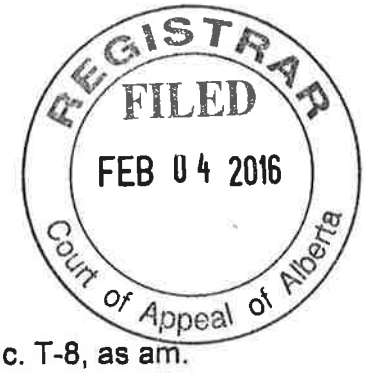
Registrar's stamp:



COURT OF APPEAL FILE NUMBER: 1603-0033AC

TRAIL COURT FILE NUMBER: 1103 14112

REGISTRY OFFICE: Edmonton

IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am.

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

INTERESTED PARTY/APPLICANT: MAURICE STONEY

STATUS ON APPEAL: APPELLANT

DEFENDANT/RESPONDENT: ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust.

STATUS ON APPEAL: RESPONDENTS

DOCUMENT: WRITTEN ARGUMENT ON APPLICATION FOR A FILING EXTENSION

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WRITTEN ARGUMENT ON APPLICATION TO EXTEND TIME

I. FACTS

1. On September 2 and 3, 2015, Mr. Justice Thomas heard an application by the Public Trustee to deal with disclosure of information including Rule 5.13 and also costs payable to the Public Trustee: Affidavit of Dana Campbell.

2. On December 17, 2015 Mr. Justice Thomas issued judgment. The parties listed on this judgment did not include counsel for Maurice Stoney although part of this judgment addresses issues related to Maurice Stoney: December 17, 2015 Judgment [Tab 1]

3. On January 11, 2016, counsel for the Sawridge Trustees requested clarification of Mr. Justice Thomas's decision of December 17, 2015 and provided a copy of this request to counsel for Maurice Stoney. This was the first information received about this decision: Affidavit of Dana Campbell.

4. On January 14, 2016, Mr. Justice Thomas provided a letter to counsel declining to respond to the Sawridge Trustees and this letter listed and was sent to counsel for Maurice Stoney: Affidavit of Dana Campbell.

5. On January 15, 2016 Appeal 1603-0026AC of Mr. Justice Thomas's judgment was filed by Catherine Twinn, a Sawridge Trustee: Affidavit of Dana Campbell.

6. On January 18, 2016, Appeal 1603-0029AC of Mr. Justice Thomas's judgment was filed by the Public Trustee: Affidavit of Dana Campbell.

7. On January 21, 2016, the Sawridge Trustees submitted a proposed distribution: Distribution Scheme Letter and Tab B Sawridge Band Inter Vivos Settlement Declaration of Trust. [Tab 2]

8. The Appeal of Maurice Stoney was filed on January 25, 2016: Affidavit of Dana Campbell.

II. EXTENSION OF TIME TO APPEAL

9. An extension "of time to appeal is governed by the principles in *Cairns v. Cairns*, [1931] 4 DLR 819 at pp. 826-7 (Alta SC (AD))". These factors are given as a guide:

> (a) a *bona fide* intention to appeal held while the right to appeal existed;
>
> (b) an explanation for the failure to appeal in time that serves to excuse or justify the lateness;
>
> (c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;
>
> (d) the applicant must not have taken the benefits of the judgment under appeal; and
>
> (e) a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.
>
> *Attila Dogan Construction and Installation Co. Inc. v. AMEC Americas Limited*, 2015 ABCA 206, paras. 4-13. [Tab 3]

10. It is submitted that the Applicant intended to appeal while the right to appeal existed, that there is an explanation about the failure to appeal in time particularly in the circumstances where the Applicant was not listed as a party on the judgment but was listed on the reconsideration application/letter, there is an absence of serious prejudice because there are already two other appeals of this same judgment by the Public

Trustee and by Sawridge Trustee Catherine Twinn, and the applicant Maurice Stoney has not taken any benefit from the judgment. It is submitted that the Applicant has a reasonably arguable appeal: Affidavit of Dana Campbell.

11. At paragraph 35 of the December 17, 2015 judgment, Mr. Justice Thomas determined without any notice of the issue to counsel for Maurice Stoney:

> 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 a better forum and now that the Federal Court has commented on the SFN membership process in *Stony v. Sawridge First Nation*, there is no need, nor is it appropriate for this Court to address this subject. ...
>
> *1985 Sawridge Trust, supra.*, para. 35. [Tab 1]
>
> *Stoney v. Sawridge First Nation*, 2013 FC 509. [Tab 4]

12. The issue before Mr. Justice Thomas on September 2 and 3, was disclosure of documents from the Sawridge First Nation and not the matters in *Stoney v. Sawridge First Nation, supra.* At paragraph 54 of his judgment [Tab 1] Mr. Justice Thomas determines that the Court has no role in evaluating band membership and held that this was a matter in the jurisdiction of the Federal Court yet it is submitted that this issue is a completely separate legal issue of who is or is not a beneficiary and is fundamental to determining whether the definition of a beneficiary is void. This is unrelated to the judicial review in the *Stoney* decision which was a review of an administrative process in 2012-3.

13. It is submitted that the issue of the meaning of the beneficiary definition in the April 15, 1985 *Inter Vivos* Trust is a distinctly different legal question than the matters addressed in the *Stoney* judicial review which was concerned with a membership

application based on membership rules in or about 2012 relying on Sawridge First Nation's being removed from the membership provisions of the *Indian Act*, after the time frame for the April 15, 1985 Sawridge Inter Vivos Trust.

14. The 1985 Trust provides:

> (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, that any person who shall become enfranchised would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions,

15. These stipulations defining the beneficiaries are unconstitutional since they purport to retroactively apply the *Indian Act* as it stood two days before the *Constitution Act, 1982* came into force. It is submitted that this was unconstitutional: *Constitution Act, 1982*. [Tab 5]

16. Further, it is submitted that as of April 17, 1982, the *Indian Act* and each First Nation under the *Indian Act*, including Sawridge First Nation, was constitutionally required to comply with the treaty and aboriginal rights of aboriginal peoples. Maurice Stoney and others were members of the Sawridge First Nation, all under *Treaty No. 8*, who were taken off the membership list of Sawridge for various reasons possibly permitted under provisions of the *Indian Act*, which were recognized as unconstitutional and corrected by Bill C-31 effected 1985 and Bill C-3 effective 2010. The *Constitution Act, 1982*, section 35 required recognition of all treaty rights. Maurice Stoney was an

adherent to *Treaty No. 8* resulting in him being required to be recognized as a member of Sawridge Band on April 17, 1982: *Treaty No. 8* [Tab 6]

17. Even without the provisions of *Treaty No. 8* and the *Constitution Act, 1982,* section 35, being applied to the definition of beneficiary in the April 15, 1985 *Inter Vivos* Trust, Canadian Courts have held that such forms of beneficiary designation which exclude women and "enfranchised" Indians are void on the ground of public policy: *Canada Trust Co. v. Ontario Human Rights Commission*, 1990 CanLII 6849, pp. 20-24. [Tab 7]

18. Accordingly it is submitted that there is a reasonably arguable appeal regarding the jurisdiction of Mr. Justice Thomas to exclude beneficiaries from challenging the 1985 Sawridge Trust without any notice or opportunity to address the Court on the issue.

III. ORDER REQUESTED

19. It is respectfully submitted that an Order extending time to appeal should be granted without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd day of February, 2016.

DLA Piper (Canada) LLP.

Per: _____
Priscilla Kennedy
Solicitor for Maurice Stoney

TABLE OF AUTHORITIES

1. *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2015 ABQB 799.

2. Distribution Scheme Letter and Tab B Sawridge Band Inter Vivos Settlement Declaration of Trust.

3. *Attila Dogan Construction and Installation Co. Inc. v. AMEC Americas Limited*, 2015 ABCA 206.

4. *Stoney v. Sawridge First Nation*, 2013 FC 509.

5. *Constitution Act, 1982*.

6. *Treaty No. 8*.

7. *Canada Trust Co. v. Ontario Human Rights Commission*, 1990 CanLII 6849.

Tab 1

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

Table of Contents

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

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

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

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and

2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

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

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

Task 4 - General and residual distributions

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

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

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

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

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

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

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

a) be distributed to the members of Pool 1, and

b) be reserved in Pool 2 for future potential Pool 2 recipients.

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

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

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

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

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

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

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
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.
(McLennan Ross LLP)
For Catherine Twinn

Tab 2

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January 21, 2016

File No.: 551860-1

DELIVERED

COPY

The Honourable Mr. Justice D.R.G. Thomas
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

Dear Sir:

RE: 1985 Sawridge Trust - Action No. 1103 14112
December 17, 2015 – Reasons for Judgment
Distribution Scheme

Please find enclosed herein the proposed distribution arrangement for the 1985 Sawridge Trust, as approved by the Sawridge Trustees, in accordance with your Reasons for Judgment dated December 17, 2015.

Yours truly,

Dentons Canada LLP

DORIS C.E. BONORA
DCEB/sh

Yours truly,

Reynolds, Mirth, Richards & Farmer LLP

MARCO S. PORETTI
MSP/SH

Enclosures

c.c. Hutchison Law
Attn: Janet Hutchison (w/enclosures)
Eugene Meehan (w/enclosures) (*EMAIL*)

cc E. Molstad, Q.C., Parlee McLaws LLP (w/enclosures)
(Sawridge First Nation)

cc P. Kennedy, DLA Piper LLP (w/enclosures)

cc K. Platten, Q.C., McLennan Ross (w/enclosures)
(Catherine Twinn)

cc N. Cumming, Q.C/J. Kueber, Q.C., Bryan & Co. (w/enclosures)
(Four Trustees)

3:07

RE[illegible]
JAN 21 2016
DLA Piper (Canada)

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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

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 given 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

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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,

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:

NAME

ADDRESS

A. Settlor

B. Trustees:

NAME

ADDRESS

1.

NAME

ADDRESS

2.

NAME

ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Tab 3

In the Court of Appeal of Alberta

Citation: Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited, 2015 ABCA 206

Date: 20150618
Docket: 1501-0068-AC
Registry: Calgary

Between:

Attila Dogan Construction and Installation Co. Inc.

Applicant

- and -

AMEC Americas Limited, formerly AMEC E&C Services Limited and Agra Monenco Inc.

Respondents

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

Application to Extend Time to File Appeal

Reasons for Decision of
The Honourable Mr. Justice Frans Slatter

[1] The applicant seeks an extension of time to appeal the decision reported as ***Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.***, 2015 ABQB 120. That decision a) denied an application for an adjournment, b) granted summary judgment dismissing the claim, and c) granted summary judgment on the counterclaim.

[2] This decision was released on February 18, 2015, and under R. 14.8(1)(b) and (2)(a)(iii) the time to appeal it expired one month later on March 18, 2015. Under R. 13.4(1) a month is measured from the numerical date in one month to the equivalent numerical date in the next month, so that the expiry of the appeal period is consistent regardless of how long a particular calendar month may be.

[3] In this case out of province counsel filed the Notice of Appeal two days late, on March 20, 2015, apparently as a result of the mistaken assumption that a "month" in the Alberta Rules means "30 days".

[4] Applications to extended time to appeal are governed by the principles in ***Cairns v Cairns***, [1931] 4 DLR 819 at pp. 826-7 (Alta SC (AD)). It is often said that ***Cairns*** sets out a "four part test", but that decision does not actually set out any "test", and it mentions more than four factors:

(a) a *bona fide* intention to appeal held while the right to appeal existed;

(b) an explanation for the failure to appeal in time that serves to excuse or justify the lateness;

(c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;

(d) the applicant must not have taken the benefits of the judgment under appeal; and

(e) a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.

These factors guide the Court in exercising its discretion to extend the time to appeal, but they do not set rigid requirements, and they do not override the Court's general discretion to extend time in appropriate cases. As noted in ***Cairns*** at p. 829 ". . . this Court considers that it has a free and unfettered discretion to do what justice requires to be done between the parties having regard to the circumstances of each particular case".

[5] Since there is an overriding discretion in the Court to extend the time to appeal, it is not necessary for an applicant to satisfy all components of the ***Cairns*** test: ***Stoddard v Montague***, 2006 ABCA 109 at para. 8, 412 AR 88. It is more accurate to say that if the applicant does satisfy all the components of the ***Cairns*** test, it is highly likely that an extension will be granted. Nevertheless, the appropriate approach is to address the ***Cairns*** factors first: ***Royal Bank of Canada v Morin*** (1977), 6 AR 341 at para. 8, 4 Alta LR (2d) 127 (App Div). However, in the end the ***Cairns*** factors and the surrounding circumstances must be considered and weighed collectively in deciding whether an extension of time is warranted.

[6] While the appellant immediately expressed an intention to appeal, the respondents argue that it was not *bona fide*. The respondents argue that the appeal is just another attempt by the appellant to delay these proceedings, given that the appellant indicated it would appeal regardless of the reasons why summary judgment was granted. This complex litigation has been underway for many years, and it has been in the Court of Appeal several times. The amounts involved are very large: the judgment on the counterclaim was in excess of $11.6 million. It is not necessarily bad faith for a litigant to express an intention to appeal an adverse result in any event, if the consequences of the judgment are very serious for that litigant. In the circumstances, it is not possible to say that the appellant is not appealing *bona fide*.

[7] The reason offered for the lateness of the appeal is that counsel miscalculated the time. The respondents argue that errors by counsel do not qualify as an acceptable explanation, citing ***Adderley v 1400467 Alberta Ltd.***, 2014 ABCA 291 at para. 12 and ***Schulte v Alberta (Workers' Compensation Appeals Commission)***, 2015 ABCA 148 at para. 14. There is no rigid rule that an error by counsel is not a sufficient explanation: ***Royal Bank v Morin*** at para. 17; ***Hudson v Bower*** (*sub nom. **Shewchuk, Re***) (1968), 67 WWR 564 at pp. 564-5, 1 DLR (3d) 288 (Alta SC (App Div)); ***L.C. v Alberta***, 2009 ABCA 77 at para. 8, 448 AR 293; ***Jackson v Canadian National Railway Co.***, 2015 ABCA 89 at para. 7; ***Pont Viau (Cité) v Gauthier Manufacturing Ltd.***, [1978] 2 SCR 516 at p. 527. Calculating "one month" may not be obscure or debatable, but human error in the legal system is inevitable, and the ***Cairns*** test does not categorically reject it as an adequate explanation.

[8] It is true that ***Cairns*** contemplates "some very special circumstance which serves to excuse or justify" the late appeal. ***Cairns***, however, was a custody dispute engaging the interests of a child: finality was of prime importance, and the procedural history was unsatisfactory. While some acceptable explanation for the lateness is required, the reason, considered in isolation, need not be "very special". The source of the error must be weighed with all of the other factors, such as the length of the delay, prejudice from granting or denying the application, and all the other relevant considerations.

[9] In many cases of a short delay of a day or two, weighing the various components of the ***Cairns*** test will result in the Court exercising its discretion to grant an extension: ***RIC New Brunswick Inc. v Telecommunications Research Laboratories***, 2010 ABCA 75 at para. 1.

[10] The respondents argue that ***Cairns*** emphasizes that the successful party at trial has a vested interest in its judgment which should not easily be displaced. There is undoubtedly some disadvantage or "prejudice" to the respondents by reason of the appeal. Much of that prejudice is, however, by reason of the appeal itself, and not by reason of the two days of delay that are at issue here. The respondents were aware that an appeal was being launched, and did not do anything in reliance on the judgment which resulted in prejudice as a result of the delay itself. The appeal does not operate as a stay of a judgment, and any incremental prejudice to the respondents by extending the time to appeal is not decisive.

[11] The appellant argues that there is a prospect for success on the appeal, and proposes to raise several grounds of appeal. The respondents argue the appeal is without merit and that the time for appeal should not be extended. The issues in the lawsuit are complex, as indicated by the 152 paragraph reasons of the case management judge. Whether the appeal is without merit is for a panel of this Court to decide. It is sufficient for the present purposes to conclude that the appeal is arguable.

[12] The respondents argue that the appellant is not entitled to appeal the denial of the adjournment unless permission to appeal is obtained under R. 14.5(1)(b). The appellant has now indicated that it does not propose to pursue any grounds of appeal arising from the denial of the adjournment.

[13] In conclusion, the time to appeal is extended two days, to March 20, 2015. Since the appellant has now applied for and received an indulgence from the Court, it is incumbent on the appellant to prosecute the appeal with special diligence. In that respect:

(a) Rule 14.16(3) directs that the Appeal Record and Transcripts be prepared promptly and filed and served forthwith. Some of the required transcripts appear to have been certified by Transcript Management in September, 2014, and the last of them was certified on April 10, 2015, but they were not filed with the Registrar until June 10, 2015. Just because the respondents have challenged some aspect of the appeal is no justification for disregarding all the other provisions in the Rules. Since counsel who appeared on the application was not retained to file the Appeal Record, Ontario counsel who has conduct of this file is to write to the Registrar by June 30, 2015 explaining the delay in filing the Appeal Record and Transcripts.

(b) The Appeal Record is to be completed, filed and served by June 30, 2015.

(c) The appellant's factum is to be filed and served by July 31, 2015.

(d) This appeal should be scheduled for oral argument now. Before June 30, 2015, counsel must select and book an appropriate date for oral argument, in consultation with the Registrar, or contact the Court for further directions.

[14] Normally, the successful applicant would be entitled to costs. However, since the need for this application arose as a result of an error of the appellant, there will be no costs to either party.

Application heard on June 11, 2015

Reasons filed at Calgary, Alberta
this 18th day of June, 2015

Slatter J.A.

Appearances:

C. Amsterdam
for the Applicant

D. Tupper
for the Respondents

Tab 4

Federal Court  Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

[2] The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

[3] The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was

not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

[4] In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 – 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

[5] Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

[6] After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their

character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

[7] In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

[8] The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

[9] I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

[11] A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic

entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[12] The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

[13] While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

[14] This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

[15] I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

[16] Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v Canada*, [2000] FCJ no 873, 258 NR 246.

[17] It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

[18] The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[22] The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

[23] For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

APPEARANCES:

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Edward H. Molstad	FOR THE RESPONDENT

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Tab 5

CanLII

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Current version: in force since Apr 17, 1985

The Constitution Act, 1982

Citation: *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental

2. Everyone has the following fundamental freedoms:

freedoms

(*a*) freedom of conscience and religion;
(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(*c*) freedom of peaceful assembly; and
(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies 4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in special circumstances (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies 5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and
(*b*) to pursue the gaining of a livelihood in any province.

Limitation (3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of

conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure 8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment 9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention 10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;
(*b*) to retain and instruct counsel without delay and to be informed of that right; and
(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters 11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;
(*b*) to be tried within a reasonable time;
(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(*e*) not to be denied reasonable bail without just cause;
(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of

sentencing, to the benefit of the lesser punishment.

Treatment or punishment 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada 16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick 16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of 17. (1) Everyone has the right to use English or French in any debates

Parliament

and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records **18.**

(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament **19.**

(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions **20.**

(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions **21.**

Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved **22.**

Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction **23.**

(1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that

instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and freedoms not affected by Charter 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities 30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended 31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter 32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation 34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II
RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada" (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Commitment to participation in constitutional conference 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

PART III
EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial

governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART IV
CONSTITUTIONAL CONFERENCE

37.

PART IV.I
CONSTITUTIONAL CONFERENCES

37.1

PART V
PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50.

51.

PART VII
GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act*followed by the year and number, if any, of its enactment.

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

[Repealed]

54.1

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act **57.** The English and French versions of this Act are equally authoritative.

Commencement **58.** Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Commencement of paragraph 23(1)(*a*) in respect of Quebec **59.** (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec (2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

Repeal of this section (3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations **60.** This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References **61.** A reference to the "*Constitution Acts, 1867 to 1982*" shall be deemed to include a reference to the "*Constitution Amendment Proclamation, 1983*".

SCHEDULE TO THE CONSTITUTION ACT, 1982

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." (2) Section 20 is repealed.	Manitoba Act, 1870

3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the*Constitution Act, 1871*."	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42		Saskatchewan Act

	(Can.)		
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor:	Newfoundland Act

		"3. This Act may be cited as the *Newfoundland Act*."	
22.	British North America (No.2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: "3. This Part may be cited	Constitution Act (No. 1), 1975

		as the *Constitution Act (No. 1), 1975*."	
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

Tab 6

Indigenous and Northern Affairs Canada

Treaty Texts - Treaty No. 8

Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.

LAYOUT IS NOT EXACTLY LIKE ORIGINAL
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Order In Council Setting Up Commission for Treaty 8

P.C. No. 2749

On a report dated 30th November, 1898, from the Superintendent General of Indian Affairs, stating with reference to his report of the 18th June, 1898, upon which was based the Minute of Council approved on the 27th of the same month, authorizing the appointing of Commissioners to negotiate a treaty with the Indians occupying territory to the north of that already ceded and shown in pink on the attached map, that in that report it was set forth that the Commissioner of the North West Mounted Police had pointed out the desirability of steps being taken for the making of a treaty with the Indians occupying the proposed line of route from Edmonton to Pelly River; that he had intimated that these Indians, as well as the Beaver Indians of the Peace and Nelson Rivers, and the Sicamas and Nihames Indians, were inclined to be turbulent and were liable to give trouble to isolated parties of miners or traders who might be regarded by the Indians as interfering with what they considered their vested rights; and that

he had stated that the situation was made more difficult by the presence of the numerous travellers who had come into the country and were scattered at various points between Lesser Slave Lake and Peace River.

The Minister further states that the view of the Commissioner of the North West Mounted Police as to the desirability of making a treaty with these Indians being concurred in by the Indian Commissioner, and the Minister being convinced that in the public interest it was necessary to take at the earliest possible date the suggested step, it was recommended that Commissioners be appointed with full power to negotiate a treaty. An Order in Council as above stated, issued accordingly; and the preliminary arrangements are now being made.

The Minister, in this connection, draws attention to the fact that part of the territory marked "A" on the plan attached is within the boundaries of the Province of British Columbia, and that in the past no treaties such as have been made with the Indians of the North West have been made with any of the Indians whose habitat is west of the Mountains. An arrangement was come to in 1876 under which the British Columbia Government agreed to the setting aside by a Commission subject to the approval of that Government, of land which might be considered necessary for Indian reserves in different parts of the Province, and later on the agreement was varied so as to provide that the setting apart should be made by a Commissioner appointed by the Dominion Government whose allotment would be subject to the approval of the Commissioner of Lands and Works of the Province.

As the Indians to the west of the Mountains are quite distinct from those whose habitat is on the eastern side thereof, no difficulty ever arose in consequence of the different methods of dealing with the Indians on either side of the Mountains. But there can be no doubt that had the division line between the Indians been artificial instead of natural, such difference in treatment would have been fraught with grave danger and have been the fruitful source of much trouble to both the Dominion and the Provincial Governments.

The Minister submits that it will neither be politic nor practicable to exclude from the treaty Indians whose habitat is in the territory lying between the height of land and the eastern boundary of British Columbia, as they know nothing of the artificial boundary, and, being allied to the Indians of Athabasca, will look for the same treatment as is given to the Indians whose habitat is in that district.

Although the rule has been laid down by the Judicial Committee of the Privy Council that the Province benefitting by a surrender of Indian title should bear the burdens incident to that surrender, he the Minister after careful consideration does not think it desirable that any demand should be made upon the Province of British Columbia for any money payment in connection with the proposed treaty.

That from the information in possession of the Department of Indian Affairs it is not at present clear whether it will be necessary to set apart any land for a reserve or reserves for Indians in that part of the Province of British Columbia which will be covered by the proposed treaty, but if the Commissioners should find it necessary to agree to the setting apart of any reserve or reserves in that territory, the Minister is of opinion that the same may properly be set aside under the agreement of 1876 already referred to.

As it is in the interest of the Province of British Columbia, as well as in that of the Dominion, that the country to be treated for should be thrown open to development and the lives and property of those who may enter therein safeguarded by the making of provision which will remove all hostile feeling from the minds of the Indians and lead them to peacefully acquiesce in the changing conditions, he the Minister would suggest that the Government of British Columbia be apprised of the intention to negotiate the proposed treaty; and as it is of the utmost importance that the Commissioners should have full power to give such guarantees as may be found necessary in regard to the setting apart of land for reserves the Minister further recommends that the Government of British Columbia be asked to formally acquiesce in the action taken by Your Excellency's Government in the matter and to intimate its readiness to confirm any reserves which it may be found necessary to set apart within the portion of the Province already described.

The Minister further recommends that a certified copy of this Minute, if approved, and of the map

attached hereto be transmitted to the Lieutenant Governor of the Province of British Columbia for the information of his Government.

The Committee submit the same for Your Excellency's approval.

(sgd.) R. W. SCOTT.

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Report of Commissioners for Treaty No. 8

WINNIPEG, MANITOBA, 22nd September, 1899.

The Honourable
CLIFFORD SIFTON,
Superintendent General of Indian Affairs,
Ottawa.

SIR, --- We have the honour to transmit herewith the treaty which, under the Commission issued to us on the 5th day of April last, we have made with the Indians of the provisional district of Athabasca and parts of the country adjacent thereto, as described in the treaty and shown on the map attached.

The date fixed for meeting the Indians at Lesser Slave Lake was the 8th of June, 1899. Owing, however, to unfavourable weather and lack of boatmen, we did not reach the point until the 19th. But one of the Commissioners Mr. Ross --- who went overland from Edmonton to the Lake, was fortunately present when the Indians first gathered. He was thus able to counteract the consequences of the delay and to expedite the work of the Commission by preliminary explanations of its objects.

We met the Indians on the 20th, and on the 21st the treaty was signed.

As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import. There was a marked absence of the old Indian style of oratory. Only among the Wood Crees were any formal speeches made, and these were brief. The Beaver Indians are taciturn. The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band. They all wanted as liberal, if not more liberal terms, than were granted to the Indians of the plains. Some expected to be fed by the Government after the making of treaty, and all asked for assistance in season of distress and urged that the old and indigent who were no longer able to hunt and trap and were consequently often in distress should be cared for by the Government. They requested that medicines be furnished. At Vermilion, Chipewyan and Smith's Landing, an earnest appeal was made for the services of a medical man. There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, and many were impressed with the notion that the treaty would lead to taxation and enforced military service. They seemed desirous of securing educational advantages for their children, but stipulated that in the matter of schools there should be no interference with their religious beliefs.

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. We told them that the Government was always ready to give relief in cases of actual destitution, and that in seasons of distress they would without any special stipulation in the treaty receive such assistance as it was usual to give in order to prevent starvation among Indians in any part of Canada; and we stated that the attention of the Government would be called to the need of some special provision being made for assisting the old and indigent who were unable to work and dependent on charity for the means of sustaining life. We promised that supplies of medicines would be put in the charge of persons selected by the Government at different points, and would be distributed free to those of the Indians who might require them. We explained that it would be

practically impossible for the Government to arrange for regular medical attendance upon Indians so widely scattered over such an extensive territory. We assured them, however, that the Government would always be ready to avail itself of any opportunity of affording medical service just as it provided that the physician attached to the Commission should give free attendance to all Indians whom he might find in need of treatment as he passed through the country.

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life, that it did not open the way to the imposition of any tax, and that there was no fear of enforced military service. We showed them that, whether treaty was made or not, they were subject to the law, bound to obey it, and liable to punishment for any infringements of it. We pointed out that the law was designed for the protection of all, and must be respected by all the inhabitants of the country, irrespective of colour or origin; and that, in requiring them to live at peace with white men who came into the country, and not to molest them in person or in property, it only required them to do what white men were required to do as to the Indians.

As to education the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children, and that the law, which was as strong as a treaty, provided for non-interference with the religion of the Indians in schools maintained or assisted by the Government.

We should add that the chief of the Chipewyans of Fort Chipewyan asked that the Government should undertake to have a railway built into the country, as the cost of goods which the Indians require would be thereby cheapened and the prosperity of the country enhanced. He was told that the Commissioners had no authority to make any statement in the matter further than to say that his desire would be made known to the Government.

When we conferred, after the first meeting with the Indians at Lesser Slave Lake, we came to the conclusion that it would be best to make one treaty covering the whole of the territory ceded, and to take adhesions thereto from the Indians to be met at the other points rather than to make several separate treaties. The treaty was therefore so drawn as to provide three ways in which assistance is to be given to the Indians, in order to accord with the conditions of the country and to meet the requirements of the Indians in the different parts of the territory.

In addition to the annuity, which we found it necessary to fix at the figures of Treaty Six, which covers adjacent territory, the treaty stipulates that assistance in the form of seed and implements and cattle will be given to those of the Indians who may take to farming, in the way of cattle and mowers to those who may devote themselves to cattle-raising, and that ammunition and twine will be given to those who continue to fish and hunt. The assistance in farming and ranching is only to be given when the Indians actually take to these pursuits, and it is not likely that for many years there will be a call for any considerable expenditure under these heads. The only Indians of the territory ceded who are likely to take to cattle-raising are those about Lesser Slave Lake and along the Peace River, where there is quite an extent of ranching country; and although there are stretches of cultivable land in those parts of the country, it is not probable that the Indians will, while present conditions obtain, engage in farming further than the raising of roots in a small way, as is now done to some extent. In the main the demand will be for ammunition and twine, as the great majority of the Indians will continue to hunt and fish for a livelihood. It does not appear likely that the conditions of the country on either side of the Athabasca and Slave Rivers or about Athabasca Lake will be so changed as to affect hunting or

trapping, and it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap.

The Indians are given the option of taking reserves or land in severalty. As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections, we confined ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required. There is no immediate necessity for the general laying out of reserves or the allotting of land. It will be quite time enough to do this as advancing settlement makes necessary the surveying of the land. Indeed, the Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.

After making the treaty at Lesser Slave Lake it was decided that, in order to offset the delay already referred to, it would be necessary for the Commission to divide. Mr. Ross and Mr. McKenna accordingly set out for Fort St. John on the 22nd of June. The date appointed for meeting the Indians there was the 21st. When the decision to divide was come to, a special messenger was despatched to the Fort with a message to the Indians explaining the delay, advising them that Commissioners were travelling to meet them, and requesting them to wait at the Fort. Unfortunately the Indians had dispersed and gone to their hunting grounds before the messenger arrived and weeks before the date originally fixed for the meeting, and when the Commissioners got within some miles of St. John the messenger met them with a letter from the Hudson's Bay Company's officer there advising them that the Indians after consuming all their provisions, set off on the 1st June in four different bands and in as many different directions for the regular hunt; that there was not a man at St. John who knew the country and could carry word of the Commissioners' coming, and even if there were it would take three weeks or a month to get the Indians in. Of course there was nothing to do but return. It may be stated, however, that what happened was not altogether unforeseen. We had grave doubts of being able to get to St. John in time to meet the Indians, but as they were reported to be rather disturbed and ill-disposed on account of the actions of miners passing through their country, it was thought that it would be well to show them that the Commissioners were prepared to go into their country, and that they had put forth every possible effort to keep the engagement made by the Government.

The Commissioners on their return from St. John met the Beaver Indians of Dunvegan on the 21st day of June and secured their adhesion to the treaty. They then proceeded to Fort Chipewyan to Smith's Landing on the Slave River and secured the adhesion of the Cree and Chipewyan Indians at these points on the 13th and 17th days of July respectively.

In the meantime Mr. Laird met the Cree and Beaver Indians at Peace River Landing and Vermilion, and secured their adhesion on the 1st and 8th days of July respectively. He then proceeded to Fond du Lac on Lake Athabasca, and obtained the adhesion of the Chipewyan Indians there on the 25th and 27th days of July.

After treating with the Indians at Smith, Mr. Ross and Mr. McKenna found it necessary to separate in order to make sure of meeting the Indians at Wabiscow on the date fixed. Mr. McKenna accordingly went to Fort McMurray, where he secured the adhesion of the Chipewyan and Cree Indians on the 4th day of August, and Mr. Ross proceeded to Wabiscow, where he obtained the adhesion of the Cree Indians on the 14th day of August.

The Indians with whom we treated differ in may respects from the Indians of the organized territories. They indulge in neither paint nor feathers, and never clothe themselves in blankets. Their dress is of the ordinary style and many of them were well clothed. In the summer they live in teepees, but many of them have log houses in which they live in winter. The Cree language is the chief language of trade, and some of the Beavers and Chipewyans speak it in addition to their own tongues. All the Indians we met were with rare exceptions professing Christians, and showed evidences of the work which missionaries have carried on among them for many years. A few of them have had their children avail themselves of the advantages afforded by boarding schools established at different missions. None of

the tribes appear to have any very definite organization. They are held together mainly by the language bond. The chiefs and headmen are simply the most efficient hunters and trappers. They are not law-makers and leaders in the sense that the chiefs and headmen of the plains and of old Canada were. The tribes have no very distinctive characteristics, and as far as we could learn no traditions of any import. The Wood Crees are an off-shoot of the Crees of the South. The Beaver Indians bear some resemblance to the Indians west of the mountains. The Chipewyans are physically the superior tribe. The Beavers have apparently suffered most from scrofula and phthisis, and there are marks of these diseases more or less among all the tribes.

Although in manners and dress the Indians of the North are much further advanced in civilization than other Indians were when treaties were made with them, they stand as much in need of the protection afforded by the law to aborigines as do any other Indians of the country, and are as fit subjects for the paternal care of the Government.

It may be pointed out that hunting in the North differs from hunting as it was on the plains in that the Indians hunt in a wooded country and instead of moving in bands go individually or in family groups.

Our journey from point to point was so hurried that we are not in a position to give any description of the country ceded which would be of value. But we may say that about Lesser Slave Lake there are stretches of country which appear well suited for ranching and mixed farming; that on both sides of the Peace River there are extensive prairies and some well wooded country; that at Vermilion, on the Peace, two settlers have successfully carried on mixed farming on a pretty extensive scale for several years, and that the appearance of the cultivated fields of the Mission there in July showed that cereals and roots were as well advanced as in any portion of the organized territories. The country along the Athabasca River is well wooded and there are miles of tar-saturated banks. But as far as our restricted view of the Lake Athabasca and Slave River country enabled us to judge, its wealth, apart from possible mineral development, consists exclusively in its fisheries and furs.

In going from Peace River Crossing to St. John, the trail which is being constructed under the supervision of the Territorial Government from moneys provided by Parliament was passed over. It was found to be well located. The grading and bridge work is of a permanent character, and the road is sure to be an important factor in the development of the country.

We desire to express our high appreciation of the valuable and most willing service rendered by Inspector Snyder and the corps of police under him, and at the same time to testify to the efficient manner in which the members of our staff performed their several duties. The presence of a medical man was much appreciated by the Indians, and Dr. West, the physician to the Commission, was most assiduous in attending to the great number of Indians who sought his services. We would add that the Very Reverend Father Lacombe, who was attached to the Commission, zealously assisted us in treating with the Crees.

The actual number of Indians paid was:----

7	Chiefs at $32.....	$ 224 00
23	Headmen at $22.....	506 00
2,187	Indians at $12.....	26,244 00
	Total:	$26,974 00

A detailed statement of the Indians treated with and of the money paid is appended.

We have the honour to be, sir,

Your obedient servants,

DAVID LAIRD,
J. H. ROSS,
J. A. J. McKENNA

Indian Treaty Commissioners.

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Statement of Indians Paid Annuity and Gratuity Moneys in Treaty No. 8, during 1899

REPORT OF COMMISSIONERS

STATEMENT of Indians paid Annuity and Gratuity Moneys in Treaty No. 8, during 1899.

.....	Chiefs.	Headmen.	Other Indians.	Cash Paid each Band.	Total Cash Paid.
				$ cts.	$ cts.
LESSER SLAVE LAKE					
Keeseekatayo's Band (Crees)					
Chief at $32	1	.....	.....	32 00	
Headmen at $22	.....	4	.....	88 00	
Other Indians at $12	.....	.....	241	2,892 00	3,012 00
Captain's Band (Crees)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	22	264 00	286 00
PEACE RIVER LANDING.					
Duncan Tastawit's Band (Crees and Beavers)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	46	552 00	574 00
VERMILION.					
Ambroise Tete-Noire's Band (Beavers)—					
Chief	1	.....	.....	32 00	
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	148	1,776 00	1,830 00
Tall Cree Band (Crees)—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	64	768 00	790 00
DUNVEGAN.					
Beaver Band—					
Headman	.....	1	.....	22 00	
Other Indians	.....	.....	33	396 00	418 00
RED RIVER POST, PEACE RIVER.					
Crees paid as part of Band—Cree Band at Vermilion					
Indians	.....	.....	66	792 00	792 00
FORT CHIPEWYAN.					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	407	4,884 00	4,960 00
Cree Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	183	2,196 00	2,272 00
SMITH'S LANDING.					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	280	3,360 00	3,436 00
FOND DU LAC					
Chipewyan Band—					
Chief	1	.....	.....	32 00	
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	376	4,512 00	4,588 00

TREATY No. 8

STATEMENT of Indians paid Annuity and Gratuity, &c.,—*Concluded.*

.....	Chiefs.	Head-men.	Other Indians.	Cash Paid each Band.	Total Cash Paid.
FORT McMURRAY.				$ cts	$ cts.
Cree and Chipewyan Bands—					
Headmen	.....	2	.....	44 00	
Other Indians	.....	.....	130	1,560 00	1,604 00
WABISCOW.					
Cree Band—		.....	.....		
Chief	1	1	.....	32 00	
Headmend	.....	.....	191	88 00	
Other Indians	.....	.....		2,292 00	2,412 00
Total	7	23	2,187	.....	26,974 00

SUMMARY.

7 Chiefs at $32	$ 224 00
23 Headmen at $22	506 00
2,187 Other Indians at $12	26,224 00
2,217	$ 26,974 00

Certified correct,
DAVID LAIRD,
J. H. ROSS,
J. A. J. McKENNA,
Indian Treaty Commissioners.

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Treaty No. 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest of Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between

them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement .

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the

Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given once for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, HAVE HEREUNTO SET THEIR HANDS at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned wit-nesses, the same having been first explained to the Indians by Albert Tate and Samuel Cun-ningham, Interpreters. Father A. LACOMBE, GEO. HOLMES, E. GROUARD, O.M.I. W. G. WHITE, JAMES WALKER, J. ARTHUR COTÉ, A. E. SNYDER, Insp. N.W.M.P., H. B. ROUND, HARRISON S. YOUNG, J. F. PRUD'HOMME, J. W. MARTIN, C. MAIR, H. A. CONROY PIERRE DESCHAMBEAULT, J. H. PICARD, RICHARD SECORD, M. MCCAULEY.	DAVID LAIRD, Treaty Commissioner, J.A.J. McKENNA, Treaty Commissioner, J. H. ROSS, Treaty Commissioner, his KEE NOO SHAY OO x Chief, mark his MOOSTOOS x Headman, mark his FELIX GIROUX x Headman, mark his WEE CHEE WAY SIS x Headman, mark his CHARLES NEE SUE TA SIS x Headman, mark his CAPTAIN x Headman, from Sturgeon mark Lake.

In witness whereof the Chairman of Her Majesty's Commissioners and the Headman of the Indians of Peace River Landing and the adjacent territory, in behalf of himself and the Indians whom he represents, have hereunto set their hands at the said Peace River Landing on the first day of July in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto, in the presence of the undersigned wit-nesses, the same having been first explained to the Indians by Father A. Lacombe and John Boucher, Interpreters. Father A. LACOMBE, E. GROUARD, O.M.I., Ev. d'Ibora, GEO. HOLMES, HENRY MCCORRISTER, K. F. ANDERSON, SGT., N.W.M.P. PIERRE DESCHAMBEAULT,	DAVID LAIRD, *Chairman of Indian Treaty Commissioners,* his DUNCAN x TASTAOOSTS, *Headman of* mark *Crees*

H. A. CONROY
T.A. BRICK,
HARRISON S. YOUNG,
J. W. MARTIN,
DAVID CURRY.

In witness whereof the Chairman of Her Majesty's Commissioners and the Chief and Headmen of the Beaver and Headman of the Crees and other Indians of Vermilion and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at Vermilion on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Boucher, Interpreters.	DAVID LAIRD, *Chairman of Indian Treaty Coms.*, his AMBROSE x TETE NOIRE, *Chief Beaver* mark *Indians.* his PIERROT x FOURNIER, *Headman Beaver* mark Indians. his *Headman* KUIS KUIS KOW CA POOHOO x *Cree* mark *Indians.*
Father A. LACOMBE, E. GROUARD, O.M.I., Ev. d'Ibora, MALCOLM SCOTT, F.D. WILSON, H.B. Co., H. A. CONROY PIERRE DESCHAMBEAULT, HARRISON S. YOUNG, J. W. MARTIN, K. F. ANDERSON, SGT., N.W.M.P. A.P. CLARKE, CHAS. H. STUART WADE, K. F. ANDERSON, SGT., N.W.M.P.	

In witness whereof the Chairman of Her Majesty's Treaty Commissioners and the Chief and Headman of the Chipewyan Indians of Fond du Lac (Lake Athabasca) and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at the said Fond du Lac on the twenty-fifth and twenty-seventh days of July, in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Pierre Deschambeault, Reverend Father Doucent and Louis Robillard, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
LAURENT x DIEDDIS, *Headman*,
mark
his
TOUSSAINT x *Headman*,
mark

(The number accepting treaty being larger than at first expected, a Chief was allowed, who signed the treaty on the 27th July before the same witnesses to signatures of the Commissioner and Headman on the 25th.)

his
MAURICE x PICHE, *Chief of Band.*
mark
Witness, H. S. YOUNG.

G. BRUYNAT, O.M.I.,
HARRISON S. YOUNG,
PIERRE DESCHAMBEAULT,
WILLIAM HENRY BURKE,
BATHURST F. COOPER,
GERMAIN MERCREDI,
his
LOUIS x ROBILLARD,
mark
K. F. ANDERSON, *Sgt., N.W.M.P.*

The Beaver Indians of Dunvegan having met on this sixth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to then the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Headman of the said Beaver Indians have hereunto set their hands at Dunvegan on this sixth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses, after the same had been read and explained to the Indians by the Reverend Joseph Le Treste and Peter Gunn, Interpreters.

J. H. ROSS,
J. A. J. MCKENNA, } *Commissioners*,
his
NATOOSES x *Headman*,
mark

A. E. SNYDER, *Insp. N.W.M.P.*
J. LE TRESTE,
PETER GUNN,
F. J. FITZGERALD.

The Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River and Gull River, and the Cree Indians of Gull River and Deep Lake, having met at Fort Chipewyan on this thirteenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chiefs and Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort Chipewyan on this thirteenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Peter Mercredi, Chipewyan Interpreter, and George Drever, Cree Interpreter.

A. E. Snyder, *Insp., N.W.M.P.*,
P. Mercredi,
Geo. Drever,
L. M. Le Doussal,
A. de Chamboud, O.M.I.
H. B. Round,
Gabriel Breynat, O.M.I.,
Colin Fraser,
F. J. Fitzgerald,
B. F. Cooper,
H. W. McLaren.

J. H. Ross, } *Treaty*
J. A. J. McKenna, } *Commissioners,*
his
Alex. x Laviolette, *Chipewyan Chief,*
mark
his
Julien x Ratfat,
mark
his } *Chipewyan*
Sept. x Heezell, *Headmen,*
mark
his
Justin x Martin, *Cree Chief,*
mark
his
Ant. x Taccarbo,
mark
his } *Cree Headmen.*
Thomas x Gibbot,
mark

The Chipewyan Indians of Slave River and the country thereabouts having met at Smith's Landing on this seventeenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country, set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chief and Headmen of the said Chipewyan Indians have hereunto set their hands at Smith's Landing, on this seventeenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by John Trindle, Interpreter.

A. E. Snyder, *Insp. N.W.M.P.*,
H. B. Round.
J. H. Reid,
Jas. Hall,
John Trindle,
F. J. Fitzgerald,
Wm. McCleland,
John Sutherland.

J. H. Ross, } *Treaty*
J. A. J. McKenna, } *Commissioners,*
his
Pierre x Squirrel, *Chief,*
mark
his
Michael x Mandrille, *Headman,*
mark
his
William x Kiscoomay, *Headman,*
mark

The Chipewyan and Cree Indians of Fort McMurray and the country thereabouts, having met at Fort McMurray, on this fourth day of August, in this present year 1899, Her Majesty's Commissioner, James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort McMurray, on this fourth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by the Rev. Father Lacombe and T. M. Clarke, Interpreters

J. A. J. McKenna, *Treaty Commissioner*,
his
Adam x Boucher, *Chipewyan Headman*,
mark
his
Seapotakinum x Cree, *Cree Headman*,
mark

A. Lacombe, *O.M.I.*,
Arthur J. Warwick,
T. M. Clarke,
J. W. Martin,
F. J. Fitzgerald,
M. J. H. Vernon.

The Indians of Wapiscow and the country thereabouts having met at Wapiscow Lake on this fourteenth day of August, in this present year 1899, Her Majesty's Commissioner, the Honourable James Hamilton Ross, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Chief and Headmen of the Indians have hereunto set their hands at Wapiscow Lake, on this fourteenth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Alexander Kennedy.

A. E. Snyder, *Insp. N.W.M.P.*,
Charles Riley Weaver,
J. B. Henri Giroux, *O.M.I., P.M.*,
Murdoch Johnston,
C. Fallier, *O.M.I.*,
Alex. Kennedy, *Interpreter*,
H. A. Conroy,
(Signature in Cree character).
John McLeod,
M. R. Johnston.

J. H. Ross, *Treaty Commissioner*,
his
Joseph x Kapesekonew, *Chief*,
mark
his
Joseph x Ansley, *Headman*,
mark
his
Waposse x *Headman*,
mark
his
Michael x Ansey, *Headman*,
mark
his
Louisa x Beaver, *Headman*,
mark

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Order In Council Ratifying Treaty No. 8

EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 20th February, 1900.

On a Memorandum dated 8th February, 1900, from the Superintendent General of Indian Affairs, submitting for Your Excellency's consideration the accompanying Treaty made by the Commissioners, the Honourable David Laird, James Andrew Joseph McKenna, Esquire, and the Honourable James Hamilton Ross, who were appointed to negotiate the same, with the Cree, Beaver, Chipewyan and other Indians inhabiting the territory, --- as fully defined in the Treaty --- lying within and adjacent to the Provisional District of Athabasca.

The Minister recommends that the Treaty referred to be approved, and that the duplicate thereof, which is also submitted herewith, be kept of record in the Privy Council and the original returned to the Department of Indian Affairs.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,

Clerk of the Privy Council.

The Honourable
The Superintendent General of Indian Affairs.

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Report of Commissioner for Treaty No. 8

DEPARTMENT OF INDIAN AFFAIRS,

OTTAWA, December 11, 1900.

The Honourable
The Superintendent General of Indian Affairs,
Ottawa.

SIR, --- I beg to report having, in pursuance of the commissions entrusted to me by you, visited the territory covered by Treaty No. 8, and all the posts from Fort St. John, on the Upper Peace River in the west, to Fort Resolution on Great Slave lake in the north. During that visit, acting as your commissioner for the purpose, formal adhesions to treaty were taken from certain Indian inhabitants of the ceded territory belonging to eight bands who were not treated with last year, annuities were paid to all treaty Indians, and business of a general character was transacted with and for them; acting as a commissioner to receive and hear half-breed claims, over three hundred and fifty cases were dealt with; and acting magisterially as a commissioner of Dominion police and a justice of the peace for the Territories, nineteen cases of crime and misdemeanour were disposed of. Separate reports touching upon half-breed claims, public order and minor Indian matters are being submitted.

My commission to take adhesions to Treaty Eight was designed to enable me to treat with the Indians of Fort St. John in the Upper Peace river, and the various bands on Great Slave lake that trade at Fort Resolution, to the end of bringing them into treaty relations with Her Majesty's government.

There came to meet me, however, in addition to these, two bands of Indians, undoubted inhabitants of the tract covered by Treaty No. 8, with whom I was not empowered to deal, one of Crees from Sturgeon lake and one of Slaves from the Upper Hay river. Both of these desired to enter into treaty, and it became necessary to decide whether they, after having come from distant points to meet one whom they looked upon as a representative of the government, were to be dismissed non-plussed and dissatisfied, or to be allowed to give in their adhesions. It being impossible to communicate with the department, and as the title of these people to the benefits of the treaty was beyond question, the conclusion was unhesitatingly adopted that it was my duty to assume responsibility and concede those benefits to them. The instruments embodying their adhesions are submitted herewith together with those I was empowered to take, which contain the adhesions of certain of the Indians of Fort St. John and the whole of those of Fort Resolution on Great Slave lake, whose hunting grounds lie within treaty limits. It is hoped that you will approve this assumption of responsibility, and that the sanction of His Excellency in Council will be extended to all the adhesions.

Last year 2,217 Indians were paid. This year 3,323 claimed the annuity, an increase of 1,106, or almost fifty per cent. Of this increased number 248 belong to or have now joined, bands treated with in 1899, and 858 to the following bands which remained undealt with in that year, namely, Crees of Sturgeon lake; Beavers of Fort St. John; Slaves of Upper Hay river, who trade at Vermilion; and the Dogribs, Yellowknives, Chipewyans and Slaves of Lower Hay river, who trade at Fort Resolution. Some Caribooeaters, belonging to the country east of Smith's Landing on Great Slave river, also came into treaty, but they were incorporated with the Chipewyan band of Smith's Landing, being allied thereto. Six new chiefs were recognized.

As was reported by your commissioners last year, there is little disposition on the part of most of the northern Indians to settle down upon land or to ask to have reserves set apart. Dealing, under your instructions, with demands for land, two small provisional reserves were laid out at Lesser Slave Lake for Kinosayo's band, and fifteen or sixteen applications were registered for land in severalty by Indians who have already, to some extent, taken to agriculture.

It appears that this disinclination to adopt agriculture as a means of livelihood is not unwisely entertained, for the more congenial occupations of hunting and fishing are still open, and agriculture is not only arduous to those untrained to it, but in many districts it as yet remains untried. A consequence of this preference of old pursuits is that the government will not be called upon for years to make those expenditures which are entailed by the treaty when the Indians take to the soil for subsistence.

The health of the Indians in the district seems to vary with the times. When game is plentiful it is good; when scarce, it is bad. The want of rabbits along the Peace and Hay rivers caused suffering to the Beavers and Slaves in part of the western portion of the territory last winter; but, in the eastern portion, the Chipewyans were unusually well off, cariboo being plentiful. At Fond du Lac, it was said, there was less disease than for many years. No such loss of life from starvation as has often characterized northern winters was reported, and the measures for relieving sick and destitute Indians planned by the commissioners last year, operated well and alleviated distress in many deserving cases. Dr. Edwards, who accompanied me, gave advice and dispensed medicine to a large number of Indians and vaccinated many. Great appreciation of his services was manifested.

At nearly all the important points the chiefs and more intelligent men who were present at the making of treaty last year, asked for extended explanations of its terms, in order that those of their bands who had failed to grasp its true meaning might be enlightened, and that those who were coming into treaty for the first time might fully understand what they were doing. In the course of the councils held for this purpose, it was possible to eradicate any little misunderstanding that had arisen in the minds of the more intelligent, and great pains were taken to give such explanations as seemed most likely to prevent any possibility of misunderstandings in future.

Each of the many appointments made was punctually kept, a fact which appeared to give great satisfaction to both the traders and the Indians.

Appended is a summary of the bands paid, showing the admissions to treaty permitted this year.

There yet remains a number of persons leading an Indian life in the country north of Lesser Slave lake, who have not accepted treaty as Indians, or scrip as half-breeds, but this is not so much through indisposition to do so as because they live at points distant from those visited, and are not pressed by want. The Indians of all parts of the territory who have not yet been paid annuity probably number about 500 exclusive of those in the extreme northwestern portion, but as most, if not all, of this number belong to bands that have already joined in the treaty, the Indian title to the tract it covers may be fairly regarded as being extinguished.

Most respectfully submitting this report,
I have, &c.,
J. A. MACRAE,
Commissioner.

Documents accompanying this report:
No. 1. Adhesion of Sturgeon Lake band.
No. 2. Adhesion of part of the Beavers of Fort St. John.
No. 3. Adhesion of Slaves of Upper Hay River.
No. 4. Adhesion of Dogribs of Great Slave Lake.
Chipewyans of Great Slave Lake.
Yellowknives of Great Slave Lake.
Slaves of Lower Hay River or Great Slave Lake.

No.5. Statement of the number of Indians admitted to treaty this year (1900) .

No. 6. Map showing the distribution of Indians in the territory covered by Treaty No. 8, and the extent of that territory.

The Cree Indians, of Sturgeon Lake, and the country thereabouts, having met at Lesser Slave Lake, on this eight day of June, in the present year 1900, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to the terms thereof in consideration of the undertakings made therein.

In witness whereof, the said James Ansdell Macrae, Esquire, and the Headmen of the said Cree Indians, have hereunto set their hands at Lesser Slave Lake, on this the eighth day of June in the year first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Peter Gunn and Albert Tate, Interpreters.

ALBERT TATE,
PETER GUNN,
GEO. HOLMES,
MYLES O'C. MAC DERMOT,
W. J. O'DONNELL,
A. CHEESBROUGH, *Const.*
R. FIELD, *Const.*

J. A. MACRAE,
his
MEE-SOO-KAM-IN-OO-KA-POW x,
mark
his
WILLIAM x PEE-YU-TAY-WEE-TUM
mark
his
MEEK-COO x MOOSO-OS,
mark
his
ALEXIS x PA-PASS-CHAY,
mark
his
THE x CAPTAIN,
mark

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner, and the following of the said Beaver Indians, have hereunto set their hands, at Fort St. John, on this the thirtieth day of May, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses, after the same had been read and explained to the Indians by John Shaw, Interpreter.

JOHN SHAW, *Interpreter*,
W. J. O'DONNELL.

J. A. MACRAE, *Commissioner*,
his
MOOKTHAY x
mark
his
AGINAS x
mark
his
DISLISTCI x
mark
his
TACHEA x
mark
his
APPAN x
mark
his
ATTACHIE x
mark
his
ALLALE x
mark
his
YATSOOSE x
mark

The Slave Indians of Hay river and the country thereabouts, having met at Vermilion, on this twenty-third day of June, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in year 1899, do join in the cessions made by the said treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner and the Chief and principal men of the said Slave Indians, have hereunto set their hands, at Vermilion, on this twenty-third day of June, in the year 1900.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Louis Cardinal.

his
LOUIS x CARDINAL,
mark
Witness: G. ARTHUR BALL
ALFRED SHERRILY WHITE,
ISAIE GAGNON,
GEO. KNAPP,
H. J. LAROQUE,
his
MARTIN x OUELETTE,
mark
Witness: G. ARTHUR BALL.
WILLIAM LEFENDRE.

J. A. MACRAE, *Commissioner*,
his
ALEXIS x TATATRIGNAY,
mark
his
FRANCOIS x TCHATSY,
mark
his
GIROUX x NAHDAYYAH,
mark
his
KOKA x
mark
his
KACHWESSALA x
mark

The Indians inhabiting the south shore of Great Slave Lake, between the mouth of Hay river and old Fort Reliance, near the mouth of Lockheart's river, and territory adjacent thereto, on the mainland or on the islands of the said lake, having met at Fort Resolution, on this twenty-fifth day of July, in the present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner and the Chief and Headmen of the said Indians have hereunto set their hands, at Fort Resolution, on the twenty-fifth day of July, in the year herein first above written.

J. A. MACRAE, *Commissioner*,

For the Dog Ribs.

his
DRIED x CHEESE, *Chief*,
mark
his
WAY-MI-AH x *H.M.*,
mark
his
CRAP-WA-TEE x *H.M.*,
mark

For the Yellow Knives.

his
SNUFF x *Chief*,
mark
his
TZIN-TU x *H.M.*,
mark
his
ATE-EE-ZEN x *H.M.*,
mark

For the Slaves of Hay River.

his
SUNRISE x *H.M.*,
mark
his
LAMELISE x *H.M.*,
mark

For the Chipewyans.

his
LOUISON x ARTHAY, *Chief*,
mark
his
OLIVER x AJERICON,
mark
his
VITAL ( ) LAMOËLLE,
sign
his
PAULETTE ( ) CHANDELLE,
sign

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read over and explained to the Indians by Rev. Father Dupirer, W. R. Norn, A. Mereredi.

L. DUPIRER, *O.M.I.*,
W. R. NORN,
ALEXANDRE MERECREDI,
THOS. J. MARSH,
F. C. GAUDET,
(The mark of Michel Mandeville),
[Indian characters.]
CHARLIE NORN,
RICHARD FIELD.

Witness:
T. C. RAE,
OLIVER MERECREDI,
J. S. CAMSELL.

STATEMENT showing the number of Indians who joined Treaty No. 8 in A.D. 1900 and received annuity and gratuity --- the bands treated with for the first time being denoted by italics (annuities paid to those dealt with in 1899 not shown).

Band.	Whereabouts.	Chiefs.	Head-men.	Indians.	Cash paid.
					$ cts.
Crees (Kinoosayn's)	Lesser Slave Lake			10	120 00
Crees	Sturgeon Lake	1	1	93	1,170 00
Crees (Tustawit's)	Peace River Crossing			20	240 00
Beavers	Fort St. John			46	552 00
Beavers	Fort Dunvegan	1		74	920 00
Beavers (Tute Nore's)	Fort Vermilion			18	210 00
Slaves of Upper Hay River	"	1	2	175	2,170 00
Crees (Tall *Cree's*)	"			43	510 00
Little Red River	Little Red River			9	108 00
Chipewyans	Fort Chipewyan			1	12 00
Crees	"			1	12 00
Chipewyans	Smith's Landing		1	35	432 00
Chipewyans	Fort Resolution	1	1	111	1,356 00
Yellowknives	"	1	2	191	2,309 00
Dogribs	"	1	2	119	1,504 00
Slaves of Lower Hay River	"		1	103	1,259 00
Chipewyans (Maurice's)	Fond du Lac (Lake Athabasca)			65	780 00
Crees	Fort McMurray			30	360 00
Stragglers	"			17	201 00
Crees	Wabiscow			39	468 00
Crees	Whitefish Lake			2	24 00
Crees	Trout Lake			1	12 00
		6	10	1,203	14,858 00

SUMMARY.

Total admitted in 1899	2,217
" 1900	1,218
Total of Indian annuitants under Treaty No. 8	3,323

Certified correct,
J.A. MACRAE,
Commissioner.

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Order In Council Ratifying Adhesions to Treaty No. 8

EXTRACT from a Report of the Committee of the Honourable the Privy Council approved His Excellency on January 3, 1901.

On a report dated December 22, 1900, from the Superintendent General of Indian Affairs referring to the Order in Council of February 20, 1900, approving of the Treaty known as Treaty No. 8, made in 1899, with the Cree, Beaver, Chipewyan and other Indians inhabiting the territory lying within and adjacent to the Provisional District of Athabaska, and stating that as the Commissioners who negotiated the treaty above mentioned, were unable last year to meet the Indians of Fort St. John and Fort Resolution, it was necessary to appoint a Commissioner during the season of 1900 to take the adhesion of the Indians in those localities and on March 2, 1900, James Ansdell Macrae, Esquire, was commissioned by Order in Council to obtain such adhesions.

The Minister submits herewith the report of Mr. Commissioner Macrae, accompanied by the following documents:

No. 1. Adhesion of Sturgeon Lake Band.
No. 2. Adhesion of part of the Beavers of Fort St. John.
No. 3. Adhesion of Slaves of Upper Hay River.
No. 4. Adhesion of Dogribs of Great Slave Lake.
Adhesion of Chipewyans of Great Slave Lake.
Adhesion of Yellowknives of Great Slave Lake.
Adhesion of Slaves of Lower Hay River or Great Slave Lake.
No.5. Statement of the number of Indians admitted to Treaty this year. (1900).

The Minister recommends that for the reasons stated in Mr. Macrae's report, all the adhesions taken by him be approved by Your Excellency in Council and that the original adhesions be returned to the Department of Indian Affairs and the duplicates thereof kept on record in the Privy Council Office.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

The Honourable
The Superintendent General of Indian Affairs.

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Date modified: 2013-08-30

Tab 7

Canada Trust Co., trustee for the Leonard Foundation v. Ontario Human Rights Commission; Royal Ontario Museum, Class of Persons Eligible to Receive Scholarships from the Leonard Foundation and Public Trustee

Indexed as: Canada Trust Co. v. Ontario Human Rights Commission
(C.A.)

74 O.R. (2d) 481
[1990] O.J. No. 615
Action Nos. 586/87 and 622/87

ONTARIO
Court of Appeal
Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)
April 24, 1990.

Courts -- Jurisdiction -- Charitable trust established to provide scholarships on allegedly discriminatory basis -- Complaint filed under Ontario Human Rights Code -- Court having jurisdiction to make declaration as to validity of trust -- Declaration prior to investigation by Human Rights Commission not premature.

Trusts and trustees -- Charitable trusts -- Public policy -- Discrimination -- Charitable trust established to provide scholarships exclusively to white, Protestant, British subjects -- Trust instrument also providing that amount of income spent on providing scholarships for female students not to exceed one quarter of total money available for all students -- Provisions discriminatory and invalid as infringing public policy.

Trusts and trustees -- Charitable trusts -- Cy-pres -- Charitable trust established to provide scholarships on discriminatory basis -- Discriminatory provisions invalid --

Cy-pres doctrine applied and trust brought into accord with public policy by removing restrictions with respect to race, colour, creed, ethnic origin and sex.

An educational trust was established in 1923. The terms of the trust excluded from benefit "all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual". The power to select recipients of the scholarships was given to a committee, the members of which had to possess the same qualifications. The trust instrument also provided that the amount of income spent on providing scholarships for female students in any one year should not exceed one quarter of the total money available for all students for that year.

A complaint was filed under the Ontario Human Rights Code, 1981.

The trustee applied for the advice, opinion and direction of the court upon certain questions arising from the administration of the trust, including whether the provisions of the trust were void or illegal by reason of contravention of public policy as declared in the Human Rights Code, 1981, contravention of other public policy or uncertainty.

The trial judge found that the court had jurisdiction to rule on the question of discrimination contrary to the Human Rights Code, 1981 and that such a ruling before the Human Rights Commission had investigated and considered the complaint would not be premature. He also found that the trust provisions were not invalid on the ground of contravention of the Code or public policy or on the ground of uncertainty.

The Human Rights Commission and a residuary legatee of the settlor appealed.

Held, the appeal should be allowed.

Per Robins J.A. (Osler J. (ad hoc) concurring): The trial

judge was correct in finding that the court had jurisdiction to make a determination as to the validity of the trust and that such a determination was not premature.

The trust violated public policy. It was premised on notions of racism and religious superiority that contravened contemporary public policy. However, the trust should not fail. The cy-pres doctrine should be applied and the trust should be brought into accord with public policy so as to permit the general charitable intent to advance education to be implemented. The recitals should be struck out and all restrictions with respect to race, colour, creed or religion, ethnic origin and sex should be struck out.

Per Tarnopolsky J.A. (concurring in result): Generally, a charitable trust should not fail for uncertainty. The definition of the persons eligible to be recipients of scholarships constituted a condition precedent. Such a condition will not fail for uncertainty if some person or persons can be established as satisfying the condition. The definition was, accordingly, sufficiently certain.

The trust was void on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex.

A charitable trust which fails can be applied cy-pres if the settlor had a general charitable intention. In this case, the settlor's paramount intention was charitable and the discriminatory scheme he chose as merely the machinery for carrying out his general charitable intention. Accordingly, the provisions of the trust which confined management, judicial advice and benefit on discriminatory grounds should be deleted from the trust instrument.

Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.); Re Lysaght; Hill v. Royal College of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888, 109 Sol. Jo. 577 (Ch. D.); National Anti-Vivisection Society v.

Inland Revenue Commissioners, [1948] A.C. 31, [1947] 2 All E.R. 217, 177 L.T. 226 (H.L.); Re Wren, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.), apld

Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65; Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph14,117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, revg (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. Paragraph14,003, 105 D.L.R. (3d) 707 (C.A.), consd

Blainey v. Ontario Hockey Assn. (1986), 54 O.R. (2d) 513, 21 C.R.R. 44, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.) [leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274n, 21 C.R.R. 44n, 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 72 N.R. 76n, 17 O.A.C. 399n], distd

Other cases referred to

Re Allen; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898, 97 Sol. Jo. 606 (C.A.) [subsequent proceedings at [1954] Ch. 259, [1954] 1 All E.R. 526, 98 Sol. Jo. 146]; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289; Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1; Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.); Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16, 86 Sol. Jo. 384 (H.L.); Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848, 93 Sol. Jo. 355 (H.L.); Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293, 88 Sol. Jo. 103 (Ch. D.); Income Tax Special Purposes Commissioners v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, 65 L.T. 621 (H.L.); Jones v. T. Eaton Co., [1973] S.C.R. 635, 35 D.L.R. (3d) 97; Re Levy Estate (1989), 68 O.R. (2d) 385, 58 D.L.R. (4th) 375, 33 E.T.R. 1,

33 O.A.C. 99 (C.A.); McGovern v. Attorney General, [1982] Ch. 321, [1981] 3 All E.R. 493, [1982] 2 W.L.R. 222 (Ch. D.); McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228, 114 Sol. Jo. 375 (H.L.); Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137, 94 Sol. Jo. 777 (H.L.); Re Moon; Ex parte Dawes (1886), 17 Q.B.D. 275, 55 L.T. 114, 34 W.R. 753 (C.A.); Noble v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [revd [1951] S.C.R. 64, [1951] 1 D.L.R. 321]; Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781, 82 C.L.L.C. Paragraph17,005, 132 D.L.R. (3d) 14, 40 N.R. 159; Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241; Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31, [1951] 1 T.L.R. 118 (H.L.); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; R. v. Tottenham & District Rent Tribunal; Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103, [1956] 2 All E.R. 863, 100 Sol. Jo. 552 (Q.B.); Re Selby's Will Trusts; Donn v. Selby, [1965] 3 All E.R. 386, [1966] 1 W.L.R. 43, 110 Sol. Jo. 74 (Ch. D.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447, [1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); Re Tarnpolsk; Barclays Bank Ltd. v. Hyer, [1958] 3 All E.R. 479, [1958] 1 W.L.R. 1157, 102 Sol. Jo. 857 (Ch. D.); Re Wilson; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-3] All E.R. Rep. 1101, 57 Sol. Jo. 245 (Ch. D.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 15(1), (2), 27, 28
Charities Accounting Act, R.S.O. 1980, c. 65
Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, ss. 13, 22
Human Rights Code, 1981, S.O. 1981, c. 53, ss. 1 [am. 1986, c. 64, s. 18(1)], 13, 31(2), 40 [am. 1986, c. 64, s. 18(16)], 40(1)
Insurance Act, R.S.O. 1980, c. 218, s. 117
Labour Relations Act, R.S.O. 1980, c. 228, s. 13
Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6, s. 4

Ontario Human Rights Code, R.S.O. 1970, c. 318
Ontario Human Rights Code, R.S.O. 1980, c. 340
Race Relations Act, 1968 (U.K.), c. 71 [now Race Relations Act, 1976 (U.K.), c. 74]
Trustee Act, R.S.O. 1980, c. 512, s. 60

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 14.05(2) [am. O. Reg. 711/89, s. 14], 14.05(3) [am. O. Reg. 711/89, s. 15]

Authorities referred to

Halsbury's Laws of England, 4th ed. (London: Butterworths, 1974), vol. 5 "Charities", p. 309, para. 505, pp. 430-31, para. 696
Hansard, 33rd Parliament, 2nd Session, May 28, 1986, pp. 937-41
Scott, A.W. and W.F. Fratcher, eds., The Law of Trusts, 4th ed. (Boston: Little, Brown & Co., 1989), vol. IVA, pp. 535-36
Waters, D.W.M., Law of Trusts in Canada (Toronto: Carswell, 1974), c. 14 "Charitable Trusts", pp. 460-504, 502, 601-03, 626
Waters, D.W.M., Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), pp. 240, 611-32 (section entitled "Cy-pres: the Scheme-Making Power")

Treaties, covenants and conventions referred to

International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), Articles 2, 3, 25, 26
International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180
International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX)

APPEAL from the judgment of the High Court of Justice (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193, which upheld the validity of certain trust provisions.

Janet E. Minor, for Ontario Human Rights Commission, appellant.

Alan P. Shanoff and Francy B. Kussner, for Royal Ontario Museum, intervener.

H. Donald Guthrie, Q.C., and John W.R. Day, for Canada Trust Company, respondent.

William L.N. Somerville, Q.C., and Lindsay A. Histrop, for Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, intervener.

Stan J. Sokol, for Public Trustee, intervener.

ROBINS J.A. (OSLER J. (ad hoc) concurring):-- The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-pres doctrine can be applied to preserve the trust.

The appeal is from the order of McKeown J. [reported (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193 (H.C.J.)] on an application under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee of a scholarship trust known as the Leonard Foundation, for the advice, opinion and direction of the court upon certain questions arising in the administration of the trust. The questions put before the court are as follows:

1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee

thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of

(i) public policy as declared in the Human Rights Code, 1981 (the "Code");

(ii) other public policy, if any;

(iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or

(iv) uncertainty?

2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite

the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

McKeown J. found that the trust provisions were not invalid for any of the reasons set out in Question 1, which made it unnecessary for him to answer Questions 2, 3 and 4. He answered Question 5 in the negative, which made it unnecessary to answer Question 6.

The order has been appealed by two of the parties to the proceedings. The first appellant, the Ontario Human Rights Commission, takes the position that the learned weekly court judge should have declined to answer Questions 1(i), 1(iii) and 5 on the ground that these questions concern the applicability of the Human Rights Code, 1981, S.O. 1981, c. 53, and relate to matters within the exclusive primary jurisdiction of the Commission and, therefore, are not properly before the court.

The appellant, the Royal Ontario Museum (the ROM), has status in these proceedings as one of the charitable institutions named in the last will of Reuben Wells Leonard. Under this will, any amount that falls to be administered in the residuary estate is to be divided among certain individuals and charitable institutions as set out by the testator. The ROM's position on this appeal is that the scholarship trust violates public policy and fails completely. In its submission, the judge erred in not holding that the trust fund falls into the Leonard estate and must be distributed to the residual beneficiaries, including the ROM, in accordance with the provisions of the will.

The Public Trustee and the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation are interveners in the case. They both support the judgment below

and ask that the appeal be dismissed. However, should the court find that the terms of the scholarship trust violate public policy, the Public Trustee submits that the trust nonetheless has a valid charitable purpose and should not fail but should be applied cy-pres without the offending conditions. On the other hand, counsel for the Class of Persons Eligible to Receive Scholarships takes the position that if the trust violates public policy, it fails completely and is incapable of being applied cy-pres.

The respondent, Canada Trust Company (the trustee), takes no position other than to suggest that: (1) the court below had jurisdiction to hear the application, and (2) that the indenture in 1923 created a valid charitable trust and, should this court determine by reason of the Human Rights Code, 1981 or other grounds of public policy that the conditions are now void, then either (a) such conditions are merely malum prohibitum and the court should strike them out and leave the charitable trust to operate freed therefrom, or (b) a reference should be directed to apply the fund cy-pres.

THE ISSUES

The preliminary issue as to jurisdiction raised by the Ontario Human Rights Commission, can be disposed of very briefly. In my opinion, this application is properly before the court. I agree with McKeown J. and Tarnopolsky J.A. in this regard and have nothing to add to their reasons. On the remaining issues, while I agree with Tarnopolsky J.A. that the appeal must be allowed, my reasons for reaching that conclusion differ from those of my learned colleague.

The remaining issues, in my view, reduce themselves to these questions:

1. Do the provisions of the trust contravene public policy or are they void for uncertainty?

2. If the answer to that question is in the affirmative, can the doctrine of cy-pres be applied to save the trust?

Before considering these issues, I think it important to examine the trust and review the circumstances that compelled the trustee to launch this application for advice and direction.

THE FACTS

A. The trust document

By indenture dated December 28, 1923 (the indenture or trust document), Reuben Wells Leonard (the settlor) created a trust to be known as the Leonard Foundation (the trust or the scholarship trust or the Foundation). He directed that the income from the property transferred and assigned by him to the trust (the trust property or trust fund) be used for the purpose of educational scholarships to be called the Leonard Scholarships. The Canada Trust Company has been appointed successor trustee of the Foundation.

The indenture opens with four recitals which relate to the race, religion, citizenship, ancestry, ethnic origin and colour of the class of persons eligible to receive scholarships. These recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into

leading citizens of the Empire:

AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

The schools, colleges and universities in which the scholarships may be granted are described in the body of the Indenture in these terms:

2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...

. . . . .

PROVIDED further and as an addition to the class or type of schools above designated or in the Schedule "A" hereto attached, the term ''School" may for the purposes of Scholarships hereunder, include Public Schools and Public

Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.

PROVIDED further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physical training for female students and physical and military or naval training for male students.

(Emphasis added)

The management and administration of the Foundation is vested in a permanent committee known as the General Committee. The Committee consists of 25 members, all of whom must be possessed of the qualifications set out in the indenture's recitals:

The administration and management of the said Foundation is hereby vested in a permanent Committee to be known as the General Committee, consisting of twenty-five members, men and women possessed of the qualifications hereinbefore in recital set out.

(Emphasis added)

The General Committee is given, inter alia, the following power:

(c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the Committee in its discretion may decide.

(Emphasis added)

The class of students eligible to receive scholarships is described as follows:

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British Subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College of Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical (sic) Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for

Scholarships under the terms hereof, shall not exceed one-fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

(Emphasis added)

The settlor expressed the wish that:

... the students or pupils who have enjoyed the benefits of a scholarship ... will form a Club or association for the purpose of

. . . . .

(b) Encouraging each other when the occasion arises and circumstances will permit, to personally afford financial assistance to pupils and students of similar classes as in recital hereinbefore described to obtain the blessings and benefits of education ...

(Emphasis added)

The trustee is empowered at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications set out in the recitals for the opinion, advice and direction of the court:

9. The Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared.

(Emphasis added)

I should perhaps note that no challenge was put forth on this basis in either this court or the court below.

The Leonard Scholarships have been available for more than 65 years to eligible students across Canada and elsewhere, and are tenable at eligible schools, colleges and universities in Canada and Great Britain. Application forms are available upon request from members of the General Committee. An applicant submits the application through a member of the General Committee who conducts a personal interview of the applicant, completes the nomination and recommendation and forwards the application to the General Committee.

The Committee on Scholarships meets in April or May of each year to consider all of the applications and to make recommendations to the General Committee. Finally, the General Committee meets and, after consideration of the recommendation of the Committee on Scholarships, approves the awards for the following academic year.

B. The circumstances leading up to the application

The circumstances leading up to this application are described in the affidavit of Jack Cummings McLeod, a trust officer with Canada Trust Company who has been the secretary of the General Committee since 1975. In light of the public policy aspects of the application, the circumstances described by Mr. McLeod become significant.

Mr. McLeod deposes that since 1975 he, as secretary, and various members of the General Committee have received correspondence from students, parents and academics expressing concerns and complaints with regard to the terms of eligibility for scholarships under the trust. Since 1956, numerous press articles, news reports and letters to the editor have appeared in the daily and university press of Canada commenting on, or reporting on comments about, the eligibility conditions. Mr. McLeod is aware of approximately 30 such articles, all generally critical of the eligibility requirements. The tenor of these articles is evident from their headings, which include "A Sorry Anachronism", "Act Now on Racist Funding" and "Whites Only Scholarship is Labelled 'Repugnant' ".

Since 1971, the Human Rights Commissions of Alberta and

Ontario and the Human Rights Branch of the Department of Labour of British Columbia have complained to the trustee and officials of the General Committee about the conditions of eligibility. Other bodies such as the Saskatoon Legal Assistance Clinic and units of the Anglican Church of Canada have made similar complaints.

Over the years 1975 to 1982, various schools and universities, including the University of Toronto, the University of Western Ontario and the University of British Columbia, have also complained, without success, to the Foundation about the eligibility requirements. In 1982, the University of Toronto discontinued publication of the Leonard Scholarship and refused to continue processing award payments because of the University's policy with respect to awards containing discriminatory or irrelevant criteria. The University of Alberta has taken similar action.

In January 1986, the chairman of the Ontario Human Rights Commission advised the Foundation that the terms of the scholarships appear to "run contrary to the public policy of the Province of Ontario" and requested "appropriate action to have the terms of the trust changed". In response, the Foundation took the position that it was administering a private trust whose provisions did not offend the Human Rights Code, 1981.

At various times over the past 25 years, members of the General Committee and officials of the trustee have themselves expressed concern about the eligibility criteria. The matter has been considered internally and, it appears, has been the subject of "divisive" debate at meetings of the General Committee.

In April 1986, the Most Reverend Edward W. Scott, then Primate of the Anglican Church of Canada, the church of which the late Colonel Leonard was a prominent member, wrote to the Foundation expressing his "deep concerns" about the trust. He recorded, in strong terms, his view that the eligibility criteria are discriminatory and against public policy and not "in keeping with the spirit and intent of the Canadian

Charter of Rights". He urged the Committee to apply to the courts to have the offensive terms "read out of the trust deed ... with the ultimate result that effect will continue to be given to the trust deed and gift as a whole". He concluded his letter stating:

> I have every confidence that if the kind benefactor of this Trust were living in 1986, rather than those many years ago, there would be agreement that the scope of possible recipients be widened bringing the document in line with standards of public acceptance of today. There is every reason why the good works of the generous benefactor of the Foundation should live on in perpetuity but, in my view, they must be in keeping with the society of today just as what was written those many years ago was, no doubt, although regretfully, in keeping with the society of that day.

In August 1986, the Ontario Human Rights Commission, not satisfied with the response to its earlier letter, filed a formal complaint against the Leonard Foundation alleging that the trust contravened the Human Rights Code, 1981. This prompted the trustee to seek the advice and direction of the court. In his affidavit, Mr. McLeod explains the Trustee's position in bringing the application as follows:

> 21. ... the Trustee has been advised that it is, and has hitherto seen it to be its duty to support, maintain and administer the trusts which were accepted by the original Trustee until such time as a Court of competent jurisdiction determines that the trust is illegal or void. This the Trustee and its predecessor corporations have done for upwards of 63 years since the inception of the trust, without serious difficulty or opposition until the more recent of the events described in paragraphs 14 to 20 hereof.
>
> 22. The inquiries from the press, complaints of universities, schools, Human Rights Commissions and similar agencies, academics, members of the public and certain members of the General Committee, as well as the Complaint referred to in paragraph 17 hereof, the press articles and reports referred to in paragraphs 14 and 18 hereof, the

divisive effect of the motion and vote referred to in paragraph 20 hereof, and other similar recent events have, in my view, had an unsettling effect and have interfered with the due administration of the trusts declared by the Indenture and the ability of the Trustee to carry on such administration effectively. They have also impacted and can be expected to continue to impact unfavourably on the efficient administration of the scholarship programme by the General Committee, its Committee on Scholarships and its officials.

23. Although there has not to date been any serious difficulty experienced by the General Committee in identifying and making awards to students who fulfil the eligibility requirements of the Indenture, there have obviously been great changes in Canadian society and in the British Empire that have occurred in the 63 years since the inception of the Foundation. It may become more difficult than in the past to interpret and apply such eligibility terms as "British Nationality", "British Parentage", "allegiance to any Foreign Government, Prince, Pope or Potentate", "Christians of the White Race", "British Subject" and "of the Christian Religion in its Protestant Form". The Trustee has received an opinion of its counsel that a charitable trust is exempt from the requirement of certainty of objects and cannot fail for uncertainty so long as there are some eligible persons who are with certainty within the ambit of the qualifications. Nevertheless, in the context of modern Canadian life and society, the increasingly multi-cultural makeup of Canada and the attention which has now been focused on the eligibility requirements of the Indenture, these difficulties may be expected to increase.

24. The Trustee accordingly believes that it requires the opinion, advice and direction of this Honourable Court as to the essential validity of the Indenture under which it operates, pursuant to the provisions of section 60 of the Trustee Act and the Court's inherent jurisdiction to supervise charitable trusts.

THE PUBLIC POLICY ISSUE

A. Can the recitals be considered in deciding this issue?

In holding that the provisions of the trust did not violate either the Human Rights Code, 1981 or public policy, McKeown J. took into account only the operative clauses of the trust document and the second sentence of the fourth recital. In his view, the balance of the recitals were merely expressions of the settlor's motive and, hence, irrelevant to a determination of the issues before him. While he found the motives offensive to today's general community, he concluded that these recitals could play no part in interpreting the trust document or in resolving the question of whether the trust contravened public policy.

In my opinion, the recitals cannot be isolated from the balance of the trust document and disregarded by the court in giving the advice and direction sought by the trustee in this case. The document must be read as a whole. While the operative provisions of an instrument of this nature will ordinarily prevail over its recitals, where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to the operative provisions, the instrument should be viewed in its entirety. That, in my opinion, is the situation in the case of this trust document.

The recitals here in no way contradict or conflict with the operative provisions. The settlor made constant reference to them throughout the operative part of the document. He restricted the class of persons entitled to the benefits of the trust by reference to the recitals; he set the qualification for those who might administer the trust and give judicial advice thereon by reference to the recitals; and he stipulated the universities and colleges which might be attended by scholarship winners by reference to the recitals.

Moreover, the recitals were intended to give guidance and direction to the General Committee in awarding scholarships. They go beyond the restriction in the second sentence of the fourth recital excluding "all who are not Christians of the

White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual" from benefits in the Foundation. They indicate that not all white Protestants of British parentage should be eligible for the benefits of the trust but, rather, only those "whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire" and "who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire". Those statements were intended as standards which, if not binding, were meant to be taken into account in the making of awards. I would not regard them as irrelevant. Nor would I regard any other of the recitals as irrelevant. The operative provisions were intended to be administered in accordance with the concepts articulated in the recitals. As this document is framed, its two parts are so linked as to be inextricably interwoven. In my opinion, one part cannot be divorced from the other.

Furthermore, and perhaps more fundamentally, even if the recitals are properly treated as going only to the matter of motive, I would not think they can be ignored on an application of this nature in which a trustee seeks advice with respect to public policy issues. While the Foundation may have been privately created, there is a clear public aspect to its purpose and administration. In awarding scholarships to study at publicly supported educational institutions to students whose application is solicited from a broad segment of the public, the Foundation is effectively acting in the public sphere. Operating in perpetuity as a charitable trust for educational purposes, as it has now for over half a century since the settlor's death, the Foundation has, in realistic terms, acquired a public or, at the least, a quasi-public character. When challenged on public policy grounds, the reasons, explicitly stated, which motivated the Foundation's establishment and give meaning to its restrictive criteria, are highly germane. To consider public policy issues of the kind in question by sterilizing the document and treating the recitals

as though they did not exist, is to proceed on an artificial basis. In my opinion, the court cannot close its eyes to any of this trust document's provisions.

B. Does the trust violate public policy?

Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:

> The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.

Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. This, in my opinion, is manifestly such a case.

The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.). That interest must, however, be limited in the case

of this trust by public policy considerations. In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

According to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation, development and progress of civilization along the best lines, and, second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.

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.

Given this conclusion, it becomes unnecessary to decide

whether the trust is invalid by reason of uncertainty or to consider the questions raised in this regard in para. 23 of Mr. McLeod's affidavit which I reproduced earlier. Nor is it necessary to make any determination as to whether other educational scholarships may contravene public policy.

On the material before the court, it appears that many scholarships are currently available to students at colleges and universities in Ontario and elsewhere in Canada which restrict eligibility or grant preference on the basis of such factors as an applicant's religion, ethnic origin, sex, or language. None, however, so far as the material reveals, is rooted in concepts in any way akin to those articulated here which proclaim, in effect, some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others. I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any proper factual basis whether these other scholarships are contrary to public policy or what approach is to be adopted in determining their validity should the issue arise. The court's intervention on public policy grounds in this case is mandated by the, hopefully, unique provisions in the trust document establishing the Leonard Foundation.

THE CY-PRES ISSUE

On this issue, I agree with the learned weekly court judge that the trust established by the indenture is a charitable trust. I am persuaded that the settlor intended the trust property to be wholly devoted to the furtherance of a charitable object whose general purpose is the advancement of education or the advancement of leadership through education.

It must not be forgotten that when the trust property initially vested in 1923 the terms of the indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal or which detracted from the settlor's general intention to devote the property to charitable purposes. However, with changing social attitudes, public policy has changed. The public policy of the

1920s is not the public policy of the 1990s. As a result, it is no longer in the interest of the community to continue the trust on the basis predicated by the settlor. Put another way, while the trust was practicable when it was created, changing times have rendered the ideas promoted by it contrary to public policy and, hence, it has become impracticable to carry it on in the manner originally planned by the settlor.

In these circumstances, the trust should not fail. It is appropriate and only reasonable that the court apply the cy-pres doctrine and invoke its inherent jurisdiction to propound a scheme that will bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented by those charged with the trust's administration.

The observations of Lord Simonds in National Anti-Vivisection Society v. Inland Revenue Commissioners, [1948] A.C. 31, [1947] 2 All E.R. 217, 177 L.T. 226 (H.L.), are apposite to this case. At p. 74 A.C. he said:

> A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by Jessel M.R. in In re Campden Charities, 18 Ch. D. 310. A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to the Minister of Education and ask that a cy-pres scheme may be established. ... A charity once established does not die, though its nature may be changed.

Reference might also be made to A.W. Scott and W.F. Fratcher, eds., The Law of Trusts, 4th ed. (Boston: Little, Brown & Co., 1989), where, at vol. IVA, pp. 535-36, the following comment appears:

> The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention (Dunbar v. Board of Trustees of George W. Clayton College, 170 Colo. 327, 461 P.2d 28 (1969) (quoting the text)). Said John Stuart Mill,
>
> "Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. ... No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found."
>
> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

(Emphasis added)

See generally, Waters, Law of Trusts, at pp. 611-32 (a section entitled "Cy-pres: the Scheme-Making Power"); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447,

[1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); and Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.).

DISPOSITION

To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows:

Q. 1(ii). Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

Q. 1(i), (iii) and (iv). It is not necessary to answer these questions.

Q. 2. No.

Q. 3. Yes.

Q. 4. As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q. 1(ii).

QQ. 5 and 6. The application form should be changed in accordance with this decision.

In the result, I would allow the appeal, set aside the order of McKeown J., and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the

corpus of the trust.

TARNOPOLSKY J.A. (concurring in result):--

THE JUDICIAL HISTORY AND THE ISSUES

This case concerns appeals from the judgment of McKeown J., dated August 10, 1987 [reported 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193] upon an application, under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee under an indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the indenture:

1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of

(i) public policy as declared in the Human Rights Code, 1981 (the "Code");

(ii) other public policy, if any;

(iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or

(iv) uncertainty?

2. If the answer to any of the questions propounded above

is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

The answers given by McKeown J. were as follows:

Question 1 (i): No; (ii): No; (iii): No; (iv): No.

Questions 2, 3 and 4: The answers given to the previous

question make it unnecessary to answer Questions 2, 3 and 4.

Question 5: No.

Question 6: The answer given to the previous question makes it unnecessary to answer this one.

One appellant is the Royal Ontario Museum (ROM), which was one of several charitable institutions which were, by order of the Associate Chief Justice of Ontario dated December 3, 1986, required to be served, as residuary legatees of the settlor, with notice of the application of the trustee. This appellant asks that the appeal be allowed in part and that positive answers be given to Questions 1(ii), 1(iii), 1(iv); and to Question 2, with the added declaration that the residual beneficiaries are entitled to the trust fund; and also that the answer to Question 3 be in the negative.

The other appellant is the Ontario Human Rights Commission which had, pursuant to s. 31(2) of the Human Rights Code, 1981, S.O. 1981, c. 53 (hereafter Human Rights Code, 1981), initiated a formal complaint with itself against the trustee on August 12, 1986, alleging discrimination in the provision of services and facilities and in contracting, on grounds of race, creed, colour, citizenship, ancestry, place of origin and ethnic origin. Subsequent to being informed of this complaint the trustee applied to the High Court for directions and the Commission was added as the respondent. The Commission appeals that part of the decision of McKeown J. in which he provides answers to Questions 1(i), 1(iii) and 5, on the ground that they concerned the applicability of the Human Rights Code, 1981 and so are matters within the exclusive primary jurisdiction of the Commission and any board of inquiry appointed under the Code.

There are two interveners in this appeal. The first is the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, added by the order of the Associate Chief Justice of the High Court referred to earlier. On behalf of this class it was argued that the appeal should be dismissed, but that, if the answer to Question 1 is answered in the

affirmative, then the answers to Questions 2, 3 and 4 should be that the trust fails, is incapable of being applied cy-pres, and the trust fund results to the settlor's estate to be distributed according to his will.

In his order of December 3, 1986 mentioned above, the Associate Chief Justice of the High Court also ordered that notice of the application be served on the Public Trustee, rather than upon the Official Guardian as set out in clause 9 of the indenture. The Public Trustee also argued that the appeal should be dismissed. However, in the alternative it was submitted that if it should be found that certain terms or clauses breach public policy or are uncertain, such terms or clauses should be treated as conditions subsequent or unessential, which could be expressed so as not to detract from a valid charitable purpose of creating a scholarship fund for students in need of financial assistance to pursue their studies in selected schools, colleges or universities.

All these submissions can be summarized into three main issues:

1. Did McKeown J. have jurisdiction to determine this matter or should he have deferred to the jurisdiction of the Ontario Human Rights Commission?

2. Is the trust void in whole or in part either for uncertainty or because it violates public policy?

3. If the trust is void on grounds of public policy or uncertainty, is there a general charitable intention so that the court can apply the trust cy-pres?

Questions 5 and 6 of the original application, which are subsidiary questions, could need to be addressed depending upon the answers to the three main issues.

II. THE FACTS

These are set out in sufficient detail in the judgment of McKeown J. at pp. 82-87 O.R. It is sufficient for our purposes

to summarize therefrom.

By indenture dated December 28, 1923, the trustee accepted the burden of certain trusts thereby created with respect to the trust property transferred and assigned to it. The trust was directed to be known as the Leonard Foundation (the Foundation), the scholarships from which were directed to be known as the Leonard Scholarships. There was provision for the settlor to revoke the indenture during his lifetime, but he did not do so before his death on December 17, 1930.

The most pertinent parts of the indenture are:

The Recitals

WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:

AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian Religion:

AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:

AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by any allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seal of which government, power or authority is outside of the British

Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

. . . . .

2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...

. . . . .

If a vacancy in the General Committee is not filled for two years after it occurs, pursuant to the above provisions, the Trustee may apply to any Judge of the Supreme Court of Ontario, possessed of the qualifications herein required of a member of the said General Committee ...

. . . . .

The General Committee shall have the following powers ...

. . . . .

(c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the

Committee in its discretion may decide.

. . . . .

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College of Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical (sic) Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one-

fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

. . . . .

8. THE Trustee shall disburse the whole or such part of the net annual income derived from the Trust Estate among the persons, Schools, Colleges and Universities in such amounts, at such times, upon such terms and in such manner as the General Committee shall in its discretion consistent with the intention of the Settlor as hereinbefore set out, decide, and the money payable in respect of such Scholarships shall, except as hereinafter provided, be paid to the respective Schools, Colleges or Universities in which the respective student or students, pupil or pupils, are in attendance ...

9. THE Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared ...

The indenture indicates that the administration and management of the Foundation, as distinct from the powers and duties of the applicant with respect to the trust estate, are vested in a General Committee and a sub-committee thereof known as the Committee on Scholarships.

Application forms for scholarships are made available during the months of January, February and March to members of the General Committee and, upon request, to schools, colleges, universities and individuals. An applicant submits an application through a member of the General Committee, who conducts a personal interview of the applicant, completes the nomination and recommendation, and forwards the application to the General Committee before March 31.

The Committee on Scholarships meets in April or May in each

year to consider the applications and to prepare recommendations to the General Committee for the award of scholarships. The General Committee then meets and, inter alia, receives the report and recommendations of the Committee on Scholarships and approves the awards to be made for the ensuing scholastic year. In making awards, the General Committee bases its decision in each individual case upon, inter alia, the requirements set out in the indenture. To be eligible for a scholarship, a person must be one who, without financial assistance, would be unable to pursue a course of study and meets the other criteria in the indenture.

Since 1971, the Ontario Human Rights Commission and its equivalents in the Provinces of Alberta and British Columbia, together with other bodies, have expressed concerns over conditions of eligibility to officials of the trustee. There are universities which, in the last ten years, have also complained or expressed concern to officers of the Foundation regarding eligibility requirements. Notwithstanding instances of this kind, the Foundation receives approximately 230 new and renewal applications annually.

Evidence was submitted to McKeown J. to show that there exist in Ontario and elsewhere in Canada numerous educational scholarships which contain eligibility restrictions based on race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, marital status, family status and handicap.

III. THE JURISPRUDENCE

(1) Jurisdiction -- Human Rights Commission or court?

The Ontario Human Rights Commission submitted that McKeown J. should have deferred to the Commission to exercise its jurisdiction under the Human Rights Code, 1981 with respect to the complaint against the trustee that the Leonard Trust contravenes the Code. In considering this submission one must start with the following fundamental proposition offered by Dubin A.C.J.O. in Blainey v. Ontario Hockey Assn. (1986), 54 O.R. (2d) 513, 21 C.R.R. 44, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.) [leave to appeal

to S.C.C. refused (1986), 58 O.R. (2d) 274n, 21 C.R.R. 44n, 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 72 N.R. 76n, 17 O.A.C. 399n], at pp. 532-33 O.R., p. 64 C.R.R.:

... the Human Rights Code provides a comprehensive scheme for the investigation and adjudication of complaints of discrimination. There is a very broad right of appeal to the Court from the ultimate determination of a board of inquiry constituted under the Human Rights Code. The procedure provided for in the Human Rights Code must first be pursued before resort can be made to the Court. This was so held in Board of Governors of Seneca College v. Bhadauria, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 ... Chief Justice Laskin, speaking for the Court, stated at p. 183 S.C.R., pp. 194-5 D.L.R.:

"In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of The Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law."

And at pp. 194-5 S.C.R., p. 203 D.L.R.:

"The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use."

Nevertheless, although this may be taken as a starting proposition, I agree with McKeown J. that in this case several factors militate towards the High Court, as the superior court of inherent jurisdiction in this province, assuming jurisdiction despite a complaint being filed with the Human Rights Commission with respect to the same subject-matter.

In the first place, the state of the law dealt with by this court and the Supreme Court of Canada in Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph14,117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, revg (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. Paragraph14,003, 105 D.L.R. (3d) 707 (C.A.) is in contrast with the situation in this case. In Bhadauria this court had attempted "to advance the common law" in filling a void by creating a new tort of discrimination. The Supreme Court held that not to be necessary because of the comprehensive scheme of the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340]. Here, however, we are concerned with the administration of a trust, over which superior courts have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts. As noted at the beginning of this judgment, the trustee in this case applied to the High Court for advice and direction pursuant to the trust instrument itself as well as s. 60 of the Trustee Act.

Second, we are not concerned here with a typical proceeding under the Human Rights Code, 1981 in which an allegation of discrimination is brought against a respondent. The Commission's first mandate is to effect a settlement. However, the trustee has no authority, absent authorization of the trust deed or legislation or a court order, to enter into a settlement which would be contrary to the terms of the trust. Even if no settlement could be effected and a board of inquiry were to be appointed, there is serious question as to whether the board could grant an adequate remedy. Its remedial authority is governed by s. 40(1) of the Code. If a Code infringement is found, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

These remedial powers do not appear to give the board of inquiry the power to alter the terms of the trust or declare it void. In any case, resort to a court would have to be made to determine authoritatively whether such power exists.

Finally, I agree with McKeown J. that this is not a case where the fact-finding role of the Commission and a board of inquiry would be required. Even in Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, where some further fact-finding and, particularly, fact-verification might have been useful, Martland J., on behalf of the majority on the Supreme Court of Canada, quoted Lord Goddard in R. v. Tottenham and District Rent Tribunal; Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103, [1956] 2 All E.R. 863, 100 Sol. Jo. 552 (Q.B.) at p. 108 Q.B., to the effect that:

... where there is a clear question of law not depending upon particular facts -- because there is no fact in dispute in this case -- there is no reason why the applicants should not come direct to this court for prohibition ...

Similarly, here, I agree with McKeown J. that we are concerned with a question of law; there are no facts in dispute. The trustee is entitled to come to the superior court pursuant to s. 60 of the Trustee Act to seek advice and direction.

(2) Is the trust Void in whole or in part either for uncertainty or because it violates public policy?

We are concerned here with a charitable trust. In order to be considered charitable, a trust must have been established for one of the following four purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community as a whole as enunciated by the courts. (For the original summary and categorization of these see Income Tax Special Purposes Commissioners v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, 65 L.T. 621 (H.L.). For their Ontario application see the Charities Accounting Act, R.S.O. 1980, c. 65 and Re Levy Estate (1989), 68 O.R. (2d) 385, 58 D.L.R. (4th) 375, 33 E.T.R. 1, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), c. 14 "Charitable Trusts".)

The general rule is that in order to achieve charitable status, a trust must satisfy three conditions. It must have as its object one of the four purposes stated above; its purpose must be wholly and exclusively charitable; and it must promote a public benefit (Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137, 94 Sol. Jo. 777 (H.L.); McGovern v. Attorney General, [1982] Ch. 321, [1981] 3 All E.R. 493, [1982] 2 W.L.R. 222 (Ch. D.), at p. 331 Ch., and Re Levy Estate, supra). To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public (Halsbury's Laws of England, 4th ed. (London: Butterworths, 1974), vol. 5 "Charities", p. 309, para. 505; Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848, 93 Sol. Jo. 355 (H.L.), at p. 855 All E.R., and Waters, Law of Trusts, c. 14, pp. 460-504). If there is a personal nexus between each of the beneficiaries and the settlor, the trust will fail for lack of public benefit (Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31, [1951] 1 T.L.R. 118 (H.L.), at p. 309 A.C.

In the case at bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a

sufficiently wide cross-section of the public.

Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (Re Moon; Ex parte Dawes (1886), 17 Q.B.D. 275, 55 L.T. 114, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries, but then went on to state [p. 89 O.R.]: "At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument".

Without deciding whether the recitals are incorporated in the trust instrument by subsequent references to them, I would agree that Colonel Leonard's beliefs as stated in the opening recitals are evidence of motive and are irrelevant. However, that part of the trust instrument which matters for the purpose of assessing certainty is the second sentence in the first full paragraph on p. 2 of the instrument, which reads as follows:

> For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition

will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (Jones v. T. Eaton Co. Ltd., [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at pp. 650-51 S.C.R., and McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228, 114 Sol. Jo. 375 (H.L.) at p. 456 A.C.). It is enough that some claimants can satisfy the condition (Re Selby's Will Trusts; Donn v. Selby, [1965] 3 All E.R. 386, [1966] 1 W.L.R. 43, 110 Sol. Jo. 74 (Ch. D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (Re Allen; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898, 97 Sol. Jo. 606 (C.A.) [subsequent proceedings at [1954] Ch. 259, [1954] 1 All E.R. 526, 98 Sol. Jo. 146]. It is well established that a charitable trust should not fail for uncertainty (see Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293, 88 Sol. Jo. 103 (Ch. D.)). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

In this case there has been no difficulty over some six decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the "allegiance'' exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to "allegiance" to be uncertain and I would hold that it is severable from the other restrictions as to class.

Turning now to the public policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as "uncertain", as in Re Lysaght; Hill v. Royal College

of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888, 109 Sol. Jo. 577 (Ch. D.); Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16, 86 Sol. Jo. 384 (H.L.), and Re Tarnpolsk; Barclays Bank Ltd. v. Hyer, [1958] 3 All E.R. 479, [1958] 1 W.L.R. 1157, 102 Sol. Jo. 857 (Ch. D.), or "impracticable" as Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.). In the latter case the court found a general charitable intention and then applied the trust property cy-pres. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in Re Lysaght, supra, at p. 206 Ch., quoted by McKeown J. at p. 93 O.R.:

> I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects and I am aware that there is a Bill dealing with racial relations at present under consideration by Parliament, but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy. The testatrix's desire to exclude persons of the Jewish faith or of the Roman Catholic faith from those eligible for the studentship in the present case appears to me to be unamiable, and I would accept Mr. Clauson's suggestion that it is undesirable, but it is not, I think, contrary to public policy.

However, in considering these observations of Buckley L.J., it is necessary to keep in mind two points. First, the observations themselves indicate that they were made before the enactment of the first comprehensive statute in the United Kingdom to prohibit discrimination on racial grounds -- the Race Relations Act of 1968, c. 71 [now Race Relations Act, 1976 (U.K.), c. 74]. Second, religion as a prohibited ground of discrimination is conspicuously left out of the anti-discrimination laws of the United Kingdom. I do not, therefore, find the English cases on point to be of any help or guidance.

In Canada the leading case on public policy and

discrimination at the commencement of World War II was Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81, wherein the majority of the Supreme Court of Canada found that denial of service on grounds of race and colour was not contrary to good morals or public order.

After the war this court, in Noble v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [revd [1951] S.C.R. 64, [1951] 1 D.L.R. 321] upheld a racially restrictive covenant in the course of deciding that there was insufficient evidence to conclude that racial discrimination was contrary to public policy in Ontario. In this the court specifically overruled Mackay J., in Re Wren, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in Noble on technical grounds, but did not refer to the public policy argument.

Subsequently, in Bhadauria (C.A.), at pp. 149-50 O.R., p. 715 D.L.R., in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340], the first two paragraphs of which then provided:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin ...

She then observed:

> I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human

rights.

That the Human Rights Code, 1981 recognizes public policy in Ontario, was acknowledged a few years later by the Supreme Court of Canada in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781, 82 C.L.L.C. Paragraph17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at pp. 213-14 S.C.R., pp. 23-24 D.L.R.

Therefore, even though McKeown J. referred to the caution of Duff C.J.C. in Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at pp. 7-8 S.C.R., to the effect that public policy is a doctrine to be invoked only in clear cases where the harm to the public is substantially incontestable and does not depend upon the "idiosyncratic inferences of a few judicial minds", the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario. I can think of no better way to respond to the caution of Duff C.J.C. than to quote the assertion of Mackay J. of nearly 45 years ago in Re Wren, supra, at p. 783 O.R.:

> Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

Further evidence of the public policy against discrimination

can be found in several statutes in addition to the preamble and content of the Human Rights Code, 1981: s. 13 of the Conveyancing and Law of Property Act, R.S.O. 1980, c. 90; s. 4 of the Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6; s. 117 of the Insurance Act, R.S.O. 1980, c. 218; and s. 13 of the Labour Relations Act, R.S.O. 1980, c. 228. All of these indicate that this particular public policy is not circumscribed by the exact words of the Human Rights Code, 1981 alone. Such a circumscription would make it necessary to alter what the courts would regard as public policy every time an amendment were made to the Human Rights Code, 1981. This can be seen just by comparing the wording of the second paragraph of today's preamble with that considered by Wilson J.A. in 1979 and quoted above. Currently this paragraph reads:

> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province ...

It is relevant in this case to refer as well to the Ontario Policy on Race Relations (Race Relations Directorate, Ministry of Citizenship) as well as the Premier's statement in the Legislature concerning that policy (Hansard Official Report of Debates of Legislative Assembly of Ontario, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-41). The Policy on Race Relations states:

> The government is committed to equality of treatment and opportunity for all Ontario residents and recognizes that a harmonious racial climate is essential to the future prosperity and social well-being of this province. ... The government will take an active role in the elimination of all racial discrimination, including those policies and practices which, while not intentionally discriminatory, have a discriminatory effect. ... The government will also continue to attack the overt manifestations of racism and to this end

declares that: (a) Racism in any form is not tolerated in Ontario.

In introducing it in the Legislature, Premier David Peterson said (Hansard, supra, at p. 937):

> This policy recognizes that Ontario's commitment to equality has grown from benign approval to active support. It leaves no doubt that the path we will follow to full racial harmony and equal opportunity is paved, not just with good wishes and best intentions but with concrete plans and active measures.

Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect.

In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.

Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.

Clearly this is a charitable trust which is void on the ground of public policy to the extent that it discriminates on grounds of race (colour, nationality, ethnic origin), religion and sex.

Some concern was expressed to us that a finding of invalidity in this case would mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy. The respondents argued that this would have adverse effects on many educational scholarships currently available in Ontario and other parts of Canada. Many of these provide support for qualified students who could not attend university without financial assistance. Some are restricted to visible minorities, women or other disadvantaged groups. In my view, these trusts will have to be evaluated on a case by case basis, should their validity be challenged. This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.

It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 1 [am. 1986, c. 64, s. 18(1)] and 13 of the Human Rights Code, 1981 and that adopted by the courts when approaching s. 15(2) of the Charter. Those charitable trusts

aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the Human Rights Code, 1981 or s. 15(2) of the Charter would not likely be found void because they promote, rather than impede, the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, at pp. 152-53 S.C.R., pp. 201-02 C.R.R., per Wilson J. and p. 175 S.C.R., p. 228-29 C.R.R., per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the Charter (Andrews, supra, pp. 168-69 S.C.R., p. 223 C.R.R., per McIntyre J.). In the indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of "clergymen", "school teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy subject, of course, to an analysis of the context, purpose and effect of the restriction.

In this case the court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the Conveyancing and Law of Property Act, s. 22, for instance, covenants that purport to restrict the sale, ownership, occupation or use of land because of, inter alia,

race, creed or colour are void. Under the Human Rights Code, 1981 discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see Waters, Law of Trusts, at pp. 601-03 and 626; and Ministry of Health v. Simpson, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-pres providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, Law of Trusts, p. 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.

(3) Is there a general charitable intention so that the court can apply the trust cy-pres?

One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-pres. However, in order to apply the trust property cy-pres, the court must find that the settlor had a general charitable intention. If the mode of application is such an essential part of the gift that the court cannot distinguish any general purpose of

charity, but is obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended, it cannot apply the trust cy-pres (see Re Wilson; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-3] All E.R. Rep. 1101, 57 Sol. Jo. 245 (Ch. D.); Re Lysaght, supra, at p. 203 Ch., and Halsbury's Laws of England, supra, pp. 430-31, para. 696). Cy-pres should never depart from the testator's true intention. This must be discerned from reading the trust instrument as a whole. The court may have regard to the recitals in order to determine the "substantial, overriding, true or paramount intention".

If the court must decide that the settlor would not have established the trust if it could not be carried out in the specific way set out, then there is no general charitable intention and the trust fails. If, on the other hand, the discriminatory provisions can be said to be the "machinery" of the trust, separable from the general intention to educate, then the court may apply the money cy-pres. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in Re Lysaght, supra, at p. 202 Ch.:

> A general charitable intention, then, may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention -- not, that is to say, part of his paramount intention.
>
> In contrast, a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way.

The question in this case is, then, whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of students and would not have created it otherwise. To preserve the trust, this court must find that the settlor's general intention was to educate young people for the benefit of the

Empire (now the Commonwealth and this country) and that the discriminatory provisions are merely the machinery designed to effect that intention. Was it his intention to educate particular kinds of people because only they could be entrusted with the future of the country? Was it his overriding purpose to select students of the right breeding and prepare them for leadership? If so, then his intention was specific and the trust must fail.

It seems to me, however, that his intention must be viewed as one to promote leadership through education. The scheme he chose was the one he thought best because of the time in which he lived. Although today discrimination is considered to have been an ugly feature of our society in the past (and is still too prevalent), we judge attitudes of the past with hindsight. It is easy, with the benefit of such hindsight, to feel contempt for the views expressed in the recitals of the trust instrument and to find the racial and religious restrictions contained in its text to be repugnant. In his day, however, Colonel Leonard was a philanthropist. He obviously believed that education was the key to a strong and prosperous country and a peaceful world. In that, he was no doubt right. The fact that he chose to implement his desire to promote education through a discriminatory scheme cannot displace his general charitable intention. In my view, the tests for finding a general charitable intention are met. This conclusion finds support in para. 13 of the trust instrument which provides that the testator could alter the trust or change its objects and purposes and that any income that became available "shall thereupon become applicable for such other objects or purposes, being an object or purpose conducive to the promotion or encouragement of education, as the settlor may from time to time think proper".

I find support for this conclusion in the case of Re Dominion Students' Hall Trust, supra, where Evershed J. granted a petition by the charity to remove a restriction which confined a student hostel to members of the Empire of European origin. He said, at p. 186 Ch.:

> It is not necessary to go to the length of saying that the

original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.

I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

This observation, made in 1946, is particularly apt today.

IV. THE DISPOSITION

In the result I would allow the appeal and substitute the following answers for those given by McKeown J.:

Q. 1 (i) - Yes, but not just as confined by the Human Rights Code, 1981.

(ii) - Yes, the provisions of the trust which confine management, judicial advice and benefit on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

(iii) - It is not necessary to answer this question.

(iv) - No.

Q. 2 - No.

Q. 3 - Yes.

Q. 4 - As before, but with a deletion of the discriminatory restrictions mentioned in answer to Q. 1.(ii).

Q. 5 - This question should not be answered in this decision. After the application form is changed in accordance with this decision the question will become moot and, if not, it should be considered under the procedures in the Human Rights Code, 1981.

Q. 6 - The answer to this question is provided in the answer to Q. 5.

As far as costs are concerned, the order made by McKeown J. should stand and the same disposition should apply with respect to costs on this appeal.

Appeal allowed.