); *Re Atwell Estate* (1998), 19 E.T.R. (2d) 234 at para. 7 (Ont. Gen. Div.).

[85] Construction of a will does not permit the Court to substitute its own judgment for that of the individuals appointed to carry out assessment and decision-making duties under the will.

[86] As discussed in Waters at p. 933, I must first ascertain as a matter of construction of the will the task to which the discretion of the Trustees is attached. In this case, at this point in time, that task, as set forth in paragraph 3(j) of the will, is to "use reasonable efforts to assess the degree to which Marie may during her lifetime be or become dependent upon the provisions of this paragraph 3(j) for adequate maintenance and support or to meet the necessities of contingencies or circumstances affecting Marie." In performing this task, the Trustees were to consult with Marie to the extent reasonably practicable. If the Trustees determined it was warranted, they were directed to establish a reserve to be held and administered by them for Marie's benefit during her lifetime. The will specifies that the Trustees "in their discretion" may terminate or reduce the reserve from time to time upon further assessment and that they may encroach on the capital of such reserve to ensure Marie's "adequate maintenance and support or to meet the necessities of contingencies or circumstances" affecting her.

[87] Marie submits that the discretion of the Trustees is not unfettered, given the initial language of paragraph 4.1 of the will which grants such absolute and unfettered discretion "(u)nless otherwise expressly and specifically provided herein". I do not view such language as fettering the discretion of the Trustees to do the task imposed on them by paragraph 3(j). Rather, the task itself delineates their discretion. In other words, the Trustees must make an assessment of how dependent Marie is on the estate for adequate maintenance and support. They cannot merely decide that enough has been paid to Marie from estate funds and that the remainder, for fairness reasons, should enure to the residuary beneficiaries. That would be a failure to act within the scope of their discretion. Conversely, they cannot decide that Marie is entitled to generous or unlimited maintenance and support; the words of paragraph 3(j), "adequate maintenance and support", must guide them. Unless the Trustees step outside the scope of the task allocated to them, their discretion in carrying it out is broad and unfettered and should be afforded considerable deference.

[88] As Waters also outlines at p. 933, the Court will intervene in trustees' decisions if:

- (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

unreasonable, outside the scope of their authority or made on the basis of irrelevant considerations.

Savings or other accumulation of assets

[106] The Memorandum makes clear that Frederick did not intend that Marie's estate would be funded by distributions from his estate. The will, read as a whole and supplemented by the Memorandum, makes it clear that payments from the estate are not to be used by Marie to accumulate savings or to acquire additional assets, nor even to replace the need to use those assets to meet her daily and special needs.

[107] It is troubling that Marie unilaterally terminated her life insurance payments and failed to inform the Trustees of that decision at a time when they were funding such premiums consistent with Frederick's instructions in the Memorandum. While she did advise them that she had changed the premium, she did not advise them of the complete elimination of the policy until much later. She cannot now attempt to remedy the situation and build an alternate pool of assets in her own estate through either the use of estate funds or payment of expenses from such funds rather than from her own assets.

Disclosure of financial information

[108] Since it is clear from the wording of the will and the Memorandum that Frederick intended that the Trustees consider Marie's non-estate assets in determining her level of financial need, the Trustees had a duty to seek such information. In the circumstances, including unreasonable resistance or refusal from Marie in meeting their initial enquiries and frequent after-the-fact notification of major expenditures, nothing that they requested from Marie by way of information-gathering was unreasonable or overly onerous. Contrary to Marie's interpretation of the will, the estate did not exist solely for the benefit of her and Marion and the Trustees were, and are, required to be diligent and prudent in exercising their discretion.

[109] In fact, the Trustees have been patient, sensitive and even apologetic in making their enquiries. Marie complains in part about the Trustees' failure to talk to her after the April 2004 letter before making their June decision, but she had been quite clear in earlier correspondence that she was reluctant to discuss her requirements with the Trustees other than in writing.

Conclusion

[110] In summary, I see no reason to interfere with the exercise by the Trustees of their discretion under the will. Even if I had the jurisdiction to do so, I would not in this case, as it appears to me that the Trustees have acted diligently and responsibly to fulfill their responsibilities in the face of a considerable lack of co-operation by Marie.