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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees");
DOCUMENT	**BRIEF OF THE SAWRIDGE TRUSTEES** **JURISDICTION APPLICATION RETURNABLE APRIL 25, 2019**
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A. Introduction:

1. On January 9, 2018, the Trustees (the **"Trustees"**) of the Sawridge Band Inter Vivo Settlement (**"1985 Trust"**) filed an application in respect of case management issues relating to the advice and direction application with respect to the beneficiary definition found within the 1985 Trust (the **"Definition"**).[1]

2. By way of Consent Order filed January 22, 2018, the court held that the Definition was discriminatory.[2]

3. By way of Consent Order filed December 19, 2018, the parties agreed to the hearing of certain questions on jurisdiction in advance of the final determination of the Trustee's application for advice and direction.[3] The issues to be addressed by the court are set out below, but simply put the parties seek guidance as to the ability of the Court to amend the Definition outside of the provisions set out in the *Trustee Act*[4].

4. This application was not brought to request the Court to amend the discriminatory Definition, nor was it brought to determine the best language for the amendment. Rather, this application merely seeks clarification of the court's jurisdiction to amend and the scope of that jurisdiction to provide guidance to the Justice who will finally determine this matter.

B. Facts:

The 1982 Trust

5. There was a trust established in 1982 for the members of Sawridge First Nation. The 1982 Trust deed did not have any discriminatory language, but simply defined its beneficiaries as members of the First Nation.[5]

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[1] Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue) filed January 9, 2019 **[TAB 1]**

[2] Consent Order (Issue of Discrimination) granted by Thomas, J on January 19, 2018 **[TAB 2]**

[3] Consent Order (Hearing of Jurisdictional Question) granted by Henderson, J on December 18, 2018 **[TAB 3]**

[4] *Trustee Act*, RSA 2000, c T-8 section 42("*Trustee Act*") **[TAB 4]**.

[5] Exhibit A, Declaration of Trust dated April 15, 1982, of the Affidavit of Paul Bujold sworn September 12, 2011, page 3, paragraph 6 **[TAB 5]**

The 1985 Trust

6. The 1985 Trust was established on April 15, 1985 by a declaration of trust (the "**Trust Deed**").[6] The assets of the 1982 trust were transferred into the 1985 Trust.

7. Paragraph 6 of the Trust Deed conferred on the Trustees of the 1985 Trust discretionary powers to pay or apply income or capital "for any one or more of the Beneficiaries". The meaning of "Beneficiaries" for the purposes of the 1985 Trust was defined in paragraph 2(a) of the Trust Deed as persons who qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the *Indian Act* RSC 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 (the "old Indian Act"). This was prior to the passage of Bill C-31 which eliminated some discrimination against women in the Indian Act as is further detailed below.[7]

8. In addition to discrimination against women, illegitimate children are discriminated against in the definition and paragraph 6 of the Trust Deed provides:

> 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.[8]

9. Paragraph 11 of the Trust Deed prohibits amendment of the definition of Beneficiaries as follows:

> The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under sub-paragraph 2(a) of the Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.[9]

10. By an Order of Thomas J. made on consent and filed on January 22, 2018, it was determined, in part, as follows:

> 1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the Indian Act made after April 15, 1982 from being beneficiaries of the 1985 Trust .... .

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[6] Exhibit G, 1985 Trust Deed, Affidavit of Paul Bujold, Sworn September 12, 2011 ("Trust Deed") **[TAB 6].**

[7] **TAB 6** at para 2(a) (first paragraph

[8] **TAB 6**at para 6 (second paragraph).

[9] **TAB 6** at para 11

4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as a ground upon which the 1985 Trust could be dissolved.[10]

The 1986 Trust

11. On August 15, 1986 a further declaration of Trust was issued by Chief Walter Twinn (the **"1986 Trust"**). The beneficiaries under the 1986 Trust included all members of the Sawridge First Nation following the amendments to the old Indian Act similar to the 1982 Trust. The Sawridge First Nation transferred cash and other assets into the 1986 Trust to further the purposes of the 1986 Trust. The 1986 Trust was established so that the assets coming into existence subsequent to April 15, 1985 could be held in trust for those individuals who qualified as members in accordance with the definition of membership that existed following amendments pursuant to Bill C-31.[11]

12. The Sawridge community in particular, and indigenous people generally, face many challenges and the 1986 Trust is providing benefits to help with many of these hardships. It currently provides, *inter alia*, a social safety net for families and those who are ill, education funding, and funding for the elderly. At this time, it is the intention of the Trustees that the 1985 Trust will do the same once the definition of beneficiaries is determined.[12]

Efforts to amend the 1985 Trust Deed

13. The *Trustee Act*, section 42, provides a mechanism to amend trusts. The Trustees attempted to obtain approval to change the Definition pursuant to section 42 of the *Trustee Act*. Paul Bujold, Chief Executive Officer of the 1985 Trust, sent letters to potential beneficiaries and persons of interest identified by the parties as potential beneficiaries. The process is more fully set out in the affidavit of Paul Bujold sworn January 9, 2019. Notwithstanding sending out 77 letters, only 8 votes were received.[13]

14. There are criticisms of the methodology and process for the communication with the potential beneficiaries and persons of interest pursuant to section 42 of the *Trustee Act*. The Trustees do not suggest that the process was perfect as is detailed more fully below.

15. The within application has lasted for nearly eight years, has involved numerous applications, appeals, and cross examinations and after all this time the parties themselves have been unable

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[10] Consent Order (Issue of Discrimination) granted by Thomas, J, January 19, 2018 at **TAB 2**

[11] Exhibit "K", 1986 Trust Deed of the Affidavit of Paul Bujold, Sworn September 12, 2011 at paras 29, 30, 31 **[TAB 8]**

[12] Distribution Proposal, directed by Thomas, J in his Order granted December 17, 2015 at para 7. **[TAB 9]**

[13] Affidavit of Paul Bujold, Sworn January 9, 2019 **[TAB 10]**

to agree on a revised Definition. The Trustees believe that either the court will need to create a revised definition or the Definition will remain in its current discriminatory form.

C. Issues:

16. By consent, the questions before the Court in this application are as follows:

(a) Does the Court have the jurisdiction to amend the beneficiary definition contained in the 1985 Trust (the "Definition"), on the basis of public policy, its inherent jurisdiction or any other common law plenary power?

(b) If the answer to question (a) is yes, what is the scope of the Court's jurisdiction to amend the definition, including can the Court:

(i) Add words to the 1985 Trust deed;

(ii) Delete words contained in the 1985 trust deed; or

(iii) Engage in a combination of addition and deletion of words to the 1985 trust deed?

(c) If the answer to question (a) is no, is the Court's jurisdiction limited to what is permitted by s. 42 of the *Trustee Act*? If so, what evidence would be required by the Court to amend the Definition using s. 42 of the *Trustee Act*?

(d) If the Court does not have jurisdiction under any of the methods set out in paragraphs (a), (b) or (c) above, do the Sawridge Trustees have jurisdiction under the existing terms of the Trust deed of the 1985 Trust to amend the Definition?

(e) If the Court proceeds pursuant to paragraph 1(c) or 1(d) above, is the Court's jurisdiction in this application affected by the *Minors Property Act*, and specifically, does the Court require evidence of consent to the application for a beneficiary definition change from minor beneficiaries who are over the age of 14?[14]

17. The Trustees have not provided any submissions in this Brief with respect to paragraph (e). If applicable and appropriate, the Trustees will respond to any submissions raised by the Public Trustee by way of reply submissions.

D. Analysis

18. Prior to examining the scope of the Court's jurisdiction, it is important to first examine:

(a) Whether an amendment may be made pursuant to paragraph 11 of the Trust Deed to remove or replace any discriminatory parts of the 1985 Trust; and

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[14] Order granted by Henderson, J at **TAB 3**

(b) Whether the 1985 Trust could be varied to remove or replace any discriminatory parts pursuant to section 42 of the *Trustee Act*.

a. Paragraph 11 of Trust Deed

19. The Trustees submit that, based on a plain language reading of the amending provisions found within the Trust Deed, it would be impossible to use the amending provisions to amend the Definition. Paragraph 11 reads:

> The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years **provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries"** under sub-paragraph 2(a) of the Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined." [15]

20. The definition of beneficiaries referenced in paragraph 11 of the Trust Deed is the subject Definition of this application. Therefore, based on a plain and ordinary language of paragraph 11, the Trustees submit that there is no way to use the Trust Deed to amend the Definition.

21. Even if an amendment was possible, there are significant problems with respect to determining who the Beneficiaries are and thus determining if one has approval of 80% the Beneficiaries This is further explored below in respect of an application under Section 42 of the *Trustee Act* in which 100% approval is required.

b. Variation Pursuant to Section 42 of the *Trustee Act ("section 42")*

22. Section 42 authorizes the Court to approve a variation of a trust on behalf of certain persons who cannot consent themselves, including minor beneficiaries, unborn persons and "any person who after reasonable inquiry cannot be located". However, subsection 42(6) provides as follows:

> Before a proposed arrangement is submitted to the Court for approval, it must have the consent in writing of all other persons who are beneficially interested under the trust and are capable of consenting to it.[16]

23. Section 42 has been an unworkable solution for amending the Definition. As outlined above, this litigation began as a straight forward application for advice and direction[17] and has turned into eight years of litigation with no consensus among the parties on the amendment to the definition.

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[15] 1985 Trust Deed, para 11 at **TAB 6**

[16] *Trustee Act*, *supra* note 4 at s. 42 at **TAB 4**

[17] Procedural Order granted by Thomas, J. August 31, 2011 **[TAB 11]**

Nevertheless, the Trustees attempted to canvass the opinion of the beneficiaries pursuant to section 42 to no avail.[18]

24. There has been much discussion of whether section 42 of the *Trustee Act* could be used to amend the Trust. It had been the Trustees' position that since the *Trustee Act* required 100% approval of the beneficiaries, that until, at a minimum, the Trustees, the Office of the Public Guardian and Trustee (the **"OPGT"**) and Catherine Twinn could come to a consensus on the Definition then it was clear that 100% approval could not be achieved.

25. Further, determining who the beneficiaries are is very difficult. If you cannot determine the beneficiaries, you cannot confirm 100% approval. An example of the problem over whether someone is a beneficiary is the debate over whether Justin Twin is a beneficiary. Justin Twin was a member of the Sawridge First Nation when the list of members was transferred to Sawridge First Nation from Indian Affairs in 1985.[19] Since then he has been an active member of the community including being elected to the Sawridge First Nation Council. When he was put forward to become a trustee of the 1985 and 1986 trust, there was opposition to his appointment suggesting that he was not a beneficiary of the 1985 Trust. Various legal and expert opinions were obtained on his status as a beneficiary but there was no consensus. [20] The dispute centres around Justin Twin's mother and is more particularly set out in the various opinions. This is just one example of the problems that exist in trying to work with the antiquated definition for a member set out in the pre-Bill C-31 Indian Act. Just this one issue in relation to one beneficiary prevents the Court from determining that 100% of the Beneficiaries have approved a definition. There are many more similar examples.

26. In respect of section 42 and despite the problems identified, the parties discussed proceeding with a vote among known and potential beneficiaries. The Affidavit of Paul Bujold of January 9, 2019 sets out the process followed.[21] McLennan Ross LLP has filed several affidavits that take issue with the addresses used to serve the Notice and other parts of the process. Ultimately, the OPGT and Catherine Twinn declined participating in the process.[22]

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[18] Affidavit of Paul Bujold sworn January 9, 2019 at **TAB 10**

[19] In *Marchand v Canada*, 2000 BCCA 642 the Court determined that once someone had been registered on the list in 1985, they could not be removed. **[TAB 7]**

[20] Exhibits H and I of Affidavit of Paul Bujold Sworn February 15, 2017, at paras 39-44, (*Letter from Michael McKinney of Sawridge First Nation and Letter from Aboriginal Affairs and Northern Development Canada – Alberta Region, respectively)* Exhibit B of Affidavit of Catherine Twinn Sworn September 23, 2015, *Opinion of Larry Gilbert* **[TAB 12]**

[21] Affidavit of Paul Bujold Sworn January 9, 2019 at para 3 at **TAB 10**

[22] Exhibits B-D of Transcript on Questioning on Affidavit of Paul Bujold Sworn January 9, 2019 dated February 11, 2019, Emails sharing request for information by Trustees and answer by OPGT and Catherine Twinn, **[TAB 13]**

27. To be clear, the Trustees do not submit that the process followed in this case was perfect. Indeed, the Trustees question, in light of the difficulties outlined above, whether an effective use of section 42 of the *Trustee Act* is even possible. However, notwithstanding what the court decides with respect to its jurisdiction, section 42 remains available to anyone who can gather 100% of proven beneficiaries to apply to Court in the future. We ask the court to declare that section 42 of the *Trustee Act* is irrelevant to these proceedings unless and until, a person comes forward with the requisite evidence of 100% written approval of accepted beneficiaries to amend the trust. Of course, any such application will still be subject to dealing with the absolute prohibition to amendment of the definition in the 1985 Trust deed.

28. The Trustees suggest that, in situations of clear discrimination, and here where the Court has confirmed the discrimination, a Court must be permitted to correct the discrimination by looking beyond both the Trust Deed and the *Trustee Act*.

c. Basis on Which Provisions of the 1985 Trust May be Challenged

29. There is strong authority to support the Court's jurisdiction to challenge and change the Definition on the basis that it provides for the distribution of property in accordance with discriminatory criteria. There are two lines of cases that illustrate this authority.

30. **Conditional Gifts:** First, there is clear authority illustrating that conditions attached to gifts may be invalid as being contrary to a public policy. This concept is best outlined by Cronk JA in *Spence* v *BMO Trust Co*:[23]

> The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift. These include cases involving: (i) conditions in restraint of marriage and those that interfere with marital relationships, e.g., conditional bequests that seek to induce celibacy or the separation of married couples; (ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent; (iii) conditions that disinherit a beneficiary if he takes steps to change a membership in a designated church or other religious faith or affiliation; and (iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law.
>
> The pivotal feature of these cases is that the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will, or oblige the executors or trustees of the will to act in a manner contrary to law or public policy in order to implement the testator's intentions. In these circumstances, the courts will intervene to void the offending testamentary conditions on public policy grounds.

31. The Trustees note the following:

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[23] *Spence v BMO Trust Co*, 2016 ONCA 196 at paras 55-56, 395 DLR (4th) 297. **[TAB 14]**.

(a) It has been stated in many cases, including *Canada Trust Co.* and *Spence*, that this public policy principle "should be invoked only in clear cases in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds".[24]

(b) As indicated in the passage quoted from Cronk JA's judgment in *Re Spence*, this public policy principle has typically been applied in respect of gifts by will. However, an estate under a will is recognized as a trust. Thus, by extension, there is no principled reason as to why it should not also be applied to inter vivos trust arrangements.

(c) As also indicated by Cronk JA, this public policy principle has typically been applied to conditions attached to gifts. This point is related to Cronk JA's finding that it is a "pivotal feature" of the cases that the conditions at issue require a beneficiary to act in a manner contrary to law or public policy in order to inherit or oblige the executors or trustees to act in a manner contrary to law or public policy in order to implement the testator's intentions. There is no reason why this same principle should not be applied to provisions that create discriminatory qualifying requirements for the beneficiaries of the Trust since such provisions require the Trustees to act in a discriminatory manner in order to implement the trust provisions and requires *inter alia*, female Beneficiaries to avoid marrying a non-indigenous man in order to remain a Beneficiary. And as seen in paragraph 15 of the Re *Millar Estate* case[25] the courts are open to creating new law in these cases.

32. **Quasi Public Trusts** - Secondly, the courts have been willing to interfere with dispositions made for charitable purposes where those dispositions have a discriminatory character. The leading case is the *Canada Trust Co.* case, the effect of which was described by Cronk JA in *Spence*, as follows:

> 39. Canada Trust is instructive in this regard. Canada Trust involved a charitable trust, established in 1923, that provided educational scholarships. By the express terms of the trust instrument, both the eligibility of students to receive scholarships and that of educational institutions to serve as places of study for scholarship students were subject to overt discriminatory conditions based on race, religion and gender. For example, the terms of the trust stipulated that the scholarships were available only to white, Protestant, British subjects and that no more than 25 percent of the scholarship funds could be allocated annually to female students.
>
> 40. The trusts operated in conformity with these conditions for about 65 years. However, when the Ontario Human Rights Commission challenged the trust in the 1980s, the trustees sought directions from the court as to the trust's validity. The issues before the court were whether the terms of the trust were contrary to public policy and, if so, whether the trust law cy-près doctrine could be applied to preserve the trust. In the Supreme Court of Ontario, the trust was upheld in its entirety. On appeal to this court, this decision was reversed unanimously.

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[24] *Millar Estate, Re*, [1938] SCR 1 at para 15, 1 DLR 65, cited in *Canada Trust Co, supra* note 30 at para 36 **[TAB 15]**, aff'g *Fender v Mildmay*, [1937] 3 All ER 402, [1938] AC 1. The quotation, which is quoted in both the *Canada Trust Co.* and *Spence* cases, is from Re Millar [1938] SCR1 at 7, adopting the statement of Lord Atkin in *Fender* v. *Mildmay* [1937] 3 All ER 402 at 407.

[25] *Millar Estate, Re*, [1938] SCR 1 at para 15 at **TAB 15**

41. Justice Robins of this court, Osler J. (*ad hoc*) concurring, took account of the Supreme Court of Canada's admonition in *Re Millar, [1938] S.C.R. 1.* at p. 7, that public policy "should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds". He noted the public or quasi-public nature of the trust and held that there are cases "where the interests of society require the court's intervention on the grounds of public policy" (at p. 495). In Robins J.A.'s view, the terms of the trust were antithetical to Canadian values and its continued operation was against the public interest. He reasoned, at p. 496:

> The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these [discriminatory] 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.

42. Justice Robins explained that the foundation for the court's intervention on public policy grounds rested on the unique terms of the trust. He emphasized, at pp. 496-97, that the trust was valid and not contrary to public policy when created in 1923. However, with changing social attitudes, public policy had also changed. As a result, the continuation of the trust as originally contemplated was no longer in the community interest. Rather, it had become "impracticable to carry it on in the manner originally planned by the settlor".

43. Justice Robins was satisfied that the settlor of the trust intended the whole of the trust property to be devoted to the educational purpose of the charitable trust. In these circumstances, in his view, the trust should not fail. Instead, it was appropriate to apply the cy-près doctrine and to invoke the court's inherent jurisdiction to bring the trust into conformity with public policy so that the settlor's general charitable trust intent to advance education or leadership through education could be continued. Consequently, he struck the offending conditions of the trust indenture, leaving the charitable trust intact and the trust administrators to carry on the trust without regard to its original discriminatory stipulations.

44, In his separate, concurring reasons, Tarnopolsky J.A. also concluded that the discriminatory trust provisions were void as contravening public policy. He, too, at pp. 514-15, endorsed the proposition that, as "[i]mportant as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right".

45. Importantly, Tarnopolsky J.A. also stressed the distinction between private trusts and public charitable trusts. He stated, at p. 515:

> 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. ... It is [the] 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.* [Emphasis added.]

46 Thus, Tarnopolsky J.A. viewed the public nature of the charitable trust as central to the determination whether interference with testamentary freedom was warranted on public policy grounds in light of the explicit discriminatory provisions of the trust indenture. In the end, like the majority, he agreed that the charitable trust should not fail, that the

> trust could be applied under the doctrine of cy-près, and that the offending discriminatory provisions should be deleted from the trust instrument."[26]

33. The Trustees submit that the discriminatory aspects of the 1985 Trust can be effectively addressed through both of these lines of authority.

34. While the first line of cases apply to non-charitable gifts, the Trustees suggest that there is no reason why the relevant principles should be restricted to conditions attached to testamentary gifts. It remains open to the court to apply the principle of these cases to a provision of an *inter vivos* trust that restricts benefits under the trust by reference to discriminatory criteria, where such criteria effectively require the Trustees and beneficiaries "to act in a way that collides with public policy" (to use the language of Cronk JA in *Spence*).

35. Even if the principle dealt with in the second line of cases is restricted, as explicitly stated by Tarnopolsky J.A. in the *Canada Trust Co.* case, so that it applies to a "charitable trust and does not affect private, family trust", the 1985 Trust is not such a private family trust. Even though it is not a charitable trust, it is a trust for the benefit of a community of people determined by reference to membership of the Sawridge Indian Band in accordance with the applicable law at a certain time. Moreover, its assets are derived from assets that originally were assets of such community.[27] Highlighted in the quote above is the reference to "quasi-public" and community nature of the trust. It must be open to the court to find a new category of trusts – community or quasi-public trusts. The Trustees suggest that these trusts lie closer on the spectrum to charitable trusts than it does a private family trust, and therefore can be amended if it offends public policy.

36. In light of the above, the Trustees submit that it is open to the court to hold that the provisions of the Trust Deed can be challenged. This challenge is based on the conclusion that it is contrary to public policy for a trust (created for the benefit of a community and holding assets derived from that community) to include provisions that provide discriminatory criteria (gender, marital status or family status) for the determination of beneficiaries.

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[26] *Canada Trust Co v Ontario (Human Rights Commission),* 1990 CarswellOnt 486 at para 106, **[TAB 16]**. See also the comment by Parachin in "Public benefit, discrimination and the definition of charity" ■ at 201 **[TAB 17]**, that these cases reveal that courts are willing to allow settlors of charitable trusts to manifest a degree of favouritism provided at least that the trust is not invidiously discriminating.

[27] Supplemental Affidavit of Records of Paul Bujold Sworn April 27, 2018, documents SAW00189 to SAW001895 **[TAB 18]**

d. Application of the Charter and Human Rights Legislation

37. The Trustees concede that the 1985 Trust is not directly affected by the Charter.[28] Generally speaking, the Charter does not apply to actions between private parties unless some manner of government intervention is involved.[29] That is not to suggest, however, that the Charter does not have relevance to the 1985 Trust or the reading of the Trust Deed. Justice Tarnoposky's comments in *Canada Trust Co v. Ontario Human Rights Commission* are particularly relevant:

> "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 ... .
>
> In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms s.15; the equal rights of men and women are reinforced in s.18; and the protection and enhancement of our multicultural heritage provided for in s. 27.
>
> Finally, the world community has made anti-discrimination a matter of public policy in specific conventions ... all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces."[30]

38. Similarly, the *Canadian Human Rights Act* and the *Alberta Human Rights Act* may not be directly applicable, but both are relevant expressions of public policy against discrimination on certain grounds including gender, marital status and family status.

39. In short, the kind of discrimination contemplated in the 1985 Trust is abhorrent in our modern society. It runs directly contrary to the prohibitions on discrimination enshrined in both our constitutional (the Charter) and legislative (the various human rights acts) protections. As such, the Trustees submit, the Definition is contrary to public policy.

e. Public Policy Considerations

40. The Government of Canada recognized that the old Indian Act was discriminatory. The old Indian Act was amended by Bill C-31 in order to align with the values and rights enshrined in the Charter. Speaking on behalf of the Government, Minister Crosbie (then the Minister of Indian Affairs and Northern Development) stated:

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[28] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 32(1). (*Charter*). **[TAB 19]**

[29] *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at 35, 33 DLR (4th) 174 **[TAB 20]**; *Horse Lake First Nation v Horseman*, 2003 ABQB 152 at para 13, 223 DLR (4th) 184 **[TAB 21]**.

[30] *Canada Trust Co v Ontario (Human Rights Commission)*, DLR (4th) 231 at paras 99-101, 37 OAC 191 (*Canada Trust Co*).at **TAB 16**

"The legislation is based on certain principles, which are the cornerstones that John Diefenbaker identified.

The first principle is that discrimination based on sex should be removed from the Indian Act.

The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.

The third principle is that no one should gain or lose their status as a result of marriage.

The fourth principle is that persons who have acquired rights should not lose those rights.

The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership. Those are the principles of the Bill.

It is clear that there is little disagreement on the first principle. Sexually discriminatory sections should be removed from the Indian Act.

I have seen cases in the past where solutions to injustice died because of an effort to exploit them for political advantage. We in the House should refrain from doing so because no one should claim pride in doing something which common decency says should have been done years ago."

. . . .

"In conclusion, I would like to make one or two points of a general nature and which I believe are important. Decolonizing is not a painless process. No one comes out a 100 per cent winner. We can never go back to square one and start over. We have to begin with the realities we confront today. While we can celebrate the ending of a long-standing injustice, we can grieve that the injustice ever existed at all. Some persons have expressed to me surprise that the Government's approach has not been to claim partisan credit for this Bill. I have seen cases in the past where solutions to injustice died because of an effort to exploit them for political advantage. We in this House should refrain from doing so because no one should claim pride in doing something which common decency says should have been done years ago."[31]

41. Through Bill C-31, Sawridge First Nation was able to take control of its membership and through its membership code there is no distinction for membership based on the legitimacy of a child. Nor is there a distinction for a person based on who they married. The whole nature of the membership code is to find the link to the community in order to be admitted as a member.[32]

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[31] Hansard. House of Commons Debates, 1st Session – 332rd Parliament Vol. II, 1985, Government Orders, Indian Act, pages 2644 to 2646, Bill C31 **[TAB 22]**

[32] Membership Code, Answers to Undertakings filed June 29, 2015 **[TAB 23]**

42. The trust not only discriminates against women and who they can marry, it also discriminates against children who are illegitimate. The family status of children has long been eliminated as a descriptor or as a factor that affects children. Further, the fact that the old Indian Act discriminates against illegitimate children, also affects women's rights. A woman must decide whether to marry or not and her choice of partner is key. The same conditions do not apply to men. A women must decide whether to have the father of her child acknowledged on the child's birth certificate. All of these factors affect whether a person is a beneficiary.

43. In our community at large, we do not dictate to women, whether to get married nor who they can marry, nor do we dictate that they must have children within a married relationship. The old Indian Act did not recognize a common law or adult interdependent relationship and thus even marital status is impacted. By codifying the old Indian Act in the 1985 Trust, the old stigmas around illegitimacy continue and the old dependencies of women on men in a married relationship continue.

44. Indigenous people face many challenges and the 1986 Trust is providing benefits to help with many of these challenges. It currently provides benefits as set out above. The Trustees have determined that the 1985 Trust will do the same once the definition of beneficiaries is determined.[33]

45. Sawridge First Nation is a community whose members can benefit from the Trust. There are addiction issues and housing issues. The vision for the 1985 Trust was to assist the community with issues and to assist members to be funded while seeking education or while they are sick or while they are elderly. Such provisions should not be conditional on meeting discriminatory provisions.

46. This discrimination is effectively illustrated by comparing the treatment of two beneficiaries recognized in the Sawridge #5 Decision.[34] Justice Thomas recognized a female person as a beneficiary. A male person was also recognized. The female person will be a beneficiary now but if she marries a non-indigenous man she will cease to be a beneficiary and so will her children. The male person is a beneficiary now. He is married to someone who is not indigenous and, he has not lost his right to be a beneficiary because of his marriage. In fact his new wife, regardless of her indigenous status, will be a beneficiary; however, because the male person's child was born before he got married, his child will be deemed illegitimate and therefore will not be a beneficiary. By contrast, if the male person has another child while he is married, and is

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[33] Distribution Proposal at **TAB 9** *(The Trustees have recently instituted a new policy on benefits that is substantially the same but this document has not yet been entered in evidence)*

[34] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377, paras 6 to 10 *(Case Management Decision [Sawridge #5] by Thomas J)* **[TAB 24]**

therefore a legitimate child, that child will be a beneficiary. Thus, there is discrepancy not just between men and women, and not just for illegitimate children, but also discrimination between siblings sharing the same parent.[35]

47. These examples of discrimination simply cannot be reconciled with our constitutional and societal norms. The Trustees sumit that there are more than adequate public policy grounds to merit court intervention.

f. Consequence of Application of Public Policy Principles

48. If the Court accepts that the Definition runs contrary to public policy, then the principles applied in the two lines of cases discussed above give rise to different potential consequences. Where a gift is subject to a condition that is held to be invalid as contrary to public policy, the application of the public policy principle has the consequence that the condition is invalidated, ordinarily leaving the gift free of the condition.[36]

49. On the other hand, where provisions of a quasi-public trust are found to be invalid as being contrary to public policy, the Court can change the provisions of the quasi-public trust to bring them into accord with public policy, as was done, for example, in the *Canada Trust Co.* case.

50. There are two main possibilities:[37]

(a) The first possibility is that, even though the 1985 Trust is not a charitable trust, the court should extend the application of the cy-près jurisdiction so that it would apply to a trust for the benefit of a community of persons even though it is not a charitable trust. In such case the discriminatory language would be struck.

(b) The alternative is to take the position that the appropriate remedy is the deletion of the parts of the declaration of trust which require discrimination to be applied as a condition of being considered a beneficiary and as such offend public policy. This position would be consistent with the consequences of the invalidity of a condition in the first line of cases discussed above since the invalid condition is effectively deleted.

51. The Trustees suggest that the first possibility would amount to an expansion of the cy-pres jurisdiction to community or quasi-public trusts and not those that are strictly charitable.

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[35] The Trustees have chosen not to name the beneficiaries identified in Sawridge #5 to avoid any stigma of illegitimacy for the person's male child.

[36] The apparently established rules in the context of conditional gifts are quite complicated and somewhat obscure. As stated in *Lewin on Trusts*, 19th ed, 2015 at 5-025 to 5-028 **[TAB 25]**

[37] *Re Sprott Estate,* 2011 NSSC 327, pages 14, 21-22, 30, 44-50 **[TAB 26]**

52. This second position is further supported in the context of contracts affected by illegality. The applicable principle is known as the doctrine of severance. Where permitted, there are essentially two types: the blue pencil severance and notional severance. Blue pencil severance is described as "effected when the part severed can be removed by running a blue pencil through it."[38] Conversely, notional severance is possible by "reading down" an illegal provision that would make the contract unenforceable, in order to make it legal and enforceable.[39]

53. It has been suggested that the Court could exercise its jurisdiction as outlined in *Re Sprott Estate* and add language to the trust,[40]. The Trustees do not believe this case, or cases that follow its authority, are applicable in situations like the amendment of the Definition, as they deal with the court's inherent jurisdiction with respect to charitable trusts and, in particular, with the exercise of a jurisdiction to make amendments by adding language regarding administrative terms only. The definition of beneficiaries and determining the beneficiaries is one of the three certainties of a trust. We submit that an amendment to a beneficiary definition cannot be an administrative term and thus the provisions of Re Sprott do not apply.

g. Voiding Trust

54. It has been suggested that the problems with determining beneficiaries coupled with the discrimination could lead to the result that the Trust is void because it is able to satisfy one of the three certainties. If the definition remains unchanged, it is possible the Trust will face a challenge to void the Trust which is certainly not in the best interests of the Trust and a possibility that the Trustees hope to avoid.

h. Recent Bill C-31 Case Involving a Trust

55. The 2019 Federal Court Decision in Ginoogaming First Nation[41] deals with a trust in which there is discrimination against Bill C-31 women. The Court was asked to interpret the provisions of a trust and specifically not asked to amend the trust. The definition of beneficiaries in this trust specifically said it should distribute without discrimination. The Court found that in interpreting the definition of beneficiaries, which was equivalent to members of the First Nation, it could not consider amendments to legislation after the date of the trust deed in respect of interpreting the trust deed. Thus, the trust deed was interpreted using and enforcing the discriminatory provisions.

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[38] *KRG Insurance Brokers (Western) Inc v Shafron*, 2009 SCC 6 at para 29, citing *Attwood v Lamont,* [1920] 3 KB 571, **[TAB 27]**

[39] **TAB 27** at para 30 and Taylor v. Ginoogaming paragraph 32 and 33 at **TAB 28** – both trust principles and contractual interpretation principles factor into how a court is to interpret a trust document.

[40] *Re Sprott Estate* at **TAB 26**

[41] *Taylor et al v Ginoogaming First Nation*, 2019 ONSC 0328 **[TAB 28]**

56. The court in Ginoogaming said in interpreting the Spence case[42] that a Settlor has the common law right to limit the scope of the beneficiaries as long as the document is not discriminatory on its face. The Court then emphasized that, the application neither sought to vary the terms of the trust, nor did they seek to have certain provisions declared void.[43] .

57. The Court went on to say that the Court was only asked to interpret the trust and not to amend or vary it and it is not the role of an interpreting court to change the plain meaning of the trust document. The Court once again invited the trustees to consider the amending provisions of the Trust Agreement and left it open for the trustees to bring an application for a variation of the terms of the Trust.[44]

58. The Ginoogaming case is distinguished because the Trustees of the 1985 Trust have asked the Court to consider an amendment of the 1985 trust to eliminate discrimination and the Court has determined by Court Order that the 1985 Trust deed is discriminatory.[45] . It is conceeded that the Ginoogaming case could stand for the proposition that a trust could continue to discriminate against individuals despite subsequent amendments to the legislation that specifically address correcting the discrimination.

59. Ginoogaming and other cases make it clear that the intention of the Settlor in setting up the trust is a factor for interpretation of the deed. This evidence is difficult to gather in this Application given that the Settlor has died but we have some sworn testimony that suggests that the 1986 Trust and the 1985 Trust were to merge after Bill C-31 was passed suggesting that the definition of beneficiaries would mirror that of the 1986 Trust.[46]

E. Summary

60. We request that the Court find that the 1985 Trust Beneficiary Definition cannot be amended using the provisions of the Trust deed as there is an absolute prohibition on such an amendment and on the plain language in the Trust deed such is not permitted.

61. We submit that a person may attempt to amend the Trust using section 42 of the *Trustee Act* but that such discussion is irrelevant to these proceedings unless and until a person presents the Court with written consent of all the agreed upon beneficiaries of the trust approving a particular amendment and then the Court must still consider the prohibition on amendment contained in the Trust deed.

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[42] *Spence v BMO Trust Co* at paras 55-56 at **TAB 14**.

[43] Taylor et al v Ginoogaming First Nation at para 50 at **TAB 28**

[44] Taylor et al v Ginoogaming First Nation at para 52 at **TAB 28**

[45] Consent Order (Issue of Discrimination) granted by Thomas, J on January 19, 2018 at **TAB 2**

[46] Exhibit "aa", Testimony of Chief Walter Twinn, Affidavit of Paul Bujold Sworn February 15, 2017 **[TAB 29]**

62. The discrimination found within the Definition is abhorrent to our society's values of gender and marriage equality and abhorrent is stigmatizing illegitimate children. The Trustees suggest that, in the face of such discrimination in a quasi-public / community trust, it is within the inherent jurisdiction of the Court to intervene by striking the discriminatory language or within the jurisdiction of the Court to strike the offending condition on the benefits provided by the Trust by using the law related to conditions on gifts that offend public policy or by using the provisions of contract interpretation.

63. We submit that the Trust cannot be amended with adding language and that the only available remedy is to strike offending language.

64. We make no comments in relation to the *Minor's Property Act* at this time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29 OF March, 2019.

DENTONS CANADA LLP

PER: _____

DORIS BONORA
MICHAEL SESTITO
Solicitors for the Sawridge Trustees

LIST OF AUTHORITIES AND EVIDENCE

TAB NO.	DESCRIPTION
TAB 1	Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue) filed January 9, 2019
TAB 2	Consent Order (Issue of Discrimination) granted by Thomas, J on January 19, 2018
TAB 3	Consent Order (Hearing of Jurisdictional Question) granted by Henderson, J on December 18, 2018
TAB 4	*Trustee Act*, RSA 2000, c T-8 section 42
TAB 5	Exhibit A, Declaration of Trust dated April 15, 1982, of the Affidavit of Paul Bujold sworn September 12, 2011
TAB 6	Exhibit G, 1985 Trust Deed, Affidavit of Paul Bujold, Sworn September 12, 2011
TAB 7	*Marchand v Canada*, 2000 BCCA 642
TAB 8	Exhibit "K", 1986 Trust Deed of the Affidavit of Paul Bujold, Sworn September 12, 2011 at paras 29, 30, 31
TAB 9	Distribution Proposal, directed by Thomas, J in his Order granted December 17, 2015
TAB 10	Affidavit of Paul Bujòld, Sworn January 9, 2019
TAB 11	Procedural Order granted by Thomas, J. August 31, 2011
TAB 12	Exhibits H and I of Affidavit of Paul Bujold Sworn February 15, 2017 and Exhibit B of Affidavit of Catherine Twinn Sworn September 23, 2015
TAB 13	Exhibits B-D of Transcript on Questioning on Affidavit of Paul Bujold Sworn January 9, 2019 dated February 11, 2019
TAB 14	*Spence v BMO Trust Co*, 2016 ONCA 196, 395 DLR (4th) 297
Tab 15	*Millar Estate, Re*, [1938] SCR 1 at para 15, 1 DLR 65
Tab 16	*Canada Trust Co v Ontario (Human Rights Commission),* 1990 CarswellOnt 486
TAB 17	Parachin in "Public benefit, discrimination and the definition of charity"
TAB 18	Supplemental Affidavit of Records of Paul Bujold Sworn April 27, 2018, documents SAW00189 to SAW001895
TAB 19	*Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,*

TAB NO.	DESCRIPTION
	being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 32(1).
TAB 20	*Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at 35, 33 DLR (4th) 174
TAB 21	*Horse Lake First Nation v Horseman*, 2003 ABQB 152 at para 13, 223 DLR (4th) 184
TAB 22	Hansard. House of Commons Debates, 1st Session – 332rd Parliament Vol. II, 1985, Government Orders, Indian Act, pages 2644 to 2646, Bill C31
TAB 23	Membership Code, Answers to Undertakings filed June 29, 2015
TAB 24	*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377
TAB 25	*Lewin on Trusts*, 19th ed, 2015
TAB 26	*Re Sprott Estate,* 2011 NSSC 327
TAB 27	*KRG Insurance Brokers (Western) Inc v Shafron*, 2009 SCC 6 at para 29, citing *Attwood v Lamont,* [1920] 3 KB 571
TAB 28	*Taylor et al v Ginoogaming First Nation*, 2019 ONSC 0328
TAB 29	Exhibit "aa", Testimony of Chief Walter Twinn, Affidavit of Paul Bujold Sworn February 15, 2017

Tab 1

Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985
APPLICANTS	ROLAND TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, CLARA MIDBO, and CATHERINE TWINN, as trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**Application by the Sawridge Trustees for Advice and Direction (Directed Trial of Issue)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Counsel for the Sawridge Trustees Attention: Doris C.E. Bonora Telephone: (780) 423-7188 Fax: (780) 423-7276 File No: 551860-001-DCEB

Respondents:

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park AB T8H 2A3
Attention: Janet L. Hutchison

Counsel for the Office of the Public Guardian and Trustee

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton AB T5N 3Y4
Attention: Karen A. Platten, Q.C.

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

NOTICE TO RESPONDENT(S)

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

You have the right to state your side of this matter before the Case Management Justice.

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

Date	January 19, 2018
Time	1:00 PM
Where	Law Courts, 1 A Sir Winston Churchill Square, **Edmonton**
Before Whom	Case Management Justice D.R.G. Thomas

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

Remedy claimed or sought:

1. The Sawridge Trustees request that the Court find that all parties have admitted that the definition of Beneficiary in the Trust Deed is discriminatory and thus declare that the definition of Beneficiary is discriminatory.

2. In the alternative, the Sawridge Trustees request that this Court grant an order for a question or issue to be determined, pursuant to Rule 7.1 of the *Alberta Rules of Court* ("**Directed Issue Hearing**"), with respect to the following issue:

   (a) Is the definition of "Beneficiary" in the Trust Deed of the Sawridge Band Inter Vivos Settlement ("1985 Trust") discriminatory?

3. If the Directed Issue Hearing is ordered, the Sawridge Trustees further request that a timetable in respect of that Hearing be set according to Schedule "A" Litigation Plan attached.

4. The Sawridge Trustees also seek direction from this Court as to the method by which beneficiaries and/or potential beneficiaries may participate in the Trust litigation. The Court of Appeal, in paragraphs 21 and 22 of *Twinn v Twinn*, 2017 ABCA 419, recommended that further direction and clarification be sought with respect to the method of permitted participation by non-parties who are beneficiaries or potential beneficiaries of the 1985 Trust.

Grounds for making this application:

Directed Issue Hearing

5. The Trustees believe all the parties have admitted that the definition of "Beneficiary" in the Trust Deed is discriminatory and thus submit that, within the jurisdiction granted to a case management justice in Rule 4.14 of the *Alberta Rules of Court* to identify, simplify and clarify the real issues in dispute, the Court may determine that the 1985 Trust's definition of "Beneficiary" is discriminatory.

6. If the Court cannot determine this issue, the Trustees submit that the resolution of this question or issue meets the objectives in Subrule 7.1(1):

   (a) Determining whether the definition of "Beneficiary" is discriminatory may dispose of the rest of the claim. If it is found that the definition is not discriminatory, that will likely make determination of the balance of the Application unnecessary, as the Sawridge Trustees will not seek a change to the definition of "Beneficiary" if it is not discriminatory.

   (b) The Directed Issue Hearing will be a short hearing, and will not require much time before it is ready to be heard by the Court. The Directed Issue Hearing will substantially shorten the required final determination application or trial, as this narrow question will require far less evidence than the balance of the Application. It is likely that the determination can be made with only affidavit evidence or very little evidence as the argument will involve legal arguments on the statute.

   (c) It will save expense, as a determination that the definition is not discriminatory would save the need for the more expansive and expensive trial that may be required for the balance of the Application.

7. If the definition of "Beneficiary" is found to be discriminatory, the parties can then focus on a hearing respecting the appropriate remedy. That remedy may involve striking the discriminatory language, amending the trust using the amending provisions of the 1985 Trust, or proceeding under section 42 of the *Trustee Act*.

8. The Sawridge Trustees submit that the 1985 Trust should be amended by striking language. Other parties have suggested that section 42 of the *Trustee Act* applies and thus all the beneficiaries would have to be identified and there would need to be 100% approval from the beneficiaries. The Court would have to consider the fact that the Trust Deed prohibits amendment. The Sawridge Trustees suggest that if the 1985 Trust needs to be amended, it may be amended under the provisions of the Trust Deed requiring only 80% approval of the beneficiaries. Which of these approaches is appropriate must be determined by the Court.

9. The Sawridge Trustees submit that the issue of the appropriate remedy is a discrete issue from the question of whether the 1985 Trust is discriminatory. There is little or no overlap between the evidence that will be required for the Directed Issue Hearing, which requires the interpretation of

a document and a statute and the evidence that will be required to determine the appropriate remedy. Further, if the definition is not discriminatory, it may be unnecessary to determine a remedy.

Method of Non-Party Beneficiary Participation

10. The Sawridge Trustees submit that it is their position that participation in writing only by any person who is a beneficiary and/or potential beneficiary will be the most effective and efficient method of participation in the Trust litigation. The Sawridge Trustees propose that the participation be limited to one submission per individual at each stage of the hearing of issues. (So, if this Court agrees to the Directed Issue Hearing, one submission could be made at that time, and one at the time of the final hearing with respect to remedy.)

11. There are many people who claim to be potential beneficiaries of whom the Trustees are aware. Given the number of such potential beneficiaries, the Sawridge Trustees further submit that a page limit of **5 pages per written submission** (including attachments) would provide an appropriate balance between the interests of the beneficiary/potential beneficiary in making a submission in respect of his or her interests, with the need to maintain proportionality and efficiency in the proceedings. The submissions are not to be duplicative of arguments already made. Any duplication could be subject to costs awards.

12. If the beneficiary or potential beneficiary wishes to file an affidavit, it can only do so to raise evidence that is unique and distinct to that evidence that has already been filed by the parties. If a beneficiary or potential beneficiary filed duplicative evidence, the issue of the duplicative nature of the evidence will be addressed in a costs application and there may be costs consequences for duplication of evidence.

13. If participation in this manner is directed, the Sawridge Trustees suggest that a deadline for beneficiary submissions in respect of the Directed Issue Hearing be incorporated into the proposed timetable, as shown in the proposed timetable attached as Schedule A. The Sawridge Trustees propose that notice be provided by way of case management order, which would be published on the website for this proceeding.

14. Further, the timeline for affidavit evidence can be incorporated in to the deadlines set out above so that the parties may know the evidence filed and then determine if they need to file further evidence. The Sawridge Trustees propose that non-party potential beneficiaries must file affidavit evidence for the Directed Issue Hearing by **February 15, 2018** and that notice of the same be provided by way of case management order, which would be published on the website for this proceeding.

Material or evidence to be relied on:

15. Proposed timetable for Directed Issue Hearing, attached as Schedule A.

16. Evidence already filed and posted on the website on the issue of discrimination.

Applicable Rules:

17. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.2, 4.14, 7.1.

How the Application is proposed to be heard or considered:

18. The Sawridge Trustees propose that this application proceed in the manner set out by the Court on January 5, 2018, in an oral hearing in Court on January 19, 2018.

WARNING

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

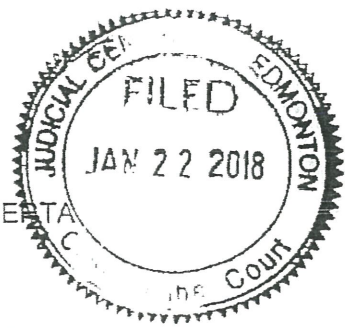
Schedule A – Proposed Litigation Timetable

NO.	ACTION	DEADLINE	PROPOSED DIRECTION
1.	All affidavits filed on issue of whether the trust beneficiary definition is discriminatory (Directed Issue Hearing)	By January 30, 2018.	Parties shall advise of affidavits which are previously filed upon which they intend to rely. All documents intended to be relied upon shall be included in affidavits. Parties will be directed to be focussed on the issue of discrimination alone, with cost consequences possible if parties file irrelevant materials in an affidavit.
2.	All questioning on affidavits filed for Directed Issue Hearing	By February 28, 2018	
3.	All undertakings answered	By March 30, 2018	
4.	All expert will say statements filed	By March 30, 2018	If any party wishes to call an expert witness for the Directed Issue Hearing, a procedure will be implemented to determine the relevance. The purpose of this procedure is to ensure that the Hearing remains focused on the discrimination issue, and not on matters that will be more properly heard with the application to resolve the discrimination. Any party wishing to rely on the evidence of an expert witness for the directed Hearing must serve a "will say" statement outlining the evidence that would be put forward by the expert witness and signed by the expert witness. The "will say" statements must be served on all other parties, and filed with the Court

5.	Any rebuttal expert will say statements filed	BY April 30, 2018	
6.	An application with respect to objections to experts based on relevance	By May 15, 2018	
7.	File written submissions on expert reports relevance	By May 31, 2018	If objections have been filed, or upon the initiative of the Court if it has concerns about relevance, the admissibility of such party's proposed expert evidence will be determined by the Case Management Justice by written submissions submitted by May 31, 2018.
8.	File expert reports	30 days following the filing of the will say or 30 days filing a written decision by the case management Justice on relevance	
9.	Non-party potential beneficiaries file non repetitive affidavits	By February 15, 2018	
10.	All submissions on the Directed Issue Hearing for parties	Will be made according to the practice Direction for special chambers applications or as directed by the court.	
11.	All submissions on the Directed Issue Hearing for non-parties and will be limited to 5 pages including attachments	Will be made one week following the applicant's and respondents' submissions	
12.	Determination of Directed Issue Hearing	Fall 2018	

Tab 2

Clerk's stamp:



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

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

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

APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**CONSENT ORDER (ISSUE OF DISCRIMINATION)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

Attention: Doris C.E. Bonora
Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

JUSTICE: D.R.G. Thomas
DATE: JAN 19, 2018
LOCATION: Edmonton

I hereby certify this to be a true copy of the original.

for Clerk of the Court

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("1985 Trust"), for which an Application for Advice and Direction was filed January 9th, 2018;

AND WHEREAS the first question in the Application by the Sawridge Trustees on which direction is sought is whether the definition of "Beneficiary" in the 1985 Trust is discriminatory, which definition reads:

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

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

AND UPON being advised that the parties have agreed to resolve this specific question on the terms herein, and no other issue or question is raised before the Court at this time, including any question of the validity of the 1985 Trust;

AND UPON being advised the Parties remain committed to finding a remedy that will protect the existence of the 1985 Trust and the interests of the beneficiaries;

AND UPON there being a number of other issues in the Application that remain to be resolved, including the appropriate relief, and upon being advised that the parties wish to reserve and adjourn the determination of the nature of the relief with respect to the discrimination;

AND UPON this Court having the authority to facilitate such resolution of some of the issues raised in the Application prior to the determination of the balance of the Application;

AND UPON noting the consent of the Sawridge Trustees, consent of The Office of the Public Trustee and Guardian of Alberta ("OPGT") and the consent of Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust is declared to be discriminatory insofar as it prohibits persons who are members of the Sawridge Indian Band No. 19 pursuant to the amendments to the *Indian Act* made after April 15, 1982 from being beneficiaries of the 1985 Trust.

2. The remaining issues in the Application, including the determination of any remedy in respect of this discriminatory definition, are to be the subject of a separate hearing. The timeline for this hearing will be as set out in Schedule "A" hereto and may be further determined at a future Case Management Meeting.

3. The Justice who hears and determines the remaining issues in this Application may consider all forms of discrimination in determining the appropriate relief.

4. Nothing in this order may be construed to be a determination that the 1985 Trust is void or otherwise invalid. This Consent Order cannot be used in an application for dissolution as ~~the sole determinative factor that~~ a ground upon which the 1985 Trust ~~should~~ could be dissolved.

5. ~~The provisions in paragraph 4, above, will not prevent reliance on this Consent Order for any purpose in the within proceedings.~~

The Honourable D.R. G. Thomas

CONSENTED TO BY:

MCLENNAN ROSS LLP

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

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

SCHEDULE "A"

Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Trust") and the SAWRIDGE TRUST ("Sawridge Trust")
APPLICANT	ROLAND TWINN, CATHERINE TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO AND WALTER FELIX TWIN, as Trustees for the 1985 Trust and the 1986 Trust ("Sawridge Trustees")
DOCUMENT	**Litigation Plan January 19, 2018**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-7276 File No: 551860-001-DCEB

1. The remaining steps and procedures are to be completed on or before the dates specified below:

NO.	ACTION	DEADLINE
1.	Case Management Meeting to address Trustee's application for an Order on the Discrimination Issue.	January 19, 2018
2.	Settlement meeting of all counsel for the Parties to continue to discuss remedies;	February 14, 15 or 16, 2018
3.	Interim payment on accounts made to OPGT from the Trustees	January 31, 2018 and February 28, 2018
4.	Agreed Statement of Facts to be circulated to all Parties, by the Trustees on the issue of the determination of the definition of beneficiary and grandfathering (if any).	By February 28, 2018
5.	Further Settlement meeting of all counsel for the Parties to continue to discuss remedies and draft Agreed Statement of Facts.	By March 30, 2018
6.	Responses from the Trustees to the OPGT regarding all outstanding issues on accounts to the end of 2017	March 30, 2018
7.	All Parties to provide preliminary comments on the Trustee's first draft of an Agreed Statement of Facts.	By May30, 2018
8.	Concurrently with the preparation of the agreed statement of facts, all Parties to advise on whether they have any documents on which they respectively intend to rely on the issue of the remedies. If they have documents, they will file an Affidavit of Records	By ~~February 28~~, 2018 April 30
9.	Concurrently with the preparation of the agreed statement of facts, all non-parties may provide records on which they intend to rely to all Parties who will determine if they are duplicates and if not, non party may file an Affidavit of Records	By February 28, 2018
10.	Third 2018 Settlement Meeting of all counsel to continue to discuss remedies and draft Agreed Statement of Facts.	By April 30, 2018
11.	Questioning on new documents only in Affidavits of Records filed, if required.	By ~~May 30~~, 2018 June 15
12.	Non-party potential beneficiaries provide all Parties with any facts they wish to insert in the Agreed Statement of Facts.	By April 30, 2018

13.	Final Response by OPGT and any other recognized party on Agreed Statement of Facts.	By June 30, 2018
14.	Agreed Statement of Facts filed, if agreement reached.	By July 15, 2018
15.	Parties to submit Consent Order proposing revised Litigation Plan including a procedure for the remainder of the application including remedy for striking language or amending the trust under section 42 of the Trustee Act or amending the trust according to the trust deed. Alternatively, Trustees to file application re: same.	By July 15, 2018
16.	All other steps to be determined in a case management hearing	As and when necessary

Tab 3

Clerk's stamp:



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

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

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

APPLICANT	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	CONSENT ORDER (Hearing of Jurisdictional Question)
DATE ORDER PRONOUNCED	December 18, 2018
LOCATION WHERE ORDER PRONOUNCED	Edmonton, Alberta
NAME OF JUSTICE WHO MADE THIS ORDER	Honourable Justice J.T. Henderson

I hereby certify this to be a true copy of the original.
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Dentons Canada LLP
2900 Manulife Place
10180 - 101 Street
Edmonton, AB T5J 3V5

Attention: Doris C.E. Bonora
Telephone: (780) 423-7100
Fax: (780) 423-7276
File No: 551860-001-DCEB

UPON the Application by the Sawridge Trustees for advice and direction in respect of the Sawridge Band Inter Vivos Settlement ("**1985 Trust**") ("**Application**");

AND WHEREAS the Sawridge Trustees seek direction respecting the source and nature of the jurisdiction of this Court to make changes to the definition of "Beneficiary" as set out in the 1985 Trust;

AND WHEREAS a Case Management Justice has authority under Rule 4.14 of the *Alberta Rules of Court* to make interlocutory orders;

AND WHEREAS the Sawridge Trustees, the OPGT and Catherine Twinn consent to this Order;

IT IS HEREBY ORDERED AND DECLARED;

1. A hearing on a directed issue will be held, prior to trial, and the issues to be determined (the "Jurisdictional Question") will be as follows:

   (a) Does the Court have jurisdiction to amend the beneficiary definition contained in the 1985 Trust (the "Definition"), on the basis of public policy, its inherent jurisdiction or any other common law plenary power?

   (b) If the answer to question (a) is yes, what is the scope of the Court's jurisdiction to amend the Definition, including can the Court:

      (i) Add words to the 1985 Trust deed;

      (ii) Delete words contained in the 1985 Trust deed; or

      (iii) Engage in a combination of addition and deletion of words to the 1985 Trust deed?

   (c) If the answer to question (a) is no, is the Court's jurisdiction limited to what is permitted by s. 42 of the *Trustee Act*? If so, what evidence would be required by the Court to amend the Definition using s. 42 of the *Trustee Act*?

   (d) If the Court does not have jurisdiction under any of the methods set out in paragraphs (a), (b) or (c) above, do the Sawridge Trustees have jurisdiction under the existing terms of the Trust Deed of the 1985 Trust to amend the Definition?

   (e) If the Court proceeds pursuant to paragraph 1(c) or 1(d) above, is the Court's jurisdiction in this application affected by the Minors Property Act, and specifically, does the Court require evidence of consent to the application for a beneficiary definition change from minor beneficiaries who are over the age of 14?

2. This Jurisdictional Question will be heard and determined by the Case Management Justice.

The Honourable Justice J.T. Henderson

CONSENTED TO BY:
MCLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

CONSENTED TO BY:

MCLENNAN ROSS LLP

Crista Osualdini
Counsel for Catherine Twinn

DENTONS CANADA LLP

Doris Bonora
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

Tab 4



Province of Alberta

TRUSTEE ACT

Revised Statutes of Alberta 2000
Chapter T-8

Current as of December 17, 2014

Office Consolidation

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(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

Tab 5

This is Exhibit "A" referred to in the Affidavit of
Paul Buffold
Sworn before me this 12 day of September A.D., 2012
A Magnan
A ~~Notary Public~~, A Commissioner for Oaths in and for the Province of Alberta
Catherine A. Magnan
My Commission Expires January 29, 2012

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

This Declaration of Trust made the 15th day of April, A.D. 1982.

BETWEEN:

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,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 A B respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

Whereas the Settlor is Chief of the Sawridge Indian Band No. 19, and in that capacity has taken title to certain properties on trust for the present and future members of the Sawridge Indian Band No. 19 (herein called the "Band"); and,

Whereas it is desirable to provide greater detail for both the terms of the trust and the administration thereof; and,

Whereas it is likely that further assets will be acquired on trust for the present and future members of the Band, and it is desirable that the same trust apply to all such assets;

NOW, therefore, in consideration of the premises and mutual promises contained herein, the Settlor and each of the Trustees do hereby covenant and agree as follows:

1. The Settlor and Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.

2. Wherever the term "Trust Fund" is used in this Agreement, it shall mean: a) the property or sums of money paid, transferred or conveyed to the Trustees or otherwise acquired by the Trustees including properties substituted therefor and b) all income received and capital gains made thereon, less c) all expenses incurred and capital losses sustained thereon and less d) distributions porperly made therefrom by the Trustees.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.

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

5. The Trustees of the Trust Fund shall be the Chief and Councillors of the Band, for the time being, as duly elected pursuant to Sections 74

through 80 inclusive of the Indian Act, R.S.C. 1970, c. I-6, as amended from time to time. Upon ceasing to be an elected Chief or Councillor as aforesaid, a Trustee shall ipso facto cease to be a Trustee hereunder; and shall automatically be replaced by the member of the Band who is elected in his stead and place. In the event that an elected Chief or Councillor refuses to accept the terms of this trust and to act as a Trustee hereunder, the remaining Trustees shall appoint a person registered under the Indian Act as a replacement for the said recusant Chief or Councillor, which replacement shall serve for the remainder of the term of the recusant Chief or Councillors. In the event that the number of elected Councillors is increased, the number of Trustees shall also be increased, it being the intention that the Chief and all Councillors should be Trustees. In the event that there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more Trustees, who shall be a member of the Band.

6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band 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; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

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 the beneficiaries set out above; and the Trustees may make such payments at such time, and from time to time, and in such manner 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 investment authorized for Trustees' investments by The Trustees' Act, being Chapter 373 of the Revised Statutes of Alberta 1970, 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 or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or desirable to give effect to the trust purposes set out above,

and to discharge their obligations thereunder other than acts done or omitted to be done by them in bad faith or in gross negligence, including, without limiting 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 therefore; and

c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by Federal, Provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

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

11. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them

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

12. A majority of the Trustees shall be required for any action taken on behalf of the Trust. In the event that there is a tie vote of the Trustees voting, the Chief shall have a second and casting vote.

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

IN WITNESS WHEREOF the parties hereto have executed this Trust Agreement.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

A. Settlor: Walter P. D.

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter P. D.

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

2. [redacted]

3. Walter F [redacted]

4.

5.

6.

7.

8.

Tab 6

This is Exhibit " G " referred to in the Affidavit of Paul Bujold

Sworn before me this 12 day of September A.D., 20 11

A. Magnan
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Catherine A. Magnan
My Commission Expires January 29, 2012

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

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

B E T W E E N :

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

OF THE FIRST PART,

- and -

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

OF THE SECOND PART.

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

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

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

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

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

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

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

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

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

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

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

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

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

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

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

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

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

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

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

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

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

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

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

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

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

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

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

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

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

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Bruce & Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

A. Settlor

B. Trustees:

Bruce & Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1.

Bruce & Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2.

Bruce & Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

Tab 7

Marchand v. Canada (Registrar, Indian and Northern Affairs), 2000 BCCA 642 (CanLII)

Date: 2000-11-28

File number: CA024838

[40] Administrative considerations aside, in our view there is no basis for reading the word "validly" into s. 6(1)(a) of the legislation. If Parliament had intended to empower the Registrar to de-register those women who had gained Indian status solely by virtue of their marriage to a status Indian, it could have done so by omitting the second proviso from s. 7(1)(a) of the 1985 Act so that it provided:

> 7. (1) The following persons are not entitled to be registered:
>
> (a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph.

Instead, Parliament chose to add an additional proviso that such a person was not entitled to be registered only if her name had been subsequently omitted or deleted from the Indian Register.

[41] Further, to read the word "validly" into s. 6(1)(a) of the Act would be to cloak the Registrar with untrammelled power to engage in a roving commission to investigate any or all of those named in the Indian Register as of April 17, 1985 to determine if they were "validly" registered. Such a sweeping power would create great uncertainty for all of those registered and could give rise to concerns of discriminatory and arbitrary treatment with respect to those singled out for review.

[42] It is also apparent from the history leading up to the enactment of the legislation that such potentially invasive authority in the Registrar was not contemplated and, in fact, had been rejected by those proposing the legislation. As the chambers judge noted, prior to the 1985 amendments an assurance was given on behalf of the then Minister of Indian Affairs that "Those who are now registered will continue to be registered." It is also interesting to note that, on April 23, 1985, the standing committee considering the amendments voted to amend the Act by adding the words "registered or" before the words "entitled to be registered" in s. 6(1)(a). In the result, the legislation enacted included that amendment which is contained in the present wording of s. 6(1)(a).

[43] In our view, it is apparent from both the unambiguous wording of the legislation and its legislative history that Parliament considered the ramifications of including in the Indian Register both those who were actually registered as of April 17, 1985 and those who were entitled to be registered. In the result, it opted for a Register which could be relied upon by those who were registered as of the cut-off date and by government, as containing the names of those entitled to Indian status.

[44] Counsel for the Registrar suggested that this interpretation of these provisions of the 1985 Act could result in a person being found entitled to Indian status or Band membership who had obtained registration by fraudulent means. We expressly decline to deal with that point, which does not arise on these facts and which might well give rise to different legal considerations.

CONCLUSION

[45] As stated at the outset of these reasons, we are satisfied that Mr. Justice Arkell did not err in overturning the decision of the Registrar and in finding that Ms. Marchand's name should continue to be on the Indian Register and on the Okanagan Band List. In the result, the appeal is dismissed.

Tab 8

Clerk's stamp:	
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD on advice and direction in the 1985 trust**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Attention: Doris C.E. Bonora Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

JUDICIAL CENTRE OF EDMONTON
FILED
SEP 13 2011
Clerk of the Court, Queen's Bench

AFFIDAVIT OF PAUL BUJOLD

Sworn on September 12, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985

24. It is clear that the transfers were done but the documentation is not currently available. The Trustees have been operating on the assumption that they were properly guided by their advisors and the asset transfer to the 1985 Trust was done properly.

25. The Trustees seek the Court's direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the benefit of the beneficiaries of the 1985 Trust.

26. The 1985 Trust is the sole shareholder of Sawridge Holdings Ltd. I am advised by Ralph Peterson, Chairman of the Board of Directors of the Sawridge Group of Companies, and do verily believe that an approximate value of the 1985 Trust investment in Sawridge Holdings Ltd. as at December 31, 2010 is $68,506,815. This represents an approximate value of the net assets of Sawridge Holdings Ltd., assuming all assets could be disposed of at their recorded net book value and all liabilities are settled at the recorded values as at that date, with no consideration for the income tax effect of any disposal transactions.

27. Taking into account the other assets and liabilities of the 1985 Trust, the approximate value of the net assets of the 1985 Trust as at December 31, 2010 is $70,263,960.

28. To unravel the assets of the 1985 Trust after 26 years would create enormous costs and would likely destroy the trust. Assets would have to be sold to pay the costs and to pay the taxes associated with a reversal of the transfer of assets.

Creation of the 1986 Trust

29. Attached to my affidavit as **Exhibit "K"** is a copy of the 1986 Trust dated August 15, 1986. The beneficiaries of the 1986 Trust included all members of the Sawridge First Nation in the post-*Bill C-31* era.

30. The Sawridge First Nation transferred cash and other assets into the 1986 Trust to further the purposes of the trust. After April 15, 1985 no further funds or assets were put into the 1985 Trust.

31. Effectively, the assets in existence as at April 15, 1985 were preserved for those who qualified as Sawridge members based on the definition of membership that existed at that time. The 1986 Trust was established so that assets coming into existence subsequent to April 15, 1985 could be held in trust for those individuals who qualified as members in accordance with the definition of membership that existed in the post-*Bill C-31* era.

Identification of Beneficiaries Under the 1985 Trust and the 1986 Trust

32. The Trustees have determined that maintaining the definition of "Beneficiaries" contained in the 1985 Trust is potentially discriminatory. The definition of "Beneficiaries" in the 1985 Trust would allow non-members of the Nation to be beneficiaries of the 1985 Trust and would exclude certain members of the Nation (such as those individuals acquiring membership as a result of *Bill C-31*) from being beneficiaries.

33. The Trustees believe that it is fair, equitable and in keeping with the history and purpose of the Sawridge Trusts that the definition of "Beneficiaries" contained in the 1985 Trust be amended such that a beneficiary is defined as a member of the Nation, which is consistent with the definition of "Beneficiaries" in the 1986 Trust.

Current Status

34. The Trustees have been administering the Sawridge Trusts for many years. In December of 2008, the Trustees retained the Four Worlds Centre for Development Learning (hereinafter referred to as "Four Worlds") to conduct a consultation process with the beneficiaries of the Sawridge Trusts. Four Worlds prepared a report identifying the types of programs and services that the Sawridge Trusts should offer to the beneficiaries and

This is Exhibit " K " referred to in the Affidavit of Paul Bujold

Sworn before me this 12 day of September A.D., 20 11

A. Magnan

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Catherine A. Magnan
My Commission Expires January 29, 20 12

THE SAWRIDGE TRUST

DECLARATION OF TRUST

THIS TRUST DEED made in duplicate as of the 15th day of August, A.D. 1986.

BETWEEN:

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

OF THE FIRST PART,

- and -

CHIEF WALTER P. TWINN, CATHERINE TWINN and GEORGE TWIN,
(hereinafter collectively called the "Trustees")

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached 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 Deed, 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 under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule attached hereto and any accumulated income thereon;

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed 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 Deed;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Deed;

(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; and

(E) "Trust" means the trust relationship established between the Trustees and the Beneficiaries pursuant to the provisions of this Deed.

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, lease 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 Deed.

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

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust 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 and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the expiration of twenty-one (21) years after the death of the last survivor of the beneficiaries alive at the date of the execution of this Deed, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then alive.

During the existence of this Trust, 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 Trustee's 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 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 Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust 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 or to any extent detracted 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 this Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of this Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

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

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received 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 and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

15. 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 Trust 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.

16. This Deed and the Trust created hereunder 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

#6, 12220 Stony Plain Road, Alta.
ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor
CHIEF WALTER P. TWINN

B. Trustees:

1.
CHIEF WALTER P. TWINN

2. Catherine M Twinn
CATHERINE TWINN

3.
GEORGE TWIN

860647-1/6

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

Tab 9

Proposed Distribution Arrangement

of the Sawridge Band Inter Vivos Settlement ("Trust")

A. Introduction

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

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

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

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

B. Intentions of the Settlor

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

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

C. Proposed Scheme of Distribution

1. Introduction

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

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

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

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

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

a) **Health, Dental, Vision Care and Life Insurance benefit** - program provides for health, dental, vision care to the beneficiaries and their dependents and life insurance benefit to the beneficiaries;

b) **Education Support Fund benefit** - this benefit provides payments for the beneficiaries or their dependents to provide for tuition and fee support support for books and equipment, living expense supports while the beneficiaries or their dependents are attending a recognized education program;

c) **Addictions Treatment Support Fund benefit** - this benefit provides for the beneficiaries, or their dependents to attend eligible treatment programs;

d) **Child and Youth Development benefit** - benefit provides up to $10.000 per annum to assist with costs associated with caring and educating a special needs dependent on a reimbursement or prepaid basis and up to $8,500 per annum to assist with childcare costs for a dependent on a reimbursement or prepaid basis;

e) **Compassionate Care and Death benefit** –this benefit provides payments to a beneficiary for travel costs for family members travelling to visit an ill or injured family member, reasonable accommodation costs, reasonable meal costs for the beneficiary and family, parking costs and child care costs for underage children. It also provides for home modifications, special equipment or dietary supplies or special medications not covered by the health plans. The death benefit provides the cost of transporting remains of the deceased, cost of burial or cremation, cost of the wake, the funeral and headstones, cost of transporting the beneficiary and family to the funeral, costs of accommodation, meals for the beneficiary and family, if the funeral is held at some distance;

f) **Seniors Support benefit** - this benefit is to provide support for elders who have provided much to the building of the community and is a monthly supplement to other government programs received by the senior;

g) **Personal Development and Alternative Health benefit** - this benefit provides the beneficiaries, or their dependents, including children, money up to $2,000 per annum for fitness and nutrition, self-esteem building programs, payments for alternative health, herbs and supplements and fitness equipment, visits to traditional healers, including the costs of transportation and other expenses.

h) **Income Replacement benefit** - this benefit provides an income replacement of up to $5,000 per year for any beneficiary if they lose income as a result of attending a personal healing program or because of extended sick leave from work because of an illness;

i) **Recognition of Beneficiaries and Dependents Educational Achievements** - this benefit provide a recognition of $250 or suitable gift along with a framed certificate to a graduate of a recognized educational program to assist with finding employment or celebrating their achievement;

j) **One Time Only "Good Faith" Cash Disbursement** - this benefit provides a one-time payment to every beneficiary of $2,500, either immediately if they are an adult or upon the beneficiary attaining the age of 18.

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

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

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

3. Distributions Available to Minors

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

a) The **Health, Dental, Vision Care benefit** - program provides for health, dental, vision care for beneficiaries and their **dependents who are under 18 or under 25 if they are attending a post-secondary institution.**

b) The **Education Support Fund benefit** provides funding to an eligible dependent who is a natural or adopted **child of an eligible beneficiary which child is under 25 years of age** and registered in a full-time or part-time education program with an accredited educational institution.

c) The **Addictions Treatment Support Fund benefit** provides a benefit to an eligible dependent which will include a natural or adopted **child of an eligible beneficiary which child is under 25** and living at home with the eligible beneficiary.

d) The **Child and Youth Development benefit** provides funding for a **child of the beneficiary who suffers a permanent physical or mental disability**, who is a natural child or adopted child of an eligible beneficiary, as well as for child care, if required, for all children of beneficiaries who are working or going to school

e) The **Personal Development and Alternative Health benefit** provides funding for an eligible dependent of a beneficiary which will include a natural or adopted **child who is under 25 years of age** and living at home with an eligible beneficiary. This policy provides for the payment of all manner of programs for children including sports and fitness programs.

f) The **Income Replacement benefit** provides a benefit to an eligible dependent of a beneficiary who is a natural or adopted **child who is under 25 years of age** and living at home with the eligible beneficiary.

g) The **Recognition of Beneficiaries and Dependents Educational Achievements benefit** provides for the dependents of a beneficiary to receive recognition for educational achievements. A dependent is defined as a natural or adopted **child of an eligible beneficiary** provided the dependent is living with the beneficiary or still considered to be a dependent of the beneficiary.

h) The **Compassionate Care and Death benefit** - provides payments to a beneficiary or their children for expenses as set out in the policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

5. **Complete Capital Distribution**

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

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

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

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

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

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

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

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

Nature of a Discretionary Trust .

a. Discretionary payments for the needs of beneficiaries

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

b. Avoiding Capital Payments to beneficiaries which destroys the Trust

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

c. Jurisdiction of the Court to direct payment of funds

The Court should only intervene to direct the payment of funds from the Trust when the Trustees fail to 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

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

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

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

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

G. Conclusion

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

Tab 10

Clerk's Stamp:



Form 26
[Rule 5.6]

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN and DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD – Jurisdiction Application**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

AFFIDAVIT OF PAUL BUJOLD
SWORN ON THE 9 DAY OF January, 2019

I, Paul Bujold, of the Edmonton, Alberta, make oath and say:

1. I am the Chief Executive Officer ("CEO") of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. The Office of the Public Guardian and Trustee ("OPGT") and Catherine Twinn, as the only other parties to this litigation, have referenced amending the 1985 Trust pursuant to section 42 of the Trustee Act. The Trustees have maintained that 100% of the beneficiaries must approve the change under the Trustee Act and until we have approval of Catherine Twinn, who is a beneficiary of the 1985 Trust and a party to this action, and the OPGT, who represents a number of beneficiaries, to a change in definition an amendment under section 42 of the Trustee Act will not be successful.

3. The Trustees directed me to make an attempt to obtain approval to a change in the definition of beneficiaries. I carried out the following steps:

   (a) I drafted letters to potential beneficiaries and persons who may have an interest proposing two definitions in the letters attached as Exhibit "A". One definition was proposed by the Trustees and the second definition was proposed by the OPGT in correspondence. Catherine Twinn was asked to provide a definition but she declined to do so.

   (b) The letters attached as Exhibit "A" were sent to the individuals that the Trustees believe may be beneficiaries or to persons identified by the OPGT and Catherine Twinn as interested persons of the 1985 Trust. The Trustees are not confident that the list is exhaustive for the reasons set out below. The list of persons to whom the letters were sent is attached hereto as Exhibit "B". I eventually found addresses for most of the people on the list. The people whose addresses I did not find are marked on Exhibit "B".

   (c) A total of 8 votes were received and the votes are as shown on the attached chart marked as Exhibit "C".

4. In my experience as the CEO, I have found that it is extremely difficult to get beneficiaries to respond to any kind of communication and thus I did not expect that there would be a good response.

5. I said above that I do not believe that the list of people to whom the list was sent was exhaustive. The three parties to this litigation do not agree on a list of beneficiaries of the 1985 Trust and thus I believe it will be impossible to satisfy the requirement to obtain approval of 100% of the beneficiaries because to date there is no agreement on who belongs in the beneficiary pool.

6. I make this Affidavit in support of an application to have the court direct the jurisdiction of the court under which the definition of the 1985 Trust could be amended.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS IN AND FOR THE PROVINCE OF ALBERTA ON THE 9 DAY OF JANUARY, 2019.

PAUL BUJOLD

Commissioner for Oaths in and for the Province of Alberta

Doris Bonora
Barrister and Solicitor
In and for the Province of Alberta

Appointment Expiry Date

This is Exhibit " A " referred to in the Affidavit of PAUL BUJOLD

Sworn before me this 9 day of JANUARY A.D., 20 19

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Dorie Benora
Barrister and Solicitor
In and for the Province of Alberta

SAWRIDGE TRUSTS

NOTICE TO POTENTIAL BENEFICIARIES

Sawridge Band Intervivos Settlement (1985 Trust)

Court Action 1103 14112 to review the definition of "Beneficiaries" in the 1985 Trust is reaching the final steps in seeking direction about a change in the definition of "Beneficiaries" in this Trust and to seek remedies for those who may be affected by the change to the current definition.

The current definition has been declared discriminatory and therefore the Trustees have determined that the definition should be changed to eliminate discrimination.

One possible action to effectively change the current definition would be to ask those persons identified as potential beneficiaries or persons who may have an interest under the current definition to approve a new definition. Under Section 42 of the Trustee Act of Alberta, the potential beneficiaries can vote on a new definition but 100% of these persons would have to agree to the new definition. Such a change would still be subject to court approval.

The current definition is provided below:

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

You are receiving this notice because our preliminary analysis has determined that you may be a beneficiary of the trust under the current definition of beneficiaries of the trust. In order to determine if someone may be a beneficiary, an analysis of their qualifications as a member under the Indian Act as it existed in 1982 must be done.

Any change in the definition may affect your rights as a person who has been identified as having an interest under that trust. The results of this vote will be presented to the court.

SAWRIDGE TRUSTS

Two possible definitions have been proposed:

1. By the Trustees of the Sawridge Band Intervivos Settlement

   "Beneficiaries" at any particular time shall mean all persons who are members of the Sawridge Indian Band under the laws of Canada in force from time to time, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code are incorporated into, or recognized by, the laws of Canada;

2. By the Alberta Office of the Public Guardian and Trustee

   "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

As a potential Beneficiary in the 1985 Trust you are being asked to vote on whether you could accept a variation of the trust that one of these two proposed definitions would be acceptable. We require your answer by **19 November 2018**. Please return your vote in the self-addressed, stamped envelope provided with this Notice.

The vote cannot be anonymous. We must have your name and identification so that we know that you as a beneficiary voted.

If 100% of those being asked to vote for a definition choose the same definition, this definition will be proposed to the court as a proposed New Definition. If 100% of those being asked to vote do not choose the same definition, the court will be asked to find another remedy to resolve the current discriminatory definition.

SAWRIDGE TRUSTS

VOTE ON A PROSPOSED NEW DEFINITION FOR "BENEFICIARIES"

IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT

NAME	
IDENTIFICATION (Driver's Licence Number, Social Insurance Number, Alberta Health Care Number or Treaty Number)	

I VOTE FOR THE FOLLOWING DEFINITION (place a mark in the appropriate box):

VOTE	*PROPOSED DEFINITION*
	"Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time, including without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

	"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

SIGNATURE	
DATE	

Return your vote in the self-addressed, stamped envelope no later than 19 November 2018.

SAWRIDGE TRUSTS

NOTICE TO PERSONS WHO MAY HAVE AN INTEREST

IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT (1985 TRUST)

Court Action 1103 141 12 to review the definition of "Beneficiaries" in the 1985 Trust is reaching the final steps in seeking direction about a change in the definition of "Beneficiaries" in this Trust and to seek remedies for those who may be affected by the change to the current definition.

The current definition has been declared discriminatory and therefore the Trustees have determined that the definition should be changed to eliminate discrimination.

One possible action to effectively change the current definition would be to ask those persons identified as potential beneficiaries or persons who may have an interest under the current definition to approve a new definition. Under Section 42 of the Trustee Act of Alberta, the potential beneficiaries can vote on a new definition but 100% of these persons would have to agree to the new definition. Such a change would still be subject to court approval.

The current definition is provided below:

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

You are receiving this notice because our preliminary analysis has determined that someone has identified you as a person who may have an interest in the trust under the current definition of beneficiaries of the trust. In order to determine if someone may be a beneficiary, an analysis of their qualifications as a member under the Indian Act as it existed in 1982 must be done.

Any change in the definition may affect your rights as a person who has been identified as having an interest under that trust. The results of this vote will be presented to the court.

SAWRIDGE
TRUSTS

Two possible definitions have been proposed:

1. By the Trustees of the Sawridge Band Intervivos Settlement

   "Beneficiaries" at any particular time shall mean all persons who at that time are members of the Sawridge Indian Band under the laws of Canada in force, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code is incorporated into, and recognized by, the Sawridge Indian Band and the laws of Canada;

2. By the Alberta Office of the Public Guardian and Trustee

   "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

As a person who may have an interest in the 1985 Trust you are being asked to vote on whether you could accept a variation of the trust that one of these two proposed definitions would be acceptable. We require your answer by **19 November 2018**. Please return your vote in the self-addressed, stamped envelope provided with this Notice.

The vote cannot be anonymous. We must have your name and identification so that we know that you as an interested person voted.

As a person who has not yet been identified as a potential beneficiary, your vote will be presented to the court as the vote of a person of interest.

If 100% of those being asked to vote for a definition choose the same definition, this definition will be proposed to the court as a proposed New Definition. If 100% of those being asked to vote do not choose the same definition, the court will be asked to find another remedy to resolve the current discriminatory definition.

SAWRIDGE TRUSTS

VOTE ON A PROSPOSED NEW DEFINITION FOR "BENEFICIARIES"

IN THE SAWRIDGE BAND INTERVIVOS SETTLEMENT

NAME	
IDENTIFICATION (Driver's Licence Number, Social Insurance Number, Alberta Health Care Number or Treaty Number)	

I VOTE FOR THE FOLLOWING DEFINITION (place a mark in the appropriate box):

VOTE	*PROPOSED DEFINITION*
	"Beneficiaries" at any particular time shall mean all persons who at that time are members of the Sawridge Indian Band under the laws of Canada in force, including without restricting the generality of the foregoing, pursuant to the Membership Code of the Sawridge Indian Band as the Membership Code may exist to the extent that such Membership Code is incorporated into, and recognized by, the Sawridge Indian Band and the laws of Canada;

	"Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19, including those who qualified or qualify as members, pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 provided, for greater certainty, that any person who shall voluntarily become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 after the establishment of this Trust shall thereupon cease to be a Beneficiary for all purposes of this Settlement;

SIGNATURE	
DATE	

Return your vote in the self-addressed, stamped envelope no later than 19 November 2018.

EXHIBIT "B"

Mailing List Beneficiary Definition

No.	Name	Initial Age Status as at 2011	Current Age Status	No Address Found
1	Burd, Svea A.	Minor	Adult	
2	Cardinal, Kieran	Adult	Adult	
3	Cardinal, Peter Allan	Adult	Adult	X
4	Donald, Gina	Adult	Adult	
5	Lamouche-Twin, Everett	Minor	Minor	
6	Lamouche-Twin, Justice	Minor	Minor	
7	Lamouche-Twin, Kalyn	Minor	Minor	
8	Lamouche-Twin, Maggie	Minor	Minor	
9	Lindberg, Rosina	Adult	Adult	
10	McDonald, William	Adult	Adult	
11	McCoy, Vera	Adult	Adult	
12	McDonald, Joshlyn	Adult	Adult	X
13	Megley, Melissa	Adult	Adult	
14	Moodie, Jorja L.	Minor	Minor	
15	Nataucappo, Ariana J.I.	Minor	Minor	
16	Potskin, Keanu N. A.	Minor	Minor	
17	Potskin, Aaron	Adult	Adult	
18	Potskin, Ethan E.R.	Minor	Minor	
19	Potskin, Jaise A.	Minor	Minor	
20	Potskin, Jeanine	Adult	Adult	
21	Potskin, Jonathon	Adult	Adult	
22	Potskin, Talia M.L.	Minor	Minor	
23	Potskin, Trent	Adult	Adult	
24	Potskin, William	Minor	Minor	
25	Quinn-Twin, Kaissac P. C.	Minor	Minor	
26	Robberstad, Jadyn	Minor	Minor	
27	Rudkowski, Julie	Adult	Adult	X
28	Shirt, Cameron	Adult	Adult	
29	Twin (Anderson), Laurie	Adult	Adult	
30	Twin, Alexander L.	Minor	Minor	
31	Twin, Autumn J.	Minor	Minor	
32	Twin, Brianne	Adult	Adult	
33	Twin, Brittany	Adult	Adult	
34	Twin, Darcy	Adult	Adult	
35	Twin, Destin D.	Minor	Minor	
36	Twin, Jaclyn	Adult	Adult	
37	Twin, Justice W.	Minor	Minor	
38	Twin, E. Justin	Adult	Adult	
39	Twin, Kerri-Lynne	Adult	Adult	
40	Twin, Logan F.	Minor	Minor	
41	Twin, Naomi	Adult	Adult	
42	Quinn-Twin, Rainbow	Minor	Adult	
43	Twin, River C.	Minor	Minor	
44	Twin, Starr	Minor	Minor	
45	Twin, Walter F.	Adult	Adult	
46	Twin, Wesley	Adult	Adult	
47	Twin, Winona	Adult	Adult	
48	Twin, Yvonne	Adult	Adult	
49	Twinn, Alexander G.	Minor	Adult	
50	Twinn, Ardell	Adult	Adult	
51	Twinn, Arlene	Adult	Adult	
52	Twinn, Aspen S.	Minor	Minor	

This is Exhibit "B" referred to in the Affidavit of PAUL BUTOLD Sworn before me this 9 day of JANUARY A.D., 20 19

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

Doris Bonora
Barrister and Solicitor
Province of Alberta

EXHIBIT "B"

Mailing List Beneficiary Definition

53	Twinn, Catherine	Adult	Adult	
54	Twinn, Clinton	Minor	Adult	
55	Twinn, Cody	Adult	Adult	
56	Twinn, Corey R.	Minor	Adult	
57	Twinn, Courtney	Adult	Adult	
58	Twinn, Graham	Adult	Adult	
59	Twinn, Haitina	Adult	Adult	
60	Twinn, Irene	Adult	Adult	
61	Twinn, Isaac	Adult	Adult	
62	Twinn, Kaitlin	Minor	Adult	
63	Twinn, Patrick	Adult	Adult	
64	Twinn, Paul	Adult	Adult	
65	Twinn, Roland	Adult	Adult	
66	Twinn, Roy	Adult	Adult	
67	Twinn, Samuel	Adult	Adult	
68	Twinn, Shannon	Adult	Adult	
69	Twinn, Shelby	Adult	Adult	
70	Twinn-Vincent, Seth	Minor	Minor	
71	Twinn-Vincent, W. Chase	Minor	Adult	
72	Ward, Angie	?	Adult	X
73	Ward, Elvina Beatrice	?	Adult	X
74	Ward, Georgina	Adult	Adult	
75	Ward, Margaret S.	Adult	Adult	
76	Ward, Michelle	Adult	Adult	
77	Ward, Nathan	Adult	Adult	

EXHIBIT "C"

Mailing List for Beneficiary Definition with Vote Tabulation

No.	Name	Initial Age Status as at 2011	Current Age Status	Date Ballot Received	TABULATION OF VOTE ON S.42 DEFINITION	
					Trustee	OPGT
1	Burd, Svea A.	Minor	Adult			
2	Cardinal, Kieran	Adult	Adult			
3	Cardinal, Peter Allan	Adult	Adult			
4	Donald, Gina	Adult	Adult			
5	Lamouche-Twin, Everett	Minor	Minor			
6	Lamouche-Twin, Justice	Minor	Minor			
7	Lamouche-Twin, Kalyn	Minor	Minor			
8	Lamouche-Twin, Maggie	Minor	Minor			
9	Lindberg, Rosina	Adult	Adult			
10	McDonald, William	Adult	Adult			
11	McCoy, Vera	Adult	Adult			
12	McDonald, Joshlyn	Adult	Adult			
13	Megley, Melissa	Adult	Adult			
14	Moodie, Jorja L.	Minor	Minor			
15	Nataucappo, Ariana J.I.	Minor	Minor			
16	Potskin, Keanu N. A.	Minor	Minor			
17	Potskin, Aaron	Adult	Adult	19-Nov-18	1	
18	Potskin, Ethan E.R.	Minor	Minor			
19	Potskin, Jaise A.	Minor	Minor			
20	Potskin, Jeanine	Adult	Adult	19-Nov-18	1	
21	Potskin, Jonathon	Adult	Adult	13-Oct-18		1
22	Potskin, Talia M.L.	Minor	Minor			
23	Potskin, Trent	Adult	Adult			
24	Potskin, William	Minor	Minor			
25	Quinn-Twin, Kaissac P. C.	Minor	Minor			
26	Robberstad, Jadyn	Minor	Minor			
27	Rudkowski, Julie	Adult	Adult			
28	Shirt, Cameron	Adult	Adult			
29	Twin (Anderson), Laurie	Adult	Adult			
30	Twin, Alexander L.	Minor	Minor	14-Nov-18	1	
31	Twin, Autumn J.	Minor	Minor			
32	Twin, Brianne	Adult	Adult			
33	Twin, Brittany	Adult	Adult			
34	Twin, Darcy	Adult	Adult			
35	Twin, Destin D.	Minor	Minor			
36	Twin, Jaclyn	Adult	Adult			
37	Twin, Justice W.	Minor	Minor			
38	Twin, E. Justin	Adult	Adult	18-Oct-18	1	
39	Twin, Kerri-Lynne	Adult	Adult			
40	Twin, Logan F.	Minor	Minor			
41	Twin, Naomi	Adult	Adult			
42	Quinn-Twin, Rainbow	Minor	Adult			
43	Twin, River C.	Minor	Minor			
44	Twin, Starr	Minor	Minor			
45	Twin, Walter F.	Adult	Adult			
46	Twin, Wesley	Adult	Adult			
47	Twin, Winona	Adult	Adult			
48	Twin, Yvonne	Adult	Adult			
49	Twinn, Alexander G.	Minor	Adult			
50	Twinn, Ardell	Adult	Adult			
51	Twinn, Arlene	Adult	Adult			

This is Exhibit "2" referred to in the Affidavit of PAUL BUSOLD
Sworn before me this 9 day of JANUARY A.D., 20 19

Doris Bonora
Barrister and Solicitor
A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

EXHIBIT "C"

• Mailing List for Beneficiary Definition with Vote Tabulation

52	Twinn, Aspen S.	Minor	Minor			
53	Twinn, Catherine	Adult	Adult			
54	Twinn, Clinton	Minor	Adult			
55	Twinn, Cody	Adult	Adult			
56	Twinn, Corey R.	Minor	Adult	Returned		
57	Twinn, Courtney	Adult	Adult			
58	Twinn, Graham	Adult	Adult			
59	Twinn, Haitina	Adult	Adult	14-Nov-18		1
60	Twinn, Irene	Adult	Adult			
61	Twinn, Isaac	Adult	Adult			
62	Twinn, Kaitlin	Minor	Adult			
63	Twinn, Patrick	Adult	Adult			
64	Twinn, Paul	Adult	Adult	Returned		
65	Twinn, Roland	Adult	Adult	14-Nov-18	1	
66	Twinn, Roy	Adult	Adult			
67	Twinn, Samuel	Adult	Adult			
68	Twinn, Shannon	Adult	Adult			
69	Twinn, Shelby	Adult	Adult			
70	Twinn-Vincent, Seth	Minor	Minor			
71	Twinn-Vincent, W. Chase	Minor	Adult			
72	Ward, Angie	?	Adult			
73	Ward, Elvina Beatrice	?	Adult			
74	Ward, Georgina	Adult	Adult			
75	Ward, Margaret S.	Adult	Adult	13-Nov-18	1	
76	Ward, Michelle	Adult	Adult			
77	Ward, Nathan	Adult	Adult			
	TOTAL VOTES				6	2

Tab 11

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

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

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

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

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

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

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

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

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

Justice of the Court of Queen's Bench in Alberta

809772;August 31, 2011

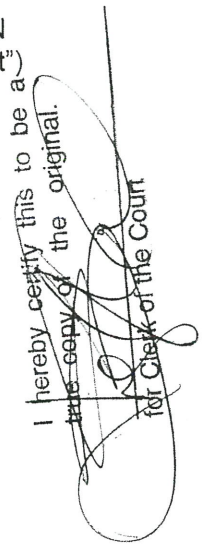
Tab 12



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

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

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



APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

I, Paul Bujold, of Edmonton, Alberta, make oath and say that:

1. I am the Chief Executive Officer of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I have reviewed the affidavit of Catherine Twinn ("Catherine") filed September 30, 2015 (the "September 30 Affidavit") and wish to provide by this affidavit my response to the

36. From January to April, 2014, Catherine refused to sign the deed to transfer the assets. In the meeting of April 15, 2014 the business proposal was put forward and the urgency of the asset transfer was again reiterated and still Catherine refused to sign the transfer documents. The following is an extract of the Minutes of the April 15, 2014 meeting:

Extract from the 15 April 2014 meeting:

> **Company Issues and Chair's Report**
>
> Brian presented the Company's proposal to invest in property development and to set up a new partnership to manage this venture along with the Telford Lake developments (See attached Appendices). He pointed out that having the Trustees approve these proposals required that the asset transfer be completed. He asked Catherine if she would be willing to sign the Deeds at this time. Catherine indicated that she was not prepared to sign the Deeds at this time. Brian indicated that there was some time urgency to these proposals and that the question of the asset transfer could not be dragged out into June.

37. Attached hereto and marked as Exhibit "G" are the Minutes of the April 15, 2014 meeting.

38. Catherine has stated that she refused to sign the deed of transfer because she said it had not been done before. However, the Trustees received legal advice that this had to be done but Catherine refused to listen to this advice.

Justin's Eligibility

39. In respect of paragraph 19 of the September 30 Affidavit, Catherine did not raise any concerns regarding Justin Twin's eligibility as a legitimate 1985 Trust beneficiary and as a SFN member, until her private meeting with Justin immediately prior to March 3, 2014. Catherine never raised this question with the Trustees prior to that date. In response to Catherine's concern, the Trustees undertook research in order to ascertain Justin's status. Michael McKinney, Barrister and Solicitor and the Sawridge First Nation's Executive Director, provided a letter outlining Justin's membership status. This letter is attached as Exhibit "H". The following summarizes the information about Justin's status:

(a) Justin made an inquiry with Indian and Northern Affairs Canada regarding his status in SFN. In response to his inquiry, a letter was received from the Superintendent of Indian Affairs stating that Justin was a legal member of SFN and had been since his birth on September 23, 1982 and that his name had been on the list of members transferred to SFN in October 1985. This letter is attached as Exhibit "I";

(b) The information regarding Justin's membership was not the subject of a vote by SFN Council. Justin was put on SFN membership list by Indian and Northern Affairs Canada and there was no protest; and

(c) No person has been removed from SFN membership list after being put on the list.

40. In respect of paragraph 20 of the September 30 Affidavit, the Trustees relied on information from Michael McKinney and from Indian and Northern Affairs Canada regarding Justin's membership status and thus his eligibility to be a beneficiary of the 1985 Trust.

41. Catherine did not accept the information provided by Michael McKinney and instead incurred the cost of obtaining her own "expert", Larry Gilbert, on the status of Justin. She is now seeking to have the Trusts pay for those costs. To date, Catherine refuses to provide the underlying evidence relied upon by Mr. Gilbert to form his opinion. The opinion contains a number of flaws.

42. I have the following concerns regarding Exhibit "B" of the September 30 Affidavit, the opinion of Mr. Gilbert:

(a) Mr. Gilbert states that he was asked to provide a legal opinion without the benefit of any records and thus bases his opinion on speculation.

(b) He misinterprets paragraph 6 of the Trust Deed as suggesting that illegitimate children of female members are not entitled to benefits. The Trust Deed states that the Trustees can choose not to give them a benefit, not that they are not entitled to benefits.

(c) He concludes that Chief and Council decided Justin was entitled to be a beneficiary, declared him a beneficiary and then appointed him as a Trustee. This is incorrect. The Chief and Council do not have the authority to decide if Justin is a beneficiary, nor do they have the authority to appoint him as a Trustee.

(d) His conclusion that Justin cannot be a Trustee is flawed because Justin could be a Trustee who is either a beneficiary or a non-beneficiary of the Trusts.

(e) I am advised by Mr. McKinney that Mr. Gilbert's opinion suggests Indian Affairs presumed that the father of an illegitimate child of a female Indian was a non-Indian, and therefore would not register the child without evidence of paternity. Mr. McKinney believes that this assumption is not correct. SFN has several instances in which paternity was not acknowledged and the illegitimate child was registered with SFN. Mr. McKinney states that if there is any uncertainty about Justin's paternity, Justin would be saved by the *Indian Act* of 1985 (after Bill C-31). In Section 11(1)(a) it states that a person is entitled to be on a Band List if the name of that person was entered on the Band List immediately prior to April 17, 1985. SFN took the Band List maintained by the department as the starting point and Justin was on that list. Justin is likely also saved by section 7 and 9 of the previous *Indian Act*. Section 7 gave the Registrar power to add names and Section 9 allowed for an appeal of the added name but within a very short time frame. In one case (involving Samson Cree Nation) the Court disallowed protests that were commenced out of time and declared that the protested persons were entitled to be placed on the Band List despite the fact that they may not have been originally entitled to be placed on the Band List.

(f) I am advised by Roland that once someone is a member and is on the membership list, SFN accepts them and SFN does not attack its members. The community is viewed as a family. It is hurtful and disrespectful of Catherine to attack the membership rights of a member on the Band List. Roland describes it as suggesting that you could kick someone out of your family.

(g) Since the 1985 Trust is based on the previous *Indian Act* as at 1982, and the *Indian Act* in 1982 was interpreted in a way that did not permit correction of

alleged errors after the protest period, it is unlikely that a protest or correction now would be permitted.

(h) Gilbert was of the opinion that Justin would not have qualified as a Trustee of the 1985 Trust since there were already two non-beneficiary Trustees. Gilbert does not address the fact that this situation would have been corrected by the death of Clara Midbo ("Clara") on July 13, 2014, after which Justin would have qualified in any case as a non-beneficiary Trustee.

(i) Mr. Gilbert does not address the fact that his opinion only relates to the 1985 Trust and not the 1986 Trust, as the 1986 Trust can have more than two non-beneficiaries as Trustees.

43. It is clear that Mr. Gilbert was given flawed information in terms of forming his opinion and thus has given a flawed opinion.

44. Catherine says that Dentons Canada LLP prepared a letter of opinion on the eligibility of Justin. There is no such letter.

Appointment of Margaret Ward

45. In respect of paragraph 22 of the September 30 Affidavit, Catherine suggests that the Trustees had knowledge of Clara's death that they did not share with Catherine. Clara's death was unexpected. Clara was in attendance at the June 10, 2014 Trustee meeting and she did not address her health. She passed away on July 13, 2014, following a brief hospital stay.

46. It was a complete surprise to everyone that Clara died. She had advised that she was ill but she did not say that her death was imminent. This is another example of Catherine thinking that "everyone is out to get her" and making Clara's death about her. Clara's death was sudden. The Trustees had to take immediate action to deal with her replacement.

47. In respect of paragraph 24 of the September 30 Affidavit, I received an email from Catherine and responded by telephone. I advised Catherine that no candidates had been proposed yet and that that this would be done at the Trustees' August 12, 2014

64-66 asked for more information on accounts that are being asked to be paid	Will not provide
67 asked for supporting document expert relied upon	"not reconsidered"
69 provide source documents of expert	"irrelevant"

190. I make this Affidavit in response to the evidence provided by Catherine Twinn.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON ALBERTA ON February 15, 2017.

Paul Bujold

Commissioner for Oaths in and for the Province of Alberta

Taylor Watts
Student-at-Law

Appointment Expiry Date

This is Exhibit " H " referred to in the Affidavit of

Paul Bujold

Sworn before me this 15th day

of February A.D., 2017

A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

TAYLOR J. WATTS
Student-at-Law

Sawridge

Katherine Twinn
EXHIBIT NO. 4
Sept. 9/16
D. WILLIAMS DW

March 5, 2014

Sawridge Trusts
Attention: Paul Bujold

Dear Sir,

RE: EVERETT JUSTIN TWIN

Further to your enquiry, we can advise that Everett Justin Twin ("Justin") was a Member of the Sawridge First Nation since his birth on September 23, 1982. On October 4, 1985 the Minister confirmed that the Sawridge Indian Band had control of its membership. Attached to that letter was a Band List as required pursuant to the Indian Act. The name of Everett Justin Twin was on that Band List. That Band List became the basis for the initial Membership List for the Sawridge Indian Band. We understand that Justin's mother did marry a non-Indian on November 1, 1986. We are not aware of any Protest regarding the inclusion of Justin on the Band List. Justin continues to be a member of the Sawridge First Nation (successor to the Sawridge Indian Band) today.

While it is arguable that under the Indian Act in force in 1982 Justin would have been enfranchised by the Minister under subsection 109(2) at the time of his mother's marriage, this was not done in all cases, and in many cases at Sawridge the children were left on the Band List when the mother subsequently married a non-Indian while that Indian Act was in force.

We trust that you will find this information helpful.

Yours truly,
Sawridge First Nation

Michael R. McKinney, Q.C.
Executive Director/General Counsel

806 Caribou Trail NE • Sawridge I.R. 150G
Box 326, Slave Lake, AB T0G 2A0

Telephone: (780) 849-4331
Fax: (780) 849-3446

This is Exhibit "I" referred to in the Affidavit of

Paul Bujold

Sworn before me this 15th day

of February A.D., 2017

A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

TAYLOR J. WATTS
Student-at-Law

Aboriginal Affairs and Northern Development Canada
Affaires autochtones et Développement du Nord Canada

630, 9700 Jasper Avenue
Edmonton, AB
T5J 4G2

Your file - Votre référence

Our file - Notre référence
6000-454

May 5, 2014

P.O. Box 462
Slave Lake, AB
TOG 2A0

Dear Mr. Twin,

Re: Confirmation of Indian Status, Band Number 454004080[illegible]

Thank you for your inquiry. I can confirm the following details regarding your Registration with Aboriginal Affairs and Northern Development Canada:

1. Your name was entered into the Indian Register on December 17, 1982
2. There were no protests within the required three (3) year period following your registration as a status Indian.
3. I can confirm that your name has been in the Indian Register since December 17, 1982 and therefore also on the band list when the responsibility for membership was transferred to the Sawridge First Nation.

Should you have any further questions or concerns, please feel free to contact me by email: Stephen.Nichols@aandc-aadnc.gc.ca or by telephone at (780) 495-4162.

Sincerely,

Stephen Nichols
Head, Indian Registration and Band Lists
Aboriginal Affairs and Northern Development Canada – Alberta Region

Canada

This is Exhibit " B " referred to in the Affidavit of Catherine Twinn
Sworn before me this 23 day of September A.D., 2015
A Commissioner for Oaths in and for the Province of Alberta

LARRY GILBERT
LAW CORPORATION
275 PALLISIER AVENUE
VICTORIA, BRITISH COLUMBIA
V9B 1C5
(250) 478-8881

Catherine M. Twinn
Barrister & Solicitor
Box 1460
Slave Lake, Alberta
T0G 2A0

July 2, 2014

KAREN A. PLATTEN, Q.C.
BARRISTER & SOLICITOR
A COMMISSIONER FOR OATHS
IN AND FOR ALBERTA

Dear Ms. Twinn:

RE: OPINION REGARDING JUSTIN TWIN-McCOY AS A BENEFIARY AND AS A TRUSTEE FOR THE APRIL 15, 1985 SAWRIDGE INDIAN BAND TRUST FUND

You have asked me to answer a number of questions:

1. Under sections 11 and 12 of the Indian Act, R.S.C. 1970, c. I-6 ("the rules") as these rules existed prior to April 17, 1982, does Justin McCoy-Twin qualify to be registered as an Indian and listed on the Sawridge Band List maintained by the Department?

   a) In particular, based on the facts and "the rules", is Justin McCoy-Twin, the son of Vera Twin and Jody McCoy, entitled to be registered as an Indian under those rules, firstly because at birth he was the illegitimate child of an Indian woman and non-Indian man?
   b) Secondly, what is the effect of the marriage of his parents, Vera Twin and Jody McCoy, as the marriage deems Justin McCoy-Twin the legitimate child of the marriage effective from the date of his date of birth.
   c) What effect does the language of the April 15, 1982 Sawridge Band Trust, antecedent to the 1985 Trust, have on Justin McCoy-Twin's eligibility? Does the Settlor's clear 1982 intention to exclude the illegitimate children of Indian women carry forward to the 1985 Trust vis a vis Justin Twin McCoy's eligibility as a beneficiary of the 1985 Trust?

2. What effect does the Chapman v. Martin, [1983] 1 SCR 356 case have to these facts? As I understand the case, the illegitimate children – male or female – of a male Indian are entitled to registration.

3. Do the actions or inactions of the Sawridge Band impact the eligibility of Justin McCoy-Twin under those rules? If so, how?

I have been asked to render this legal opinion based on a number of assumptions regarding Justin McCoy-Twin's birth and his family without access to the records that

may or may not confirm those assumptions. I am prepared to revisit this legal opinion if any of those assumptions are proven to be incorrect.

Sections 11 and 12 of the Indian Act, R.S.C. 1970, c. I-6 provide the following:

> 11. (1) Subject to section 12, a person is entitled to be registered if that person
>
> (a) on the 26th day of May, 1874 was, for the purposes of an Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, being chapter 42 of the Statutes of Canada, 1868, as amended by section 6 of chapter 6 of the Statutes of Canada, 1869, and section 8 of chapter 21 of the Statutes of Canada, 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;
> (b) is a member of a band
> (i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May 1874, have been agreed by treaty to be set apart, or
> (ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;
> (c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b);
> (d) is the legitimate child of
> (i) a male person described in paragraph (a) or (b),
> or
> (ii) a person described in paragraph (c);
> (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or
> (f) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (a), (b), (c), (d) or (e).
>
> (2) Paragraph (1) (e) applies only to persons born after the 13th day of August 1956.
>
> 12. (1) The following persons are not entitled to be registered, namely,
> (a) a person who
> (i) has received or has been allotted half-breed lands or money scrip,
> (ii) is a descendent of a person described in sub-paragraph (i),
> (iii) is enfranchised, or
> (iv) is a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(a), (b) or (d) or entitled to be registered by virtue of paragraph 11(1)(e),

unless, being a woman, that person is the wife or widow of a person described in section 11, and

(b) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

(3) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect.

(4) Subparagraphs 1 (a)(i) and (ii) do not apply to a person who
(a) pursuant to this Act is registered as an Indian on the 13th day of August 1958, or
(b) is a descendent of a person described in paragraph (a) of this subsection.

(5) Subsection (2) applies only to persons born after the 13th day of August 1956.

Justin McCoy-Twin was born on September 23, 1982. His mother is Vera Irene Twin, born on December 15, 1956 who has been on the Sawridge Paylist since birth. His father is Jody McCoy, a non-Indian. On September 23, 1982, Justin McCoy-Twin's parents were not married. Justin McCoy-Twin was registered as an Indian as the illegitimate child of an Indian woman. I am informed that his paternity must not have been disclosed to the Department. This is important because the Indian Act, 1970 determined Indian status and Band Membership strictly and in accordance with the paternal line. As noted above, section 11(1)(c) refers to the male line:

11(1) Subject to section 12, a person is entitled to be registered if that person

(c) is a male person who is a direct descendent in the male line of a male person described in paragraph (a) or (b).

Contrast that provision with paragraphs 11(1)(e) and 12(2), both dealing with the illegitimate child of an Indian woman:

11(1) Subject to section 12, a person is entitled to be registered if that person

(e) is the illegitimate child of a female person described in paragraph (a), (b) or (d).

12.(1) The following persons are not entitled to be registered, namely,

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11(1)(e) may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

Accordingly, the policy of the Department at the time was to deny registration for an illegitimate child because the father was presumed to be a non-Indian. However, the Band or the person submitting the birth record to the Department can and often did overcome that presumption by providing evidence that the father was an Indian such as in a sworn statement from the Indian father. Indeed, even today, the policy is to presume that the father of an illegitimate child is a non-Indian unless the mother and/or the Band proves otherwise.

Although Justin McCoy-Twin was registered as an Indian, he was not entitled to be registered because his father was a non-Indian.

I conclude therefore that Justin McCoy-Twin was not entitled to be registered as an Indian under the Indian Act, 1970. In addition, he was not entitled under that Act to be added to the Band List of the Sawridge Indian Band as that List was maintained by the Department.

Turning now to the Sawridge Band Inter Vivos Settlement and Declaration of Trust dated April 15, 1985. The question asked is whether Justin McCoy-Twin is eligible to be a Beneficiary of that Trust and whether Justin McCoy-Twin is eligible to be a Trustee of that Trust. These questions arise because recently Justin McCoy-Twin was made a Beneficiary and appointed as a Trustee of that Trust by Chief and Council of the Sawridge Indian Band.

Paragraph 2(a) of the Trust describes who may be a Beneficiary:

(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.

Based on the above-quoted statement about "Beneficiaries", I conclude that it is the Settlor's intention that

> (i) those persons whose names appeared on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 shall be considered to be Beneficiaries of this Trust and that
> (ii) no person who would not qualify to have his or her name on the Band List maintained by the Department under the authority of the Indian Act, on April 15, 1982 shall be considered to be a Beneficiary of this Trust and that
> (iii) no person whose entitlement to membership in the Sawridge Indian Band that flows only from an amended Indian Act shall be considered to be a Beneficiary of this Trust.

As noted above, Justin McCoy-Twin was born on September 23, 1982. Accordingly, he could not have his name entered on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 because he was not yet born. On that basis alone Justin McCoy-Twin is not qualified to be a Beneficiary of the Trust. Furthermore, as noted above, Justin McCoy-Twin is not qualified to be a Beneficiary because he was never entitled to be registered as an Indian in accordance with the Indian Act, 1970, and he was never entitled to have his name entered on the Band List maintained by the Department under the authority of the Indian Act, 1970, on April 15, 1982 or even on the date of his birth, September 23, 1982 because of his status as an illegitimate child.

In the Declaration of Trust, Sawridge Band Trust dated April 15, 1982, the Settlor wrote at paragraph 6:

> The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21)

years after the death of the last descendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band 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; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act.)

By virtue of paragraph 6 of the Declaration of Trust, Sawridge Band Trust dated April 15, 1982, I believe it was the intention of the Settlor of the 1985 Trust Fund to exclude illegitimate children from being Beneficiaries of the Trust. As Justin McCoy-Twin was born the illegitimate child of his Indian mother and although his name was added to the Indian Register and the addition of his name to the Registry was not protested, paragraph 6 provides that Justin McCoy-Twin is nevertheless not entitled to be a Beneficiary of the Trust.

I am informed that sometime after the Indian Act, 1970 was amended in 1985, Justin McCoy-Twin became the legitimate child of his parents when they were legally married. With that legal marriage occurring after the Indian Act was amended, the illegitimacy of the child was no longer used as a basis to add or delete a name to or from the Indian Registry. Accordingly, Justin McCoy-Twin's status under the Indian Act, 1970, was unchanged by his parent's legal marriage. Justin-McCoy Twin would however be entitled to be registered under the amended Indian Act, R.S.C. 1985, c. I-5 as a person with one Indian parent, namely, his mother.

According to the instructions I received in preparation for this legal opinion, immediately prior to his appointment as a Trustee, there were already two (2) Trustees of this Settlement who are not Beneficiaries. Guidance on this issue is found in paragraph 5 of the Sawridge Band Inter Vivos Settlement and Declaration of Trust dated April 15, 1985. Paragraph 5 deals with who may be appointed as a Trustee:

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.

As there are already two (2) Trustees of this Settlement who are not Beneficiaries and as Justin McCoy-Twin is not a Beneficiary, it follows therefore that Justin McCoy-Twin cannot and should not have been appointed as a Trustee of this Settlement.

I was asked to comment on whether the Supreme Court of Canada decision in Martin v. Chapman, [1983] 1 SCR 356 has any impact on the facts of this case. This is the case of an illegitimate child of an Indian man being denied registration as an Indian because according to the Registrar in the Department, the Federal Court of Canada and the Federal Court of Appeal all decided that paragraph 11(1) (c):

> 11(1) Subject to section 12, a person is entitled to be registered if that person
>
> (c) is a male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b);

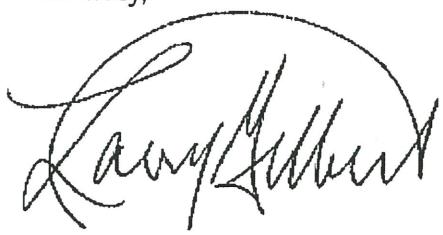
means that only legitimate descendants in the male line are entitled to be registered. The Supreme Court of Canada said no; paragraph 11(1)(c) applies equally to an illegitimate or legitimate male person who is a direct descendant in the male line of a male person described in paragraph (a) or (b). As Justin McCoy-Twin was the illegitimate child of an Indian woman, paragraph 11(1)(c) has no application to his case and the decision of Martin v. Chapman has no relevance to these facts.

Finally, the question is whether the actions or inactions of the Sawridge Band impacts the eligibility of Justin McCoy-Twin under those rules? If so, how? I conclude that the Sawridge Band and the mother of Justin McCoy-Twin were responsible for Justin McCoy-Twin being registered as an Indian when he was born on September 23, 1982 notwithstanding the fact that he was never entitled to be registered as an Indian in accordance with the Indian Act, 1970.

I also conclude that it was the Chief and Council of the Sawridge Indian Band who decided Justin McCoy-Twin is entitled to be a Beneficiary of this Trust and declared him a Beneficiary and then appointed him as a Trustee of this Trust. As noted above, Justin McCoy-Twin is not entitled to be a Beneficiary and should never have been granted that status. Furthermore, Justin McCoy-Twin is not qualified but is specifically disqualified from being appointed as a Trustee of this Trust.

Please do not hesitate to call or write if you have any questions or concerns regarding this legal opinion.

Yours truly,



Larry Gilbert
Barrister & Solicitor

"The Honourable Chief Justice McEachern"

"The Honourable Mr. Justice Cumming"

"The Honourable Madam Justice Prowse"

Tab 13

COURT FILE NO: 1103 14112

COURT: QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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

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

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

---

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD
SWORN JANUARY 9, 2019

Ms. D. Bonora	For the Applicants
Ms. J. Hutchison	For the Public Trustee
Ms. C. Osualdini	For Catherine Twinn

Susan Stelter Court Reporter

Edmonton, Alberta

11 February, 2019

EXHIBITS

EXHIBIT NO. A FOR IDENTIFICATION: 4
LETTER DATED JULY 27, 2018 FROM HUTCHISON LAW TO DENTONS

EXHIBIT NO. B FOR IDENTIFICATION: 10
EMAIL CHAIN, TOP ONE DATED OCTOBER 5, 2018 FROM MS. BONORA TO MS. HUTCHISON AND MS. OSUALDINI

EXHIBIT NO. C FOR IDENTIFICATION: 14
EMAIL CHAIN, TOP ONE DATED SEPTEMBER 25, 2018 FROM MS. BONORA TO MS. OSUALDINI

EXHIBIT NO. D FOR IDENTIFICATION: 18
EMAIL CHAIN, TOP ONE DATED OCTOBER 11, 2018 FROM MS. BONORA TO MS. OSUALDINI

EXHIBIT NO. 1: 34
LETTER DATED DECEMBER 31, 2009 ON SAWRIDGE TRUSTS LETTERHEAD SIGNED BY MR. BUJOLD

EXHIBIT NO. 2: 35
COPY OF NEWSPAPER AD, SAWRIDGE DOCUMENT 564

EXHIBIT NO. 3: 39
LETTER DATED SEPTEMBER 1, 2011 ON SAWRIDGE TRUSTS LETTERHEAD FROM MR. BUJOLD TO JONATHON POTSKIN

Exhibit B For Identification
Date: February 11, 2019
Exam of: Paul Bujold

Chantelle Monson

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Friday, October 05, 2018 6:55 PM
To: Janet Hutchison; 'Crista Osualdini (cosualdini@mross.com)'
Cc: England, Mandy
Subject: RE: Sawridge Trustees - 51433 JLH

Janet and Crista

Thank you for your emails on the correspondence the trustees wish to send to the beneficiaries and potential beneficiaries

We sought the trustees approval on a mail out after the last settlement meeting.

We will be proceeding with a mail out to the potential beneficiaries. The mail out is a letter sent by the trustees to its potential beneficiaries. We do not intend to seek approval of the wording from opposing counsel.

We will not be explaining the definitions being proposed. We are including the definition proposed by the OPGT. Crista has advised that Catherine does not wish to participate in this process as she believes that it is premature.

The trustees have decided to proceed. The OPGT can consent or not on behalf of the individuals that it represents. It can certainly choose not to vote at all although we are assuming that the OPGT will vote in favor of its own definition.

Paul is currently seeking addresses. We may reach out for addresses of people that were added to the list by each of your clients.

We need to continue to try and conclude this litigation. There is good reason for the trustees to seek information from the potential beneficiaries. The trustees did not feel constrained to put forward the definition with crossed out language as section 42 of the Trustee Act would allow more latitude. We thus are putting forward a definition that is more in keeping with the definition in the 1986 trust.

The letter will go out on the date set out in the proposed litigation plan with a response date expected of November 19, 2018 as set out in the proposed litigation plan. We will also post the letter to the website and post it in the Band office. We will also send the letter to Ed Molstad who seems to be the only counsel remaining at the moment who represents an interested party.

If the OPGT would like to include a different definition, we are prepared to include it. If Catherine Twinn changes her mind and would like to include a definition, we are prepared to include it. We need those definitions by October 11, 2018.

On another note, Janet suggested that we write to the court to see if we can obtain one half day with Justice Thomas. We will seek that date from him. We will of course share our letter to the court with you. We would like to be able to proceed with the privilege order as that would allow us to finish questioning.

Crista has advised that she is still working on the list of agreed facts on which the OPGT and the trustees agree but which we do not have a position from Catherine Twinn. We look forward to receiving that.

Please let us know if you have any questions.

Doris

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From: Janet Hutchison <JHutchison@jlhlaw.ca>
Sent: October 4, 2018 12:04 PM
To: England, Mandy <mandy.england@dentons.com>; Bonora, Doris <doris.bonora@dentons.com>
Cc: 'Crista Osualdini (cosualdini@mross.com)' <cosualdini@mross.com>; Chantelle Monson <CMonson@jlhlaw.ca>
Subject: Sawridge Trustees - 51433 JLH

I am writing to follow up on the exchanges about the dates being discussed in the litigation plan and in correspondence in relation to sending notices out to beneficiaries about proposed definitions. My understanding is counsel have yet to reach an agreement on that front and I wanted to be clear that my current understanding is that nothing will proceed until agreement is reached. However, on review of the correspondence I thought it prudent to clarify that this understanding is correct.

As such, we would appreciate the Trustees' response on the following questions:

1.) Are the Trustees proceeding with a mail out regardless of whether counsel for the parties agree with the approach/ content?

2.) If yes, are the Trustees proposing to include any materials commenting on or presenting the OPGT's proposal.

3.) If yes, will the OPGT be given the courtesy of reviewing the text of any notice/ documentation referring to the OPGT proposal in advance- and if so- when will that be available?

Our questions arise, in part, because we have some concerns about how accessible our July 27, 2018 letter would be to the average beneficiary, not represented by legal counsel. As you will appreciate, that correspondence was prepared with the understanding the audience would be experienced legal counsel acting on this file.

Once the parties had agreed upon timelines, we had hoped there would be discussion about options for a joint- and plain language- approach to explanations of any proposed definitions. Given that we understand all parties are committed to trying to keep this process as efficient and cost effective as possible, and given that notices on proposed definitions certainly has the potential to impact the current process and litigation plan, our client would certainly prefer- and support- a collaborative approach.

We look forward to hearing back regarding whether that is the intention for how to address that aspect of the litigation plan.

Yours truly,



Janet L. Hutchison

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3
Phone: 780-417-7871 (ext. 225)
Fax: 780-417-7872

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Exhibit M: C For Identification
Date: February 11, 2019
Exam of: Paul Bujold
Susan Sleifel, CSR(A)

Chantelle Monson

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Tuesday, September 25, 2018 3:07 PM
To: Crista Osualdini
Cc: Janet Hutchison; England, Mandy
Subject: RE: Sending definition to beneficiaries

Crista

If we plan to send out a mailing to all the beneficiaries and proposed beneficiaries, that takes some time to put the mailing together. That was the reason for the short response time.
If you do not wish to provide a definition, then there is no obligation for you to do so. The trustees have the ability to communicate with the beneficiaries and we will likely take that step as planned.
We do not agree with the premise that all the litigation must now be halted waiting for the new case management meeting. We are hoping that this litigation can continue despite the delay in the case management hearing.

The response from Catherine on the agreed statement of facts chart which outlines where the OPGT and the trustees agreed but Catherine has not said that she agrees, is outstanding and we are hoping that we will shortly have a response from you on that.

Doris

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From: Crista Osualdini <cosualdini@mross.com>
Sent: September 25, 2018 9:05 AM
To: Bonora, Doris <doris.bonora@dentons.com>; 'Janet Hutchison' <jhutchison@jlhlaw.ca>; England, Mandy <mandy.england@dentons.com>
Cc: Hagerman, Susan <susan.hagerman@dentons.com>; Karen Platten <kplatten@mross.com>; David Risling <drisling@mross.com>
Subject: RE: Sending definition to beneficiaries

Doris,

At present, there is not consensus amongst the parties as to the purpose of the trustees' proposed beneficiary communication, the form of such communication, and the timing of same – amongst other matters. This disagreement is articulated in full in our written submissions.

I would also incidentally note that the litigation plan proposed by the trustees did not seek the parties' position on beneficiary definition until October 19th. I was surprised to see the trustees' requesting the definition by September 26th on a few days notice and without any explanation for the deviation from their own proposed litigation plan.

In any event, if the purpose of the communication is to create an evidentiary basis to suggest that 100% beneficiary approval cannot be obtained, my client does not agree that the process proposed by the trustees is appropriate. The direction of the Court in this regard will be needed at the re-scheduled case management meeting.

Until these matters can be adjudicated at the next case management meeting, and direction obtained, any communication to the beneficiaries in this regard is premature. While my client is always in favour of regular communication with beneficiaries, such communication should be clear and informative. Given the lack of clarity around the substance and purpose of the communication, this should be resolved prior to the communication with the beneficiaries occurring – this is imperative in order to avoid any unnecessary confusion.

Given that all dates in the trustees' litigation plan were premised around the case management date occurring on September 25, it appears that the litigation plan will need to be re-worked in order to reflect the rescheduled date. Once we know the new date for the case management meeting we can start looking at a schedule that works with this new date in mind and that considers alternative scheduling depending on the direction of the Court on these and related issues.

Crista

Crista Osualdini | Partner | direct 780.482.9239 | toll free 1.800.567.9200 | fax 780.733.9723
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From: Bonora, Doris [mailto:doris.bonora@dentons.com]
Sent: Saturday, September 22, 2018 7:53 PM
To: Crista Osualdini <cosualdini@mross.com>; 'Janet Hutchison' <jhutchison@jlhlaw.ca>; England, Mandy <mandy.england@dentons.com>
Cc: Paul@sawridgetrusts.ca; Brian Heidecker <brian@sawridgetrusts.ca>; Hagerman, Susan <susan.hagerman@dentons.com>
Subject: Sending definition to beneficiaries

Janet and Crista

Despite postponing the application we wish to proceed as we have agreed in the litigation plan and wish to send out definitions to the beneficiaries to solicit consent to a definition

Please provide us the definition that you wish to send out

Crista,

We will need addresses for any of the beneficiaries you have added

We need these right away as it will take time to prepare the packages to send out with the proposed definition and prepare self addressed return envelopes to receive the responses

May we please have your definition by Wednesday

Doris

DENTONS

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Partner

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Exhibit D For Identification
Date: February 11, 2019
Exam of: Paul Bujold
Court Reporter: Susan Stelter, CSR(A)

Chantelle Monson

From: Bonora, Doris <doris.bonora@dentons.com>
Sent: Thursday, October 11, 2018 10:53 AM
To: Crista Osualdini
Cc: Janet Hutchison; England, Mandy; Hagerman, Susan
Subject: Re: Sawridge Trustees - 51433 JLH

Crista
The trustees have an obligation to proceed with the litigation. We believe this is a step we can take that will advance the litigation. The cost of the mail out is not substantial and we believe it will be useful.

Doris

Doris Bonora
Dentons Canada LLP
Doris.bonora@dentons.com
780-423-7188

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On Oct 10, 2018, at 7:05 AM, Crista Osualdini <cosualdini@mross.com> wrote:

Doris,

Thank you for providing this confirmation, including confirmation that the OPGT has the ability to vote on behalf of the persons it represents for a s. 42 definition amendment.

We had a few additional questions

1. To whom is this mail out being sent? Who are the trustees deeming to be "identified potential beneficiaries". Can we please be provided with the mailing list.
2. What steps are the trustees' employing to ensure the accuracy of the mailing list, both in terms of who is included and their mailing information.

3. Can you please confirm why this mail out cannot wait until judicial direction is obtained on the disputes pertaining to the mail out (as particularized in our written submissions). It strikes our client that it is inefficient to be circulating this mail out for the purpose of establishing whether s. 42 of the Trustee Act can be utilized to amend the definition, before we have Court approval that the process will create the necessary evidentiary basis. Quite importantly, we would need direction on what persons are required for s. 42 approval. It is quite foreseeable that another mail out could be required which will only serve to increase cost for the beneficiaries. This is especially so given Shelby Twinn's recent correspondence that class counsel is being sought for the adult beneficiaries. If class counsel is appointed it will make the process much more efficient.

Thank you and we look forward to your response.

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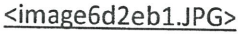

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From: Bonora, Doris [mailto:doris.bonora@dentons.com]
Sent: Friday, October 05, 2018 6:55 PM
To: Janet Hutchison <JHutchison@jlhlaw.ca>; Crista Osualdini <cosualdini@mross.com>
Cc: England, Mandy <mandy.england@dentons.com>
Subject: RE: Sawridge Trustees - 51433 JLH

Janet and Crista

Thank you for your emails on the correspondence the trustees wish to send to the beneficiaries and potential beneficiaries

We sought the trustees approval on a mail out after the last settlement meeting.

We will be proceeding with a mail out to the potential beneficiaries. The mail out is a letter sent by the trustees to its potential beneficiaries. We do not intend to seek approval of the wording from opposing counsel.

We will not be explaining the definitions being proposed. We are including the definition proposed by the OPGT. Crista has advised that Catherine does not wish to participate in this process as she believes that it is premature.

The trustees have decided to proceed. The OPGT can consent or not on behalf of the individuals that it represents. It can certainly choose not to vote at all although we are assuming that the OPGT will vote in favor of its own definition.

Paul is currently seeking addresses. We may reach out for addresses of people that were added to the list by each of your clients.

We need to continue to try and conclude this litigation. There is good reason for the trustees to seek information from the potential beneficiaries. The trustees did not feel constrained to put forward the

definition with crossed out language as section 42 of the Trustee Act would allow more latitude. We thus are putting forward a definition that is more in keeping with the definition in the 1986 trust.

The letter will go out on the date set out in the proposed litigation plan with a response date expected of November 19, 2018 as set out in the proposed litigation plan. We will also post the letter to the website and post it in the Band office. We will also send the letter to Ed Molstad who seems to be the only counsel remaining at the moment who represents an interested party.

If the OPGT would like to include a different definition, we are prepared to include it. If Catherine Twinn changes her mind and would like to include a definition, we are prepared to include it. We need those definitions by October 11, 2018.

On another note, Janet suggested that we write to the court to see if we can obtain one half day with Justice Thomas. We will seek that date from him. We will of course share our letter to the court with you. We would like to be able to proceed with the privilege order as that would allow us to finish questioning.

Crista has advised that she is still working on the list of agreed facts on which the OPGT and the trustees agree but which we do not have a position from Catherine Twinn. We look forward to receiving that.

Please let us know if you have any questions.

Doris

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From: Janet Hutchison <JHutchison@jlhlaw.ca>
Sent: October 4, 2018 12:04 PM
To: England, Mandy <mandy.england@dentons.com>; Bonora, Doris <doris.bonora@dentons.com>
Cc: 'Crista Osualdini (cosualdini@mross.com)' <cosualdini@mross.com>; Chantelle Monson <CMonson@jlhlaw.ca>
Subject: Sawridge Trustees - 51433 JLH

I am writing to follow up on the exchanges about the dates being discussed in the litigation plan and in correspondence in relation to sending notices out to beneficiaries about

proposed definitions. My understanding is counsel have yet to reach an agreement on that front and I wanted to be clear that my current understanding is that nothing will proceed until agreement is reached. However, on review of the correspondence I thought it prudent to clarify that this understanding is correct.

As such, we would appreciate the Trustees' response on the following questions:

1.) Are the Trustees proceeding with a mail out regardless of whether counsel for the parties agree with the approach/ content?

2.) If yes, are the Trustees proposing to include any materials commenting on or presenting the OPGT's proposal.

3.) If yes, will the OPGT be given the courtesy of reviewing the text of any notice/ documentation referring to the OPGT proposal in advance- and if so- when will that be available?

Our questions arise, in part, because we have some concerns about how accessible our July 27, 2018 letter would be to the average beneficiary, not represented by legal counsel. As you will appreciate, that correspondence was prepared with the understanding the audience would be experienced legal counsel acting on this file.

Once the parties had agreed upon timelines, we had hoped there would be discussion about options for a joint- and plain language- approach to explanations of any proposed definitions. Given that we understand all parties are committed to trying to keep this process as efficient and cost effective as possible, and given that notices on proposed definitions certainly has the potential to impact the current process and litigation plan, our client would certainly prefer- and support- a collaborative approach.

We look forward to hearing back regarding whether that is the intention for how to address that aspect of the litigation plan.

Yours truly,

<image001.png>

Janet L. Hutchison

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, Alberta T8H 2A3
Phone: 780-417-7871 (ext. 225)
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Tab 14

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Spence v. BMO Trust Co. | 2016 CarswellOnt 5519 | (S.C.C., Mar 23, 2016)

2016 ONCA 196
Ontario Court of Appeal

Spence v. BMO Trust Co.

2016 CarswellOnt 3345, 2016 ONCA 196, [2016] O.J. No. 1162, 129 O.R. (3d) 561, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 346 O.A.C. 108, 395 D.L.R. (4th) 297

In the Estate of Rector Emanuel Spence, also known as Eric Spence, deceased

Verolin Spence and A.S., Applicants (Respondents) and BMO Trust Company, Donna Spence, K. S.-P. and K. S.-P., Respondents (Appellant)

E.A. Cronk, P. Lauwers, K. van Rensburg JJ.A.

Heard: September 4, 2015
Judgment: March 8, 2016
Docket: CA C60021

Proceedings: reversing *Spence v. BMO Trust Co.* (2015), 123 O.R. (3d) 611, 2015 ONSC 615, 2015 CarswellOnt 886, 3 E.T.R. (4th) 214, C.A. Gilmore J. (Ont. S.C.J.)

Counsel: Justin W. de Vries, Angela Casey, for Appellant
Earl A. Cherniak, Q.C., Jasmine T. Akbarali, Michael S. Deverett, for Respondents

Subject: Constitutional; Estates and Trusts
Related Abridgment Classifications
Estates and trusts
I Estates
I.5 Construction of wills
I.5.a Fundamental issues
I.5.a.ii Testator's intentions given effect
I.5.a.ii.A Determination of intent
I.5.a.ii.A.2 Extrinsic evidence of intent
Estates and trusts
I Estates
I.6 Legacies and devises
I.6.n Grounds for invalidity
Headnote
Estates and trusts --- Estates — Legacies and devises — Grounds for invalidity
Testator's will provided unconditionally for distribution of residue of his estate to his daughter D and her sons (beneficiaries) — Will stated that no provision was made for his other daughter V because "she has had no communication with me for several years and has shown no interest in me as a father" — V alleged that she was disinherited because she had child with man of different race, relying on affidavits from herself and from her father's former caregiver — V brought successful application to have will set aside as void for public policy reasons — Trustee and beneficiaries appealed — Appeal allowed — Application judge erred by embarking on public policy-based review of will and further erred by admitting extrinsic evidence in circumstances — Terms of will gifting residue of estate to D and her sons and disinheriting

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V were unequivocal and unambiguous — No interpretive question arose as to meaning of will — Will imposed no conditions that offended public policy — In circumstances, public policy-based inquiry regarding validity of will was not available, and judicial interference with testator's testamentary freedom was not warranted — Will did not involve public charitable trust or other public entity so as to require conformity to public policy against discrimination — Bequest was of private nature — Absent valid legislative provision to contrary, common law principle of testamentary freedom protected testator's right to unconditionally dispose of property and to choose beneficiaries, even on discriminatory grounds.

Estates and trusts --- Estates — Construction of wills — Fundamental issues — Testator's intentions given effect — Determination of intent — Extrinsic evidence of intent

Testator's will provided for distribution of residue of his estate to his daughter D and her sons (beneficiaries) — Will stated that no provision was made for his other daughter V because "she has had no communication with me for several years and has shown no interest in me as a father" — V alleged that she was disinherited because she had child with man of different race, relying on affidavits from herself and from her father's former caregiver — V brought successful application to have will set aside as void for public policy reasons — Trustee and beneficiaries appealed — Appeal allowed — Application judge erred by admitting extrinsic evidence — Will expressly disclosed testator's motive and provided explanation for his decision to exclude V from will — Purpose of extrinsic evidence was not to establish testator's motive for bequest but to contradict lawful motive for bequest disclosed by plain language of will and to substitute different and allegedly unlawful motive — There was no legal basis to admit wholly contradictory, extrinsic evidence of motive for this purpose.

The testator had two daughters, D and V. When he died, the testator's will provided unconditionally for distribution of the residue of his estate to D and her sons (beneficiaries), and contained a clause stating that no provision was made for V because "she has had no communication with me for several years and has shown no interest in me as a father". V alleged that she was disinherited because she had a child with a man of a different race. V applied to have her father's will set aside as void for public policy reasons, and submitted extrinsic evidence consisting of affidavits from herself and from her father's former caregiver to support her allegation that the disinheritance was for discriminatory reasons.

The application judge considered the affidavits and granted V's application. The trustee and the beneficiaries appealed.

Held: The appeal was allowed.

Per E.A. Cronk J.A. (K. van Rensburg J.A. concurring): The application judge erred by undertaking a public policy-based review of the will. Under Ontario law V and her son had no legal entitlement to share in the estate. The terms of the will gifting the residue of the estate to D and her sons and disinheriting V were unequivocal and unambiguous. No interpretive question arose as to the meaning of will. The will imposed no conditions that offended public policy, did not require the trustee or the beneficiaries to engage in discriminatory or unlawful conduct in order to carry out the testator's intentions, and did not involve a public charitable trust or other public entity so as to require conformity to public policy against discrimination. A public policy-based inquiry regarding the validity of the will was not available, and judicial interference with the testator's testamentary freedom was not warranted. The testator's bequest was of a private nature, and absent any valid legislative provision to the contrary, the common law principle of testamentary freedom protected the testator's right to unconditionally dispose of his property and to choose beneficiaries, even on discriminatory grounds The application judge erred by admitting the extrinsic evidence. The will expressly disclosed the testator's motive and provided an explanation for his decision to exclude V from the will. The purpose of the extrinsic evidence was not to establish the testator's motive for the bequest but, rather, to contradict the lawful motive for the bequest disclosed by the plain language of the will and to substitute a different and allegedly unlawful motive. There was no basis at law for the admission of wholly contradictory, extrinsic evidence of motive for this purpose. The desirability of affirming the public policy against discrimination does not lead to the conclusion that third-party extrinsic evidence of a testator's alleged discriminatory motive is admissible to challenge the validity of a will where the testator's residual bequest to a private beneficiary is absolute, unequivocal and unambiguous.

Per Lauwers J.A. (concurring): The appeal should be allowed for the reasons given by the majority. There was merit in the trustee's argument that allowing the application judge's decision to stand would increase uncertainty in estates law and open the litigation floodgates.

There is no law in Ontario that entitles V to share in her father's estate. No law has deprived her of any right. V relied on s. 15 of the Canadian Charter of Rights and Freedoms, and s. 1 of the Human Rights Code to support a public policy

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argument. The Code does not regulate the actions of individuals unless they are supplying "services, goods [or] facilities" or "accommodation" in the market. It is not the Code's purpose to force people to think and act rightly everywhere and at all times. The Charter does not reach or seek to affect the private conduct of individuals in their relations with each other. In probating the testator's will there is no state action that engages the Charter in the relevant sense. The court's jurisdiction in matters of probate in Ontario is narrow. In probating a will the court is not concerned about the validity of specific bequests and does not require proof that bequests in a valid will are non-discriminatory.

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Fox v. Fox Estate (1996), 10 E.T.R. (2d) 229, 28 O.R. (3d) 496, (sub nom. *Fox v. Fox)* 88 O.A.C. 201, 1996 CarswellOnt 317 (Ont. C.A.) — distinguished

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s. 83.02 [en. 2001, c. 41, s. 4] — referred to

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s. 60 — referred to

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s. 2(1) — considered

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Generally — referred to

s. 60 — considered

Rules considered by *E.A. Cronk J.A.*:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 75.06 — referred to

Statutes considered by *P. Lauwers J.A.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15 — referred to

s. 32 — considered

Estates Act, R.S.O. 1990, c. E.21

Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

s. 1 — referred to

s. 2 — referred to

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APPEAL by trustee and beneficiaries from judgment reported at *Spence v. BMO Trust Co.* (2015), 2015 ONSC 615, 2015 CarswellOnt 886, 3 E.T.R. (4th) 214, 123 O.R. (3d) 611 (Ont. S.C.J.), allowing application to strike down bequest as invalid for public policy reasons.

***E.A. Cronk J.A.*:**

1 Is it open to the courts to scrutinize an unambiguous and unequivocal residual bequest in a will, with no discriminatory conditions or stipulations, if a disappointed beneficiary or other third party claims that the bequest offends public policy? Is third-party extrinsic evidence of the testator's alleged discriminatory motive for making the bequest admissible on an application to set aside the will on public policy grounds?

2 This appeal raises these important issues. They are matters of first impression for this court.

I. Background Facts

(1) The Parties

3 Rector Emanuel Spence, also known as Eric Spence ("Eric"), was born in Jamaica. He died in Ontario on January 25, 2013 at 71 years of age. He was predeceased by his wife, Norma Spence ("Norma"). Eric and Norma had no children.

4 Eric and his previous partner had separated in about 1964 or 1965. They had two children: the respondent Verolin Spence, born in England in 1963, and Donna Spence, born in England in 1964. Verolin is now 52 years of age. Donna is 51 years of age.

5 After their parents separated, Verolin lived with her father and Donna lived with her mother. The two sisters did not communicate with each other after the separation.

6 Eric immigrated to Canada from England in 1979. Verolin joined him in 1984. She lived with her father in Canada, except for periods of educational study abroad, until approximately 1993. Donna lived with her mother in England. She continues to live there, with her children.

7 According to Verolin, she and her father enjoyed a positive relationship for many years. However, as I will describe in more detail later in these reasons, she claims that their relationship changed in September 2002 when she told Eric that she was pregnant. Verolin says that Eric, a black man, began to restrict his communications and any other contact with her when he learned that the father of her child was white.

8 Verolin gave birth to her son A.S. on April 26, 2003. A.S. is now almost 13 years old. Unfortunately, he never met Eric.

(2) The Will

9 Eric made a will on May 12, 2010, almost eight years after Verolin alleges that he cut off all contact with her (the "Will"). The Will makes no provision for Verolin or A.S. Instead, it provides that: i) Donna's two sons are to inherit Eric's jewellery; ii) Norma or, if Norma predeceased Eric, Donna, is to inherit Eric's personal and household articles; iii) the residue of Eric's estate is to be divided in equal shares among Donna and her sons; and iv) one of Eric's cousins is the remainder beneficiary of Eric's estate.

10 Eric expressly excluded Verolin from sharing in any part of his estate. Clause 5(h) of the Will states:

> I specifically bequeath nothing to my daughter, [Verolin] as she has had no communication with me for several years and has shown no interest in me as her father.

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offends public policy". During oral argument, this position shifted. At the appeal hearing, Verolin and A.S.'s counsel acknowledged that evidence of Eric's intentions in disposing of his property under his Will was inadmissible on the authority of this court's decision in *Robinson Estate v. Robinson*, 2011 ONCA 493, 106 O.R. (3d) 321 (Ont. C.A.), leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 536 (S.C.C.). Nonetheless, they maintained that the Extrinsic Evidence was properly admissible because it relates, not to Eric's intention, but rather, to his specific discriminatory motive for disinheriting Verolin.

28 Verolin and A.S. submit that the Extrinsic Evidence supports the application judge's finding that the Will is based on offensive racist principles. Further, the application judge made no palpable and overriding error in her assessment of the Extrinsic Evidence. As a result, she did not err in concluding that the Will must be set aside as contrary to public policy against discrimination.

(2) Testamentary Freedom

29 I begin my analysis of the issues on appeal with consideration of the important principle of testamentary freedom.

30 A testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle. As this court emphasized in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), at p. 495, citing *Blathwayt v. Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.):

> 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.

31 The Supreme Court has also recognized the importance of testamentary autonomy, holding that it should not be interfered with lightly, but only in so far as the law requires: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.), at p. 824.

32 The freedom to dispose of her property as a testator wishes has a simple but significant effect on the law of wills and estates: no one, including the spouse or children of a testator, is entitled to receive anything under a testator's will, subject to legislation that imposes obligations on the testator.

33 *Tataryn* is a case in point. In *Tataryn*, the Supreme Court was concerned with the principles to be applied to s. 2(1) of the British Columbia *Wills Variation Act*, R.S.B.C. 1979, c. 435. Under that section, if a testator failed to make adequate provision for the proper maintenance and support of a surviving spouse and children, including independent adult children, the court was authorized to order provision from the estate that it considered "adequate, just and equitable in the circumstances" for the claimant. [2]

34 In considering the purposes and scheme of the British Columbia statute, the Supreme Court held that the legislation protected two interests: i) adequate, just and equitable provision for the spouses and children of testators; and ii) testamentary autonomy. With respect to testamentary autonomy, the Supreme Court observed, at p. 816:

> The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances".
>
> [Emphasis in original.]

35 *Tataryn* holds that, in British Columbia, a testator's broad right of testamentary freedom is constrained by, but only to the extent of, the specific obligation imposed by the British Columbia legislature on testators to provide what is "adequate, just and equitable in the circumstances" for the testator's wife, husband or children after the testator's death.

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36 Even when required to enforce a statutory requirement of this kind, *Tataryn* instructs, at pp. 823-24, that the courts should be cautious in interfering with a testator's testamentary freedom:

> In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. *Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate* in the best interests of the persons and institutions closest to him. *It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.*
>
> [Emphasis added.]

37 I note at this point that, unlike the legislation addressed in *Tataryn*, in Ontario there is no statutory duty on a competent testator to provide in her will for an adult, independent child, whether based on an overriding concept of a parent's alleged moral obligation to provide on death for her children or otherwise: see *Verch v. Weckwerth*, 2013 ONSC 3018 (Ont. S.C.J.), at paras. 43-44, aff'd 2014 ONCA 338 (Ont. C.A.), at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288 (S.C.C.). Adult independent children are not entitled to dependant's relief protection under the *SLRA* because they do not meet the definition of "dependant" under that statute. Ontario law accords testators the freedom to exclude children who are not dependants from their estate distribution.

38 Notwithstanding the robust nature of the principle of testamentary freedom and its salutary social interest dimensions, the courts have recognized that it is not an absolute right. Apart from limits imposed by legislation, it may also be constrained by public policy considerations in some circumstances.

39 *Canada Trust* is instructive in this regard. *Canada Trust* involved a charitable trust, established in 1923, that provided educational scholarships. By the express terms of the trust instrument, both the eligibility of students to receive scholarships and that of educational institutions to serve as places of study for scholarship students were subject to overt discriminatory conditions based on race, religion and gender. For example, the terms of the trust stipulated that the scholarships were available only to white, Protestant, British subjects and that no more than 25 percent of the scholarship funds could be allocated annually to female students.

40 The trusts operated in conformity with these conditions for about 65 years. However, when the Ontario Human Rights Commission challenged the trust in the 1980s, the trustees sought directions from the court as to the trust's validity. The issues before the court were whether the terms of the trust were contrary to public policy and, if so, whether the trust law cy-près doctrine could be applied to preserve the trust. In the Supreme Court of Ontario, the trust was upheld in its entirety. On appeal to this court, this decision was reversed unanimously.

41 Justice Robins of this court, Osler J. (*ad hoc*) concurring, took account of the Supreme Court of Canada's admonition in *Millar, Re* (1937), [1938] S.C.R. 1 (S.C.C.), at p. 7, that public policy "should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds". He noted the public or quasi-public nature of the trust and held that there are cases "where the interests of society require the court's intervention on the grounds of public policy" (at p. 495). In Robins J.A.'s view, the terms of the trust were antithetical to Canadian values and its continued operation was against the public interest. He reasoned, at p. 496:

> The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these [discriminatory] 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.

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42 Justice Robins explained that the foundation for the court's intervention on public policy grounds rested on the unique terms of the trust. He emphasized, at pp. 496-97, that the trust was valid and not contrary to public policy when created in 1923. However, with changing social attitudes, public policy had also changed. As a result, the continuation of the trust as originally contemplated was no longer in the community interest. Rather, it had become "impracticable to carry it on in the manner originally planned by the settlor".

43 Justice Robins was satisfied that the settlor of the trust intended the whole of the trust property to be devoted to the educational purpose of the charitable trust. In these circumstances, in his view, the trust should not fail. Instead, it was appropriate to apply the cy-près doctrine and to invoke the court's inherent jurisdiction to bring the trust into conformity with public policy so that the settlor's general charitable trust intent to advance education or leadership through education could be continued. Consequently, he struck the offending conditions of the trust indenture, leaving the charitable trust intact and the trust administrators to carry on the trust without regard to its original discriminatory stipulations.

44 In his separate, concurring reasons, Tarnopolsky J.A. also concluded that the discriminatory trust provisions were void as contravening public policy. He, too, at pp. 514-15, endorsed the proposition that, as "[i]mportant as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right."

45 Importantly, Tarnopolsky J.A. also stressed the distinction between private trusts and public charitable trusts. He stated, at p. 515:

> 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. ... It is [the] 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.*
>
> [Emphasis added.]

46 Thus, Tarnopolsky J.A. viewed the public nature of the charitable trust as central to the determination whether interference with testamentary freedom was warranted on public policy grounds in light of the explicit discriminatory provisions of the trust indenture. In the end, like the majority, he agreed that the charitable trust should not fail, that the trust could be applied under the doctrine of cy-près, and that the offending discriminatory provisions should be deleted from the trust instrument.

47 The scope of testamentary freedom and the court's role in limiting that freedom in light of *Tataryn* and *Canada Trust* are central issues in this case.

48 BMO Trust submits that Eric's gift of the residue of his estate and his disinheritance of Verolin are unambiguous, unequivocal and unconditional and that clause 5(h) - the 'disinheritance clause' of the Will - contains none of the unsavoury or patently discriminatory provisions of the type at issue in *Canada Trust*. Additionally, Eric's bequest of the residue of his estate is of a private, rather than a public, nature. In these circumstances, BMO Trust says, the application judge erred by unjustifiably interfering with Eric's testamentary freedom in circumstances where Verolin and A.S. have no legal right to share in Eric's estate.

49 Verolin and A.S. counter that the courts have jurisdiction to assess whether testamentary bequests should be set aside as offending public policy. They contend that there was admissible evidence before the application judge establishing that Eric's motive for disinheriting Verolin and benefiting Donna and her sons was racist. Since racial equality is firmly embedded in the public policy of Canada and the destructive force of racism is contrary to Canadian public policy, the application judge did not err in setting aside the Will on grounds of public policy.

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50 I turn now to consideration of these arguments.

(3) Unavailability of a Public Policy-Based Inquiry Regarding the Validity of the Will

51 Three factual aspects of this case are especially significant. First, as I have already emphasized, under Ontario law Verolin and A.S. have no legal entitlement to share in Eric's estate. This is not a case like *Tataryn*, where a statutory constraint on a testator's testamentary freedom is in play. In order to share in her father's estate, Verolin must succeed in setting aside the Will.

52 Second, this is not a wills construction case. The terms of the Will gifting the residue of Eric's estate to Donna and her sons and disinheriting Verolin are unequivocal and unambiguous. No interpretive question arises concerning the meaning of the Will.

53 Third, unlike *Canada Trust*, the Will imposes no conditions that offend public policy. It provides unconditionally for the distribution of the residue of Eric's estate to Donna and her sons and states, at clause 5(h), that no provision was made for Verolin because "she has had no communication with me for several years and has shown no interest in me as a father". Although this may reflect the sentiments of a disgruntled or bitter father, it is not the language of racial discrimination. The application judge held that clause 5(h) of the Will "does not, on its face, offend public policy". I agree, and would add that the same may also be said of clause 5(f) of the Will, the residual bequest provision.

54 In these circumstances, was a public policy-based inquiry regarding the validity of Eric's Will available? Was judicial interference with his testamentary freedom warranted? I conclude that they were not, for the following reasons.

55 The fact that Eric's residual bequest imposes no conditions or stipulations is significant. The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift. These include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, *e.g.*, conditional bequests that seek to induce celibacy or the separation of married couples; [3] ii) conditions that interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent; [4] iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; [5] and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law. [6]

56 The pivotal feature of these cases is that the conditions at issue required a beneficiary to act in a manner contrary to law or public policy in order to inherit under the will, or obliged the executors or trustees of the will to act in a manner contrary to law or public policy in order to implement the testator's intentions. In these circumstances, the courts will intervene to void the offending testamentary conditions on public policy grounds.

57 In this case, however, no such condition appears in Eric's Will. Eric's residual beneficiaries are not obliged to act in a manner contrary to law or public policy in order to inherit the residue of his estate. Nor is BMO Trust required to act in a manner contrary to law or public policy in order to implement Eric's intentions. This case, therefore, is markedly different from those in which judicial interference with a testator's wishes has been justified on public policy grounds.

58 Verolin and A.S. rely heavily on the recent decision of the New Brunswick Court of Queen's Bench in *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (N.B. Q.B.), aff'd 2015 NBCA 50 (N.B. C.A.), leave to appeal to S.C.C. requested [2015 CarswellNB 479 (S.C.C.)], to argue, in effect, that the courts have overarching authority to examine the validity of a testamentary residual bequest on public policy grounds. On their argument, this authority extends to cases where the terms of the bequest do not include discriminatory conditions but evidence is tendered that a testator's alleged motive in making the bequest offends public policy. I see no support in the established jurisprudence for the acceptance of such an open-ended invitation to enlarge the scope of the public policy doctrine in estates cases.

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59 In *McCorkill*, the testator left the residue of his estate to the National Alliance, a neo-Nazi organization in the United States. The testator's sister, supported by numerous interveners, challenged the validity of the will, arguing that the residual bequest was void as "illegal and/or contrary to public policy". The executor and another intervener defended the bequest. They argued that only facially repugnant testamentary conditions could be set aside on public policy grounds and that the nature or quality of the intended beneficiary was irrelevant.

60 The application judge disagreed. In his view, the 'worthiness' of the residual beneficiary was a central consideration. On the basis of extensive extrinsic evidence regarding the residual beneficiary, much of it generated by the beneficiary itself, he held, at para. 75, that the National Alliance's entire purpose was contrary to the public policy of Canada because it stood for "anti-Semitism, eugenics, discrimination, racism and white supremacy". The effect of the testator's gift to such an organization was to finance hate crimes, contrary to s. 319 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 and Canadian human rights legislation and international commitments. As a result, the application judge held, at para. 89, that voiding the gift was justified on the ground of illegality, as well as public policy, because the beneficiary's "*raison d'être* is contrary to public policy". In so holding, the application judge expressly accepted that voiding the residual bequest based "on the character of the beneficiary is, and will continue to be, an unusual remedy".

61 The Court of Appeal for New Brunswick, in brief reasons, upheld the application judge's ruling, stating that it was "in substantial agreement with the essential features" of his reasons: *Canadian Assn. for Free Expression v. McCorkill Estate*, 2015 NBCA 50 (N.B. C.A.), at para. 1. [7]

62 The decision in *McCorkill* is significant in at least two respects. First, prior to *McCorkill*, public policy-based justification for judicial interference with a testator's freedom to dispose of her property had been advanced only in respect of conditional testamentary gifts. In *McCorkill*, as in this case, the testator's residual gift was absolute, not conditional.

63 Second, before *McCorkill*, Canadian law recognized two kinds of "unworthy heirs": i) beneficiaries who claimed entitlement to a testator's property after having killed the testator; and ii) terrorist groups who, contrary to ss. 83.02 and 83.03 of the *Criminal Code*, sought to benefit from a testator's financial support. *McCorkill*, however, recognizes a third kind of "unworthy heir": a beneficiary whose self-declared reasons for existence involve activities that constitute offences under Canadian criminal law and run contrary to Canadian public policy against discrimination.

64 *McCorkill v. McCorkill Estate* has been the subject of academic scrutiny and some criticism. Professor Bruce Ziff, in an article entitled "Welcome the Newest Unworthy Heir" (2014) 1 E.T.R. (4th) 76 , argues that *McCorkill* is but the latest judicial attempt "to find the proper demarcation between acceptable and intolerable discriminatory private conduct". He suggests that the extension of public policy to void absolute gifts is warranted in certain circumstances, *e.g.* when, as in *McCorkill*, it would be illegal to donate money to an unworthy heir because of its status as a hate organization.

65 However, Professor Ziff also acknowledges that, even in unworthy heir cases like *McCorkill*, the invocation of public policy considerations to void an unconditional testamentary bequest may overreach the proper ambit of the public policy doctrine. He observes:

> *The more challenging problem with McCorkill is that it may be overbroad. That is so because this gift, uniquely, was invalidated even though it involved an unqualified and absolute transfer of legal and beneficial title. As noted above, all previous cases in which the doctrine of public policy was applied involved terms embedded in the granting document.*
>
> Fixing on such stipulations is important for several reasons. Such terms expressly recite the discriminatory preferences and thereby provide cogent proof of the predilection. The stipulations also give the stated preferences teeth, for failure to comply can have legal consequences. Moreover, as an incidental effect, a focus on such stated terms will necessarily limit the number of cases in which challenges can be brought; the litigation floodgates do not open.

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[Emphasis added.]

I agree.

66 In this case, relying on *McCorkill*, the application judge held, at para. 44, that notwithstanding the clear terms of the Will, "the matter bears further scrutiny". She went on to conclude, at para. 49, that in view of the Extrinsic Evidence, Eric's motive for disinheriting Verolin was based "on a clearly stated racist principle" that violated public policy as well as "human sensibilities".

67 With respect, the application judge's reliance on *McCorkill* for this purpose was misplaced. *McCorkill* must be understood in the context of its unique factual circumstances. In *McCorkill*, the implementation of the testator's intentions would have facilitated the financing of hate crimes, contrary to Canada's criminal and human rights laws, by funding an organization dedicated to such illegal and discriminatory ends - an unworthy heir. In contrast, nothing in this case indicates that Eric's residual beneficiaries are unworthy heirs, or that they would use their bequest for purposes contrary to law. Verolin and A.S. do not suggest otherwise.

68 Further, I underscore that the Will does not require BMO Trust to engage in discriminatory or unlawful conduct in order to carry out Eric's testamentary intentions. In *Canada Trust*, this court's interference with the settlor's right to dispose of his property as he saw fit was triggered by blatantly discriminatory conditions in the trust indenture that required the trust administrators, in carrying out the settlor's intentions concerning the operation of a public charitable trust, to engage in discriminatory conduct in the selection of scholarship candidates and eligible academic institutions. It was this requirement for discriminatory action on the part of the trust administrators in the operation of a public charitable trust that triggered the public policy-based intervention of the court.

69 Similarly, in *Peach Estate, Re* (2010), 2009 NSSC 383 (N.S. S.C.), an estate trustee would have been required to take affirmative steps in violation of provincial human rights legislation in order to carry out the testator's intentions regarding the sale of his property. On this basis, the court held that the relevant condition in the testator's will regarding the class of persons to whom his property might be sold was of no force or effect.

70 These, and analogous cases, confirm that Canadian courts will not hesitate to intervene on the grounds of public policy where implementation of a testator's wishes requires a testator's executors or trustees or a named beneficiary to act in a way that collides with public policy.

71 That is not this case. Unlike *Canada Trust* and *Peach Estate, Re*, where implementing the settlor's or testator's intentions required discriminatory acts in contravention of public policy, carrying out Eric's gift of the residue of his estate does not require discriminatory conduct by BMO Trust or by Donna and her sons. Nor, in contrast to *Canada Trust*, does it involve the creation or operation of a public charitable trust or other public entity so as to require conformity to the public policy against discrimination.

72 And this leads, in my view, to a second, pertinent consideration. As I have said, Eric's Will does not "facially offend public policy." But what if it did? Was it open to Eric to disinherit Verolin in his Will on discriminatory grounds, that is, on the express basis that the father of her son was a white man, without triggering review by the courts on the grounds of public policy?

73 This question lies at the very heart of Eric's exercise of his testamentary freedom. It must be remembered that the bequest at issue is of a private, rather than a public or quasi-public, nature. Recall Tarnopolsky J.A.'s caution in *Canada Trust*, at p. 515, that it was the "public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination". Here, assuming that Eric's testamentary bequest had been facially repugnant in the sense that it disinherited Verolin for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property - the core aspect of testamentary freedom.

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Tab 15

Most Negative Treatment: Check subsequent history and related treatments.

1937 CarswellOnt 108
The Supreme Court of Canada

Millar Estate, Re

1937 CarswellOnt 108, [1938] 1 D.L.R. 65, [1938] S.C.R. 1

In the Matter of the Estate of Charles Millar, Deceased

Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

Judgment: November 4, 1937
Judgment: December 22, 1937

Proceedings: On Appeal from the Court of Appeal for Ontario

Counsel: *I.F. Hellmuth K.C.* and *I. Levinter K.C.* for appellants (next of kin and those claiming under them).
W.N. Tilley K.C. and *B.V. McCrimmon* for the executors and trustees under the will of deceased.
G.T. Walsh K.C. for mothers of legitimate children.
T.R.J. Wray and *R.J.R. Russell* for mothers of legitimate children.
C.R. McKeown K.C. for mothers of children who may or may not be legitimate.

Subject: Contracts; Estates and Trusts; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
VIII Commencement of proceedings
VIII.4 Originating notice, summons or application
VIII.4.a When appropriate
Contracts
VI Illegal contracts (substantive validity)
VI.3 Contrary to public policy
VI.3.a General principles
Estates and trusts
I Estates
I.5 Construction of wills
I.5.c Description of persons
I.5.c.v Definitions
I.5.c.v.B "Children"
I.5.c.v.B.4 Children born outside of marriage
Estates and trusts
I Estates
I.6 Legacies and devises
I.6.d Conditional gifts
I.6.d.iii Grounds for invalidity
I.6.d.iii.B Public policy grounds
I.6.d.iii.B.2 Miscellaneous

Headnote
Contracts --- Illegal contracts — Contrary to public policy

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General principles on which Courts proceed — New grounds of public policy may not be applied — Conditions of applicability of rule.
There are at least two conditions which must be present to justify setting aside a disposition on grounds of public policy. It may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. The tendency of the disposition must therefore be evil in respect of some interest of the state or of the people as a whole, and not merely of some people. The doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. Where a testator devised the residue of his estate "to the mother who has since my death given birth ... to the greatest number of children," held, this clause was not void as against public policy, since it fulfilled neither of the conditions laid down.
Estates --- Construction of wills — Description of persons — "Children" — Illegitimate children
Estates --- Legacies and devises — Conditional gifts — Grounds for invalidity — Public policy grounds
Rules for setting aside testamentary disposition.
Per Duff D.J.: "There are at least two conditions which must be present to justify setting aside a disposition on grounds of public policy. The first of these conditions is thus laid down by Lord Thankerton in Fender v. Mildmay, [1937] 3 All E.R. 402: `Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole.' The tendency of the disposition must therefore be evil in respect of some interest of the state or of the people as a whole, and not merely of some people. The second requirement is thus laid down by Lord Atkin in the same case: `... the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'." A testator devised the residue of his estate "to the mother who has since my death given birth ... to the greatest number of children." Held, this clause was not void as against public policy, since it fulfilled neither of the conditions laid down.
Practice --- Institution of proceedings — Originating notice, summons or application — When appropriate

The judgment of Duff C.J. and Davis, Kerwin and Hudson JJ. was delivered by *Duff C.J.*:

1 The question to be determined on this appeal concerns the validity of a clause in the will of the late Charles Millar of Toronto. It is in these words:

> 9. All the rest and residue of my property wheresoever situate, I give, devise and bequeath unto my Executors and Trustees named below in Trust to convert into money as they deem advisable and invest all the money until the expiration of nine years from my death and then call in and convert it all into money and at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the Registrations under the Vital Statistics Act. If one or more mothers have equal highest number of registrations under the said Act to divide the said moneys and accumulations equally between them.

2 The determination of this controversy as to validity involves the decision of a point of construction, viz., whether the word "children," as here employed, includes illegitimate children. That question was answered in the negative by Mr. Justice Middleton and by the Court of Appeal. We think it sufficient to say that we agree with this conclusion, which rests upon the reasons fully stated in the able judgments delivered by the Chief Justice of Ontario and Riddell J.A. in the Court of Appeal and by Middleton J.A.; and we think it unnecessary to add anything to these reasons.

3 The remaining question, concerning which we express our views more at length, is raised by the contention that this clause is void as "against public policy." In sup port of that contention we have had a powerful argument from Mr. Hellmuth; but, giving due weight to it, we find ourselves in agreement with the conclusions of the Ontario judges who unanimously held the clause to be valid.

4 It is convenient to notice first of all the manner in which the principle of law operates, by force of which a contract or disposition of property is held to be invalidated as being obnoxious to the public good on some ground or principle

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comprehended within the general phrase "against public policy"; and this has not a little relevancy in examining the contentions advanced by the appellant.

5 As Lord Sumner said in *Rodriguez v. Speyer* [1],

> Considerations of public policy are applied to private contracts or dispositions in order to disable * * *

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. This is emphasized in the judgments of Lord Thankerton (at p. 414), and Lord Wright (at p. 425), in *Fender v. Mildmay* [2].

6 As regards the doctrine of public policy itself, there is some lack of unanimity upon the point of the jurisdiction of the courts to proceed under some new head of public policy, that is to say, some principle of public policy not already recognized by judicial decision in the sense hereinafter explained. There is high authority for the proposition that,

> It is not at the present time open to the courts of justice to hold transactions or dispositions of property void simply because in the judgment of the court it is against the public good that they should be enforced, although the grounds of that judgment may be novel.

This is the view expressed by Lord Halsbury in a well known discussion of the subject in *Janson v. Driefontein Consolidated Mines, Ltd.* [3]. "I do not think," he said,

> that the phrase "against public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy.

And, at page 496,

> I do not think he [the judge] has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law.

7 Alderson B., in his opinion in *Egerton v. Brownlow* [4], agrees that such a principle "would altogether destroy the sound and true distinction between judicial and legislative functions," and he adds, "my duty is as a judge to be governed by fixed rules and settled precedents." And Parke B. in his opinion in the same case observes (p. 123):

> It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments.

8 The subject is discussed in, if I may say so, a very illuminating way by Lord Wright in *Fender v. Mildmay* [5]. His conclusion is that the modern view of the law is that expressed in the observations, which he quotes, of Parke B. in *Egerton v. Brownlow* [6], and of Lord Lindley in *Janson v. Driefontein Consolidated Mines, Ltd.* [7].

9 The passage from Parke B. is in these words:

> It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded

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> upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

10 The sentence taken from Lord Lindley's judgment is this:

> public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B., and Parke B., in *Egerton v. Brownlow* [8].

11 After stating that these passages embody the modern view of the law by which the courts in more recent times have governed themselves in exercising this exceptional jurisdiction, he proceeds — and the precise terms in which he expresses himself should be carefully observed: —

> Public policy, like any other branch of the common law, is governed by the judicial use of precedents. * * * They [the House of Lords in the *Mogul* case [9], in the *Maxim Nordenfelt* case [10] and in *Rodriguez v. Speyer* [11]] have proceeded to apply some recognized principle to the new conditions, proceeding by way of analogy and according to logic and convenience, just as courts deal with any other rule of the common law.

and he adds:

> It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world; but that is true of the principles of common law generally.

12 On the other hand, Lord Atkin (p. 407) expresses the definite opinion that Lord Halsbury's view is "too rigid." Lord Roche (p. 436) says the question is debatable and does not give his own opinion upon it. Neither Lord Thankerton nor Lord Russell of Killowen, I think, intends to pass upon the general question, although the conclusions of both are based upon rules or principles deduced from decided cases. Lord Russell says:

> as I see this case, there is here no question of inventing a new rule of public policy [p. 422].

Lord Wright says he can hardly conceive that at this day a new head of public policy could be discovered.

13 Before leaving the subject, we ought, perhaps, to refer to three sentences in the opinion of Parke B. in *Egerton v. Brownlow* [12] which immediately follow the passages quoted above. They seem to put more pointedly than the sentences which precede them the view which, subject to the explanation by Lord Wright already quoted, would appear to have been the view of Lord Halsbury. The sentences are these:

> The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail.

He adds:

> But we are clearly of opinion that this cannot be shown here.

14 We should be disposed to think, if it were necessary to decide the question, that Lord Wright's view was the preferable view. We are, however, for the purpose of disposing of this appeal, under no obligation to decide this particular point touching the limits of the jurisdiction of the courts in respect of this branch of the law; and we are expressing no final opinion upon it.

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15 It has not been argued by the appellants that the disposition in question here is void upon any particular rule or principle established by judicial decision. Such being the case, we think, taking the most liberal view of the jurisdiction of the courts, there are at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. First, we respectfully concur in these two sentences in the judgment of Lord Thankerton in *Fender v. Mildmay*[13]:

> Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.

Secondly, we take the liberty of adopting the words of Lord Atkin in his judgment in the same case (at p. 407):

> * * * it [referring to Lord Halsbury's judgment in *Janson's case*[14]] fortifies the serious warning, illustrated by the passages cited above [among them is the passage, already quoted, from the opinion of Parke B.], that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.

The last sentence makes it plain that we have here no mere *obiter dictum*. As regards the second of these conditions, it was in substance expressed by Lord Truro in *Egerton v. Brownlow*[15] in this sentence:

> Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation.

16 Lord Parmoor in *Rodriguez v. Speyer Brothers*[16] thus emphasizes the admonition:

> My Lords, in considering a rule of law founded on public policy care must always be taken not to introduce new principles which, to be valid, would require the sanction of the Legislature, and to maintain the important limitation, that it is beyond the jurisdiction of tribunals to determine matters of national policy.

17 Lord Roche, in his judgment in *Fender v. Mildmay*[17], says:

> Now, to evolve new heads of public policy, * * * if permissible to the courts at all, which is debatable, would, in my judgment, certainly be permissible only upon some occasion * * * where there was substantial agreement within the judiciary, * * *

18 We are asked to say that the tendency of this disposition is "against public policy" in the pertinent sense because, it is urged, its tendency is to give rise to a competition between married couples to bring about successive births of children in rapid sequence to the injury of the mothers' health, to the injury of the children, morally and physically, and to the degradation of motherhood and family life. It is even suggested that in cases in which the husband ceased to be fecund in course of the race, the contestants might be tempted to resort to other males to do his office.

19 The appellants argue that these tendencies bring the case within a sentence inadvertently ascribed to Lord Bramwell, but in fact taken from the judgment of Younger L.J. (now Lord Blanesburgh) in *In re Wallace; Champion v. Wallace*[18]. That sentence is:

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> This is only another way of saying that a tendency to be subversive of the public good within the meaning of the rule now under consideration must be subversive of something in the body politic which every normally constituted citizen of goodwill must, of necessity, desire to preserve.

This sentence, of course, does not define any head of public policy. It lays down a condition which must be present in order to enable the principle of public policy to operate. It leaves untouched the question, what precisely is the principle of public policy contended for in this case. We will, however, not dwell further upon the first condition.

20 We ask ourselves the question, is the second condition satisfied? Can it be judicially affirmed that for such reasons "the harm to the public" from such dispositions "is substantially incontestable"? Is it so clear that something like general agreement upon the point among judges of this country could be judicially assumed? It will not be overlooked that the Ontario judges unanimously held the opposite view.

21 It is the evil tendency of such dispositions in respect of some interest of the state, or of some interest of the people as a whole, with which we are concerned. We find it impossible to affirm from any knowledge we have that a policy of encouraging large families by pecuniary rewards to the parents or donations to the children would have a tendency injurious to the state or to the people as a whole; still less that anything like unanimity in favour of such a proposition could be assumed. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining this legacy to conduct themselves in a manner injurious to wife and children. That sort of argument is conclusively answered in *Egerton v. Brownlow* [19] in the judgment of the Lord Chancellor at the trial (pp. 24-26), in the opinion of Mr. Justice Cresswell (pp. 85, 86), and in the opinion of Baron Parke (pp. 126-128). One could easily conjure up the possibility that similar temptations might be inspired by a bequest of a large fortune to the grandchildren of the testator, to be divided equally among them, as inviting each of the children to have a numerous offspring in order to secure for his family as large a proportion as possible of the inheritance.

22 Conceive the case of a bequest of a large sum of money to each child of a given woman to vest at its birth. Such a bequest might, one could imagine, in some cases give rise to temptations similar to those whose possibility, it is said, is sufficient to invalidate the disposition before us. We do not suppose it would seriously be argued that in such a case the courts could deny the claim of a legatee on grounds of public policy.

23 In *Egerton v. Brownlow* [20], Alderson B. states explicitly, and there can be no doubt about it, that

> a sum of money or an estate left to the first son of a marriage if born within a year of the nuptials, would not be a void bequest or devise.

Would such a devise or bequest be void if given to the second son if born within two years?

24 The observations of Parke B. in *Egerton v. Brownlow* [21] are so pertinent in this connection that we think it right to reproduce them textually:

> Suppose a large estate left to A, subject to the condition of his becoming senior wrangler and senior medallist at Cambridge. Would it be illegal, as tending to induce him to employ the money in corrupting the examiners, or betraying into idleness and profligacy, or destroying his most promising competitors? If a large estate is left to a man conditioned that he should within a stated time marry a countess, would it be void, as tending to induce him to use improper means to effect such an alliance? Or if an estate was to be forfeited in case the devisee did not take holy orders, or become a dean or a bishop, or take a degree of doctor of divinity in a certain time, would it be void, as having a tendency to induce him to obtain those orders, dignities, or distinctions by bad means? So the case of a condition to obtain the royal licence to use a particular name and arms, a most common occurrence, might on similar grounds be impeached, as having a tendency to cause the royal licence to be obtained by corrupt means. So even also the clause, in the form in this will, which is to use "the utmost endeavours to obtain it," might be said to have a

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Tab 16

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, [2016] O.J. No. 1162, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1990 CarswellOnt 486
Ontario Supreme Court, Court of Appeal

Canada Trust Co. v. Ontario (Human Rights Commission)

1990 CarswellOnt 486, [1990] O.J. No. 615, 12 C.H.R.R. D/184, 20 A.C.W.S. (3d) 736, 37 O.A.C. 191, 38 E.T.R. 1, 69 D.L.R. (4th) 321, 74 O.R. (2d) 481

RE LEONARD FOUNDATION TRUST; CANADA TRUST CO. v. ONTARIO HUMAN RIGHTS COMMISSION; ROYAL ONTARIO MUSEUM et al. (intervenors)

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

Heard: September 7 and 8, 1989
Judgment: April 24, 1990
Docket: Doc. Nos. CA586/87 and CA622/87

Counsel: *Janet E. Minor*, for appellant Ontario Human Rights Commission.
Alan P. Shanoff and *Francy Kussner*, for intervenor-appellant Royal Ontario Museum.
H. Donald Guthrie, Q.C., and *John W.R. Day*, for respondent Canada Trust Co.
William L.N. Somerville, Q.C., *Lindsay A. Histrop*, for intervenor Class of Persons Eligible to Receive Scholarships from the Leonard Foundation.
Stan J. Sokol, for intervenor Public Trustee.

Subject: Estates and Trusts; Constitutional
Related Abridgment Classifications
Estates and trusts
II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.iv Limitations on creation
II.2.a.iv.C Contrary to public policy
Estates and trusts
V Charities
V.4 Doctrine of cy-près
V.4.b When cy-près doctrine applicable
V.4.b.viii Miscellaneous
Human rights
III What constitutes discrimination
III.3 Race, ancestry or place of origin
III.3.f Miscellaneous
Headnote
Human Rights --- What constitutes discrimination — Race, ancestry or place of origin — General

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Human rights — Jurisdiction of Supreme Court — Trust established to provide scholarships on discriminatory basis — Complaint filed under Human Rights Code — Trustee seeking Court's direction as to validity of trust — Court having jurisdiction to give directions — Human Rights Code, 1981, S.O. 1981, c. 53.

Trusts and trustees — Express trusts — Creation — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Nature of gift — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Doctrine of cy-près — When cy-près doctrine applicable — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy — Property subject to trust applied cy-près by striking out invalid discriminatory provisions.

By an instrument made in 1923, certain trusts were established under which the income from the property subject to the trusts was to be used to provide scholarships for students attending schools and colleges in Canada and universities in Canada and Great Britain.

The first three recitals to the trust instrument expressed the settlor's reasons for certain conditions affecting the terms of the trust, and the fourth recital dealt both with the settlor's reasons for and the substance of the conditions. In particular, he expressed the intention to exclude 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." Similarly, the schools and colleges and universities at which recipients of scholarships could attend were required not to be under the control and domination of the classes of persons described in the recitals as excluded from benefits from the trust. Whereas the administration of the trust property was conducted by the trustee, various other powers, including the power to select students as recipients of the scholarships, were given to a general committee, members of which were required to possess the qualifications set out in the recitals. The instrument further and explicitly provided that, to be eligible for a scholarship, a student was required to 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." The trust instrument empowered the trustee at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications of a member of the general committee, as set out in the recitals, for the opinion, advice and directions of the Court.

The trust instrument further provided that the amount of income spent on providing scholarships for female students in any one year should not exceed one-fourth of the total money available for all students for such year.

The references in the trust instrument to "British Nationality", "British Parentage" and being a "British subject" had, for some time, in practice been replaced, by the general committee, by references to Canadian citizenship.

In August 1986, the Ontario Human Rights Commission filed a complaint to the effect that the provisions of the scholarships infringed the *Human Rights Code, 1981*. Because of this and because of other criticisms of the operation of the trust, the trustee sought the directions of the Court. The alleged invalidity of the trust was put on three main grounds: (1) contravention of the *Human Rights Code, 1981*; (2) contravention of the general principles of public policy; and (3) the uncertainty of some of the conditions affecting the giving of scholarships. The following preliminary issues also arose: (1) whether the Court had jurisdiction to rule on a question of discrimination alleged to be contrary to the *Human Rights Code, 1981*, and whether, in any event, the Court should entertain proceedings before the Human Rights Commission had investigated and considered the complaint; (2) how the interpretation of the instrument should be affected by the recitals to the instrument.

At first instance it was held: (1) that the Court had jurisdiction to make a determination as to the validity of the trust, including the question whether it created discrimination contrary to the *Human Rights Code, 1981*, and it was not premature for the Court to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission; (2) in interpreting the trust instrument the Court should not have regard to the settlor's expression of motivation in the first three recitals, since the operative parts of the instrument were not ambiguous and

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no reference back was made to these recitals; (3) the trust instrument was not invalid since it did not contravene the *Human Rights Code, 1981* or the general principles of public policy, and the conditions affecting eligibility as recipients of a scholarship were not void for uncertainty.

The Human Rights Commission and a party who would be entitled to the property of the trust as residuary legatee of the settlor in the event of invalidity of the trust both appealed.

Held:

The appeal was allowed.

(1) For the following reasons, the Judge at first instance correctly held that the Court had jurisdiction to make a determination as to the validity of the trust and that it was not premature to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission.

(a) The application to the Court did not involve an attempt to advance the common law by creating a new cause of action, rather it was concerned with the administration of a trust over which superior courts have had inherent jurisdiction for centuries.

(b) The determination of the complaint made under the *Human Rights Code, 1981* would not prevent the need for a determination by the Court, since the Commission's mandate to attempt a settlement was not apt in the circumstances that the trustee had no authority, in the absence of authorization by the trust instrument, legislation or court order, to enter into a settlement which would be contrary to the terms of the trust and since the remedial powers under the *Code* appeared not to give a board of enquiry power to alter the terms of the trust or to declare it void.

(c) The fact-finding role of the Commission and a board of enquiry would not be required in the circumstances of the case.

Per Robins J.A. (Osler J. (ad hoc) concurring)

(2) The recitals could be considered in deciding the issues that were raised by the application. Although the operative provisions of a trust instrument will ordinarily prevail over the 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. In the trust instrument under consideration, the recitals and operative parts were so linked as to be inextricably interwoven. One part could not, therefore, be divorced from the other.

In addition, even if the recitals were properly treated as going only to the matter of motive, they could not be ignored. There was a clear public aspect to the purpose and administration of the trust, and, when challenged on public-policy grounds, the reasons, explicitly stated, which motivated the establishment of the trust and gave meaning to its restrictive criteria were highly germane.

(3) The trust violated public policy. Although 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 the law, that interest is limited by public-policy considerations. The trust was premised on notions of racism and religious superiority that contravened contemporary public policy. 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.

(4) The trust was established as a charitable trust which, when created in 1923, was not contrary to public policy and was valid. However, changing social attitudes had the result that it was no longer in the interests of the community to continue the trust on the basis predicated by the settlor: while the trust was practicable when it was created, changing times had rendered the ideas promoted by it contrary to public policy and it had, therefore, become impracticable to carry it on in the manner originally planned by the settlor. Accordingly, the trust should not fail. Rather, the Court should apply the cy-près doctrine and propound a scheme that would 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. This should be done by striking out the recitals and removing all restrictions with respect to race, colour, creed or religion, ethnic origin and sex, as they related to those entitled to the benefits of the trust, to the qualifications of those who may be members of the general committee or give judicial advice and to the schools, colleges or universities in which scholarships may be enjoyed.

Per Tarnopolsky J.A.

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(2) The trust instrument established a charitable trust for the advancement of education.
(3) In considering whether the trust could be invalid because of uncertainty, the Court could not refer to the recitals unless the operative words were ambiguous or unless they incorporated the recitals by reference to them. The settlor's beliefs as stated in the opening recitals were evidence of his motives and were irrelevant.
(4) The definition of the persons eligible to be recipients of scholarships or to be eligible to be part of the management of the trust constituted a condition precedent. Such a condition will not fail for uncertainty if some person or persons can be established as satisfying the condition. Moreover, a charitable trust should not fail for uncertainty. Accordingly, the definition was sufficiently certain.
(5) The promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario, as recognized by a variety of sources including provincial and federal statutes, official declarations of government policy, the *Constitution Act, 1982* and international conventions. The charitable trust under consideration was, accordingly, void on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex. This public policy would only affect charitable trusts; it would not affect a private family trust. It is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.
(6) A charitable trust which fails can be applied cy-près if the settlor had a general charitable intention. The question was, therefore, whether the settlor's paramount intention was to provide scholarships for education so that the discriminatory provisions were merely the machinery designed to effect that intention or whether he intended to provide it for specific kinds of students and would not have created it otherwise. The answer was that the settlor's intention was to promote leadership through education, and the discriminatory scheme he chose for this purpose was merely the machinery for carrying out this general charitable intention. Accordingly, the provisions of the trust which confined management, judicial advice and benefit on grounds of race, religion and sex should be deleted from the trust instrument.

Annotation

While public policy considerations surrounding the Leonard Foundation Trust are clearly important and will likely attract a good deal of academic comment, this annotation deals only with the application of the cy-près doctrine to the trust. It is concerned with the circumstances and conditions under which a court may apply trust funds cy-près when a well-established charitable purpose subsequently becomes impracticable.

The ability of the Court to apply trust funds cy-près is a part of the Court's inherent scheme-making power. Although many have attempted to define the concept, it seems to have been difficult to articulate a clear definition. In England, the Nathan Committee, (1952, Cmd 8710) reporting on the law and practice relating to charitable trusts, loosely defined it as "a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation." (LA. Sheridan and V.T.H. Delaney, *The Cy-près Doctrine*, 1985 at 2).

An important feature of the charitable trust is its dedication to a purpose for the public benefit. This aspect of the charitable trust has allowed the relaxation of many of the strict rules generally applicable to trusts. Most notable is the preferential treatment of the charitable trust under the rule against perpetuities. Nonetheless, the perpetual nature of charitable trusts creates difficulties that are unique to it:

Its continued existence is almost certain to produce a state of affairs in which its social utility will become impaired if not destroyed. A direction by a testator that his bounty is to be applied along narrow or eccentric lines, coupled with the passage of time, may mean that the purpose for which it was given has disappeared. Far from conferring a benefit upon the community, the continued performance of the trust may be positively detrimental to the commonweal.

[Sheridan and Delaney, supra, at 2.]

Such was the case with the Leonard Foundation Trust. This trust, which, in 1923, was clearly implemented with an element of public benefit in mind, later came to undermine the public quest for equality. The question then arose whether the funds could be applied cy-près.

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The cy-près doctrine may only be applied to charitable trusts. It is not available to save a private trust that has been incompletely or improperly created. How the doctrine will be applied in any given case will depend upon whether the impossibility or impracticability of carrying out the charitable purpose is initial or supervening. Initial impossibility or impracticability arises where a donor makes a grant of property on trust for charity which cannot ever take effect in the precise terms specified. The rule in such a case is that the property will be applied cy-près only if the donor can be shown to have had a general charitable intention. If no general charitable intention can be shown, the property will return to the donor on a resulting trust. According to Buckley L.J. in *Re Lysaght*, [1966] 1 Ch. 141, [1965] 2 AU .E.R. 288, at 202 [Ch.], a general charitable intention:

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.

While it is necessary to demonstrate a general charitable intention on the part of the donor where there is an initial impossibility, this is not necessary where the object of the trust is possible at the date of the gift but subsequently becomes impossible. All that is necessary in such a case is that the donor has made an exclusive dedication of the property to charity. (See D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 611-632.)

In order for a gift to be exclusively for charity, there must be no gift over of any kind. In the case of the Leonard Foundation Trust, it was found by McKeown J. and affirmed by the Court of Appeal, that this was a charitable trust. No provisions were made for a gift over. It is worth noting that the Royal Ontario Museum ("R.O.M.") in this case was not claiming on the basis that it was entitled to a gift over in the event of a failure of the trust purpose. It claimed instead that, as the trust was contrary to public policy, it should fail completely. In such a case, the R.O.M. argued, the trust fund would fall into the Leonard estate to be distributed to the residual beneficiaries, of which the R.O.M. was one.

Unfortunately for the R.O.M., however, once a trust has become vested in charity, it can never return upon a resulting trust to the donor or the donor's estate. (Waters, supra; see also S. G. Maurice & D. B. Parker, eds. *Tudor on Charities*, 7th ed. (1984)). Where the trust purpose fails at some point after the property has vested, the property will pass to the Crown as parens patriae, the ultimate protector of charities. (*Moggeridge v. Thackwell* (1803), 7 Ves. 36, 32 E.R. 15). The Crown will then submit to the court's cy-près jurisdiction, and the trust will be applied to another similar or related charitable purpose.

An analysis of the Leonard Foundation Trust on the basis of a very technical application of the cy-près doctrine would in all certainty lead to the same result as that reached by the Ontario Court of Appeal, but it would arrive at the conclusion by a different route. The appropriate question to ask, it is submitted, is not whether Colonel Leonard had a general charitable intent at the time he created the Leonard Scholarships but rather whether, in making his gift, he dedicated it exclusively to charity? The answer to this latter question, it is submitted, is that the property was dedicated to the purpose of charity alone, there being no gift over. It is this answer which triggers the application of the cy-près doctrine.

Although the doctrine, when considered in the abstract, makes a clear distinction between the need for a general charitable intention in the cases of initial impossibility and for an exclusive dedication to charity in the case of supervening impossibility, the distinction is not always so easily made in actual application of the doctrine to a particular case. It is very common to discover judicial searches for general charitable intent in cases of supervening impossibility, when in fact the question should have been, "Did the donor give the property to charity exclusively?" *Tudor on Charities*, supra. Although these two queries will often lead to the same result and may appear to be synonymous, they are not. As stated by the learned authors of *Tudor on Charities* (supra, at 268):

an intention to make an out-and-out gift may be some evidence and, in some cases, conclusive evidence of a general charitable intention; but it is submitted that the judges who have treated a mere intention to make an out-and-out gift

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as automatically conclusive evidence of a general charitable intention have failed to recognize and give effect to the established distinction between the two intentions.

The test contained in the phrase "general charitable intention" is a stricter test and more difficult to meet than the standard implied by the concept of "exclusive dedication to charity". Thus, it is possible that the misapplication of the general charitable intention test in a case where exclusive dedication to charity would suffice could result in the failure of a trust that ought to have been applied cy-près. The case of *Wokingham Fire Brigade Trusts*, [1951] Ch. 373 is a good example. Sixty-six years after a public appeal was made for funds to establish a voluntary fire brigade, the National Fire Service took over the operation of the brigade. After the takeover, the trustees were left with a sum of money, and they applied to the Court for directions for the use of the funds. Danckwerts J. found that the original subscribers had donated their money with the specific intention of establishing a fire brigade and that they did not therefore have a general charitable intention. However, Danckwerts J. also concluded that the subscribers had intended to part with all of their interest in their money when they made their donations and that they had thus made an exclusive dedication to charity. He ordered that the money should be applied cy-près by means of a scheme. If, in his analysis, Danckwerts J. had stopped after concluding that the subscribers did not have any general charitable intention, the trust would have failed. It was the exclusive dedication to charity that allowed the funds to be applied cy-près.

Professor Waters has often bemoaned the confusion in the application of the doctrine. In a comment on the case of *Re Hunter; Genn v. Attorney General (British Columbia)*, [1973] 3 W.W.R. 197, 34 D.L.R. (3d) 602 (B.C. S.C.), Waters stated that:

It was irrelevant that [the testatrix] had ... no general charitable intent. The property now passed to the Crown, and a *cy-près* scheme could be put forward by the Crown from or approval. By the exclusive dedication to charity, [her] next-of-kind had been excluded forever.

However, this was not the result to which MacIntyre J. came.

. . . . .

Left to one's own devices, one is compelled to conclude that *Re Hunter* was wrongly decided.

(D. W. M. Waters, "Comment on *Re Hunter*" (1974) 52 Can. Bar Rev. 598).

In his treatise, *Law of Trusts in Canada*, Professor Waters elaborates on the confusion in Canadian courts applying the *cy-près* doctrine:

A fault with the decision, however, is that it insists on a general charitable intention in the donor before there can be a *cy-près* application, though the problem in hand is one of *supervening* impossibility or impracticability. This idea can be found repeated in a number of earlier and later Canadian cases, and it has support in earlier English authority. In *Re McDougall*, however, Kelly J. would have none of this, and his view has been supported by later English authority. It is to be hoped that Kelly J.'s view prevails in the higher Canadian Courts, because if the doctrine of exclusive dedication to charity means anything, and the Crown is prepared to waive any rights it has to the property already vested in a trust whose objects subsequently can no longer be pursued, the presence or absence of a general charitable intent in the testator or the *inter vivos* settlor is irrelevant.

[Waters, supra, at 629.]

Although it may not be doctrinally correct to look for general charitable intent in the case of supervening impossibility, as a practical matter the attempt to discover a means of applying the trust cy-près may demand an equivalent inquiry. In order to discover another purpose that is as near as possible to the original intent of the donor, it may be necessary to inquire what, generally, the donor was attempting to accomplish. Can it really be said that this question is substantially different from the search for a general charitable intent?

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In the case of the Leonard Foundation Trust, the quest for the general charitable intent led the Court of Appeal to find that Colonel Leonard had a general intention to promote education and leadership.

This conclusion allowed a *cy-près* application of the trust fund to education generally. If, instead, the Court had asked whether Colonel Leonard had made and exclusive dedication to charity and concluded that he had and that the trust funds should be applied *cy-près*, they would then have had to determine what alternate means would be as near as possible to the donor's original intent. They would, it is submitted, have applied the property in the same way. The fact that both approaches will in most cases lead to the same result perhaps explains why the application of the doctrine is in such a state of confusion. Despite the confusion, in most cases the courts still arrive at the correct result. Occasionally, in cases where the original intention is simply too narrow for any amount of judicial creativity to discover a general charitable intent, and otherwise salvageable trust will fail. This is the problem with the *cy-près* doctrine in Canada.

The confusion in this area has led to calls for legislative reform in both England and the United States. In England, the *Charities Act, 1960* (U.K.) (8 & 9 Eliz. 2, c. 58; see also *Charities Act, 1985* (U.K.), 1985, c. 20 has alleviated some confusion by expressly laying out the circumstances in which funds may be applied *cy-près*. The legislation also declares the duty of trustees to obtain a scheme whenever their trust falls within the requirements of the Act. In the United States, the doctrine is even less clear than it is here. It is not uncommon for well established trusts which have been in existence for decades to fall into the estate of their original donor long after the donor and any residuary beneficiaries have died. The funds are then lost to charity forever.

Hopefully, Canadian courts will be able to avoid the extremes encountered in the United States. In Canada, many of the strict rules applicable to private trusts are waived: as a matter of public policy we wish to encourage and facilitate charitable giving. Yet, when the original charitable purpose fails, by misapplying the *cy-près* doctrine, we allow the demise of the charitable gift. The problem has been addressed by the Law Reform Commission of Ontario (*Report on the Law of Trusts*, 1984; more specifically, the Commission is currently conducting a *Project on the Reform of the Law of Charities*). Perhaps the time is now ripe for a legislative response.

L.A. Turnbull [1]

Table of Authorities

Cases considered:

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

Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625 (H.L.) — *referred to*

Dominion Students' Hall Trust, Re, [1947] Ch. 183 — *referred to*

Fitzpatrick, Re; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.) — *referred to*

Millar, Re, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 — *referred to*

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Tacon, Re; Public Trustee v. Tacon, [1958] Ch. D. 447, [1958] 1 All E.R. 163 — *referred to*

Per Tarnopolsky J.A.:

Allen, Re; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526 — *referred to*

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255 — *referred to*

Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1 — *referred to*

Blainey v. Ontario Hockey Association (1986), 54 O.R. (2d) 513, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 21 C.R.R. 44, 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) 274 (headnote), 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 21 C.R.R. 44n, 72 N.R. 76 (note), 17 O.A.C. 399 (note) (S.C.C.) — *distinguished*

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Gott, Re, [1944] Ch. 193, [1944] 1 All E.R. 293 — *referred to*
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Levy, Re (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.) — *referred to*
Lysaght, Re; Hill v. Royal College of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888 — *applied*
McGovern v. Attorney General, [1982] 1 Ch. 321, [1981] 3 All E.R. 493 — *referred to*
McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) — *referred to*
Millar, Re, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 — *considered*
Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) — *referred to*
Moon, Re; Dawes, Ex parte (1886), 17 Q.B.D. 275, 34 W.R. 753 (C.A.) — *referred to*
Noble and Wolf v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.), rev'd [1951] S.C.R. 64, [1951] 1 D.L.R. 321 — *referred to*
Ontario Human Rights Commission v. Borough of Etobicoke (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159 (S.C.C.) — *referred to*
Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (headnote only), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (headnote only), 64 N.R. 161, 12 O.A.C. 241 — *considered*
Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31 (H.L.) — *referred to*
R. v. Tottenham and District Rent Tribunal, Ex parte Northfield (Highgate) Ltd. (1956), [1957] 1 Q.B. 103 — *referred to*
Selby's Will Trusts, Re; Donn v. Selby, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (Ch. D.) — *referred to*
Seneca College of Applied Arts & Technology (Board of Governors) v. Bhadauria (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (C.A.), rev'd [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 22 C.P.C. 130, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 124 D.L.R. (3d) 193, 37 N.R. 455 — *distinguished*
Tarnopolsk, Re; Barclay's Bank Ltd. v. Hyer, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 — *referred to*
Wilson, Re; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-13] All E.R. Rep. 1101 — *referred to*

Statutes considered:

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

Human Rights Code, 1981, S.O. 1981, c. 53.

Trustee Act, R.S.O. 1980, c. 512 —

s. 60

Per Tarnopolsky J.A.:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 15

s. 27

s. 28

Charities Accounting Act, R.S.O. 1980, c. 65.

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Conveyancing and Law of Property Act, R.S.O. 1980, c. 90 —

s. 13

s. 22

Human Rights Code, 1981, S.O. 1981, c. 53 —

s. 1

s. 13

s. 31(2)

s. 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.

Race Relations Act (U.K.), 1968, c. 71.

Trustee Act, R.S.O. 1980, c. 512 —

s. 60

Rules considered:

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

Ontario, Rules of Civil Procedure

r. 14.05(2)

r. 14.05(3)

Per Tarnopolsky J.A.:

Ontario, Rules of Civil Procedure

r. 14.05(2)

r. 14.05(3)

Authorities considered:

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

Fratcher, W.F., ed., *Scott on Trusts*, 4th ed. (Boston: Little, Brown & Co., 1989).

Waters, D.W.M., *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

Per Tarnopolsky J.A.:

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Convention on the Elimination of All Forms of Discrimination Against Women, (1979).

5 *Hals.* (4th ed., 1989), "public benefit", "the cy-près doctrine".

International Covenant on Civil and Political Rights, arts. 2, 3, 25 and 26.

International Convention on the Elimination of All Forms of Racial Discrimination, (1965).

Ontario, Debates of Legislative Assembly at 937-941 (28 May 1986).

Ontario, Legislative Assembly, Ministry of Citizenship and Culture, Race Relations Directorate, "Ontario Policy on Race Relations".

Waters, D.M.W., *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

APPEAL from judgment [reported (1987), 27 E.T.R. 193 (H.C.)] upholding validity of trust instrument.

Robins J.A.** (**Osler J.** **(ad hoc) concurring):

1 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-près doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 27 E.T.R. 193 (H.C.)] on an application under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, 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 of 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-près?

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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.

35 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?

36 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 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, at 7 [S.C.R.]. I have regard also to the observation of Professor Waters in his text on the *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 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.

37 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 (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.

38 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.

39 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

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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.

40 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.

41 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.

42 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-Près Issue

43 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.

44 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.

45 In these circumstances, the trust should not fail. It is appropriate and only reasonable that the Court apply the cy-près 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.

46 The observations of Lord Simonds in *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1947), [1948] A.C. 31 (H.L.), are apposite to this case. At 74 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 (I)*. 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*

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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

85 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 Commissioners v. Pemsel*, [1891] A.C. 531. For their Ontario application see *Charities Accounting Act*, R.S.O. 1980, c. 65 and *Re Levy* (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), c. 14.

86 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 (H.L.); *McGovern v. Attorney General*, [1982] 1 Ch. 321, [1981] 3 All E.R. 493, at 331 [Ch.] and *Re Levy*, 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., 1989) vol. 5, para. 505, p. 309; *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) at 855 [All E.R.] and Waters, supra, 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 (H.L.) at 309 [A.C.]).

87 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.

88 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, 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 [at 214-215]:

> 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.

89 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.

90 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

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certainty that any proposed beneficiary is or is not a member of the class (*Jones v. T. Eaton Co.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at 650-651 [S.C.R.] and *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) at 456 [A.C.]). It is enough that some claimants can satisfy the condition (*Re Selby's Will Trusts; Donn v. Selby*, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (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 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526). It is well established that a charitable trust should not fail for uncertainty (see *Re Gott*, [1944] Ch. 193, [1944] 1 All E.R. 293). 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.

91 In this case, there has been no difficulty over some 6 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.

92 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; *Clayton v. Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) and *Re Tarnopolsk; Barclay's Bank Ltd. v. Hyer*, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 or "impracticable" as in *Re Dominion Students' Hall Trust*, [1947] Ch. 183. In the latter case, the Court found a general charitable intention and then applied the trust property cy-près. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in *Re Lysaght*, supra, at 206, quoted by McKeown J. at 220:

> 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*, (U.K.), 1968, c. 71. 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.

93 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.

94 After the war, this Court, in *Noble and Wolf v. Alley*, [1949] O.R. 503, [1949] 4 D.L.R. 375, rev'd [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 Drummond-Wren*, [1945] O.R. 778 (H.C.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in *Noble and Wolf*, supra, on technical grounds but did not refer to the public-policy argument.

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95 Subsequently, in *Bhadauria*, supra, at 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, 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* recognizes public policy in Ontario was acknowledged a few years later by the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at 23-24 [D.L.R.].

96 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 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 Drummond-Wren*, supra, at 783:

> 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.

97 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*. 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.

98 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 the policy (*Hansard Official*

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Report of Debates of Legislative Assembly of Ontario, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-941). 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* at 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.

99 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 (headnote only), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (headnote only), 64 N.R. 161, 12 O.A.C. 241, at 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 Corp. of B.C. v. Heerspink et al.* ... [1982] 2 S.C.R. 145 at pp. 157-158 ...), 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 ordinary — and it is for the courts to seek out its purpose and give it effect.

100 In addition, equality rights "without discrimination" are now enshrined in the *Constitution Act, 1982* [*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.

101 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, and the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, as well as arts. 2, 3, 25 and 26 of the *International Covenant on Civil and Political Rights*, 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.

102 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.

103 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.

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104 It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 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* 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, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, at 152-153 [S.C.R.] per Wilson J. and 175 per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

105 Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the *Charter* (*Andrews*, supra, at 168-169 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.

106 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 sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the *Human Rights Code*, 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, supra, at 601-603 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.

107 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-près, 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, supra, 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-près?

108 One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-près. However, in order to apply the trust property cy-près, 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-près (see *Re Wilson; Twentyman v. Simpson*, [1913] 1 Ch. 314 [1911-13] All E.R. Rep. 1101; *Re Lysaght*, supra, at 203 and *Halsbury's Laws of England*, (4th ed., 1989), vol. 5, Charities, para. 696). Cy-près should

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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."

109 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-près. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in *Re Lysaght*, supra, at 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.

110 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.

111 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."

112 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 186:

> 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

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> 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

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

114 Q.1 (i) — Yes, but not just as confined by the *Human Rights Code*.

115 (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.

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

117 (iv) — No.

118 Q.2 — No.

119 Q.3 — Yes.

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

121 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*.

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

123 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.

Footnotes

1 L.A. Turnbull, lecturer, Osgoode Hall Law School.

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Tab 17

6

Public benefit, discrimination and the definition of charity

ADAM PARACHIN

1 Introduction

Discriminatory charitable trusts represent an interesting context in which to study the relationship between public law values pertaining to equality and private law. The unique juridical features of charitable trusts, especially the public benefit requirement exclusive to charitable trusts, have been thought to mitigate the controversies normally arising when the extension of public law equality values to branches of private law is mooted. So while Lorraine Weinrib and Ernest Weinrib have concluded that constitutional equality values enshrined in the Canadian Charter of Rights and Freedoms[1] should not be invoked to invalidate discriminatory clauses in non-charitable trusts, they have drawn just the opposite conclusion in relation to charitable trusts.[2] Specifically, they have concluded that '[b]ecause public benefit constitutes the entire range of application for testamentary freedom in charitable trusts, that freedom has no application inconsistent with Charter values'.[3] Elsewhere, it has been argued that a discriminatory charitable trust is a 'contradiction in terms'.[4] Likewise, discrimination has been said to be 'intrinsically incompatible'[5] with legal

The helpful comments of Debra Morris on an earlier draft of this chapter are acknowledged.

[1] The Constitution Act 1982 (being Schedule B to the Canada Act 1982 (UK) 1982, c 11), pt. I (Canadian Charter of Rights and Freedoms) (Canadian Charter).

[2] L. Weinrib and E. Weinrib, 'Constitutional Values in Private Law in Canada', in Daniel Friedmann and Daphne Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: Hart Publishing, 2001), p. 68.

[3] *Ibid.* Though the quote references 'Charter values' generally rather than constitutional equality values specifically, it is taken from a context in which the argument is made out that discriminatory trust provisions should be struck.

[4] P. S. A. Lamek, Case Comment (1966) 4 *Osgoode Hall Law Journal* 113, 119.

[5] N. Mirkay, 'Is It "Charitable" to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities' (2007) *Wisconsin Law Review* 45, 84.

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charity and 'at odds with the common community conscience and the notion of what constitutes a charity'.[6] One of the leading cases went so far as to conclude that it was to 'expatiate the obvious' to say that the discriminatory trust under review lacked the character of a charitable trust.[7] More recently, an esteemed charity law scholar observed that the charity law 'requirement to provide public benefit clearly links very neatly with the duty to avoid discrimination' and that 'it could be argued that public benefit cannot be achieved through discrimination'.[8] The implication of this is that charity law is an area where private law and public law values dovetail such that 'equality' is not a foreign public law value per se but rather a value inhering in the internal logic and reasoning of charity law, and, in particular, the charity law requirement for public benefit.

This chapter critically reflects upon this view of discriminatory charity. I will not challenge the claim that discrimination is non-charitable, at least not in the sense of building a normative case in support of the charitableness of discrimination. I will instead seek to understand the nature of the claim that charity and discrimination are incompatible. Does this claim appeal to ideals and doctrines originating in the law of charity such that it is cognisable to the internal logic of charity law or does it use, consciously or otherwise, the public benefit requirement to import into charity law equality values originating in public law or elsewhere? When people say that it is not charitable to discriminate, are they doing private law in the sense of attempting to understand a branch of private law on its own terms or are they, in effect, subjecting the law of charitable trusts to a form of public law scrutiny? One might say they are doing both and that framing the question as 'either/or' misses the very point that the public benefit requirement applied in charity law shares a concern for equality in common with public law. Fair enough. My question is whether this view supplies an accurate depiction of the public benefit requirement. Focusing specifically on how the public benefit requirement is currently applied under Canadian law, I argue that it is more difficult to defend the idea that it is not charitable to discriminate from a perspective internal to the logic and doctrines of charity law than tends to be recognised.[9] Neither

[6] *Ibid.*, 86.

[7] *Canada Trust Co.* v. *Ontario Human Rights Commission* (1990) 69 DLR (4th) 321 (*Canada Trust Co.*) at [37] (Robins J).

[8] Debra Morris, 'Charities and the Modern Equality Framework – Heading for a Collision?' (2012) 65 *Current Legal Problems* 295, at 299 and 300, respectively.

[9] See also François du Toit, 'Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law In South Africa's Mixed Jurisdiction?' (2012) 27 *Tulane European and Civil Law Forum* 97 for

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component of the public benefit requirement – the public component nor the benefit component – firmly establishes the proposition that discrimination is necessarily a bar to charitable status.

The argument developed in this chapter matters for at least two reasons. First, it seeks to enhance understanding of the public benefit requirement, which is a difficult and often misunderstood feature of charity law.[10] Second, and more to the point of this edited collection, it responds to the suggestion that charity law – owing to the public benefit test's alleged embodiment of equality values – represents an exceptional context in which the transmission of values between public law and private law is uncontentious. While it could, of course, be said that the charity law requirement of public benefit supplies a basis for concluding that it is not charitable to discriminate, this is arguably an aspirational argument about what public benefit could and perhaps even should come to mean more than it is an argument about what the cases to date reveal about the public benefit requirement.[11] A study of the public benefit jurisprudence suggests that public law equality norms lack the innate and obvious compatibility that they have at times been assumed to have with the public benefit requirement.[12] It follows that the considerations governing when, if at all, public law equality norms should be applied to trusts generally versus charitable trusts specifically might not be as dissimilar as they are sometimes thought to be. Those suggesting otherwise are not rooting their argument in how courts have developed the charity law requirement for public benefit so much as they are deferring to public law equality norms to determine the proper boundaries of public benefit.

an analysis casting the regulation of both charitable and non-charitable trusts as an exercise in weighting constitutional and public policy equality prescripts against traditional private law values such as testamentary freedom.

[10] The public benefit jurisprudence has, for example, been described as 'capricious', 'arbitrary' and 'sometimes impossible to reconcile'. See G. H. L. Fridman, 'Charities and Public Benefit' (1953) 31 *The Canadian Bar Review* 537, 539.

[11] The above quote from Debra Morris very clearly acknowledges this point, as she expressly observes that it '*could* be argued that public benefit cannot be achieved through discrimination': Morris, 'Charities and the Modern Equality Framework', 300 (emphasis added). Her argument, rooted as it is in recent statutory reforms to English equality law, is not intended to develop a general theory of public benefit for jurisdictions lacking analogous statutory rules.

[12] See, however, the chapter in this collection by Matthew Harding for an appeal to the value of autonomy as a way of understanding and justifying the legal phenomenon of charity. Harding argues that discriminatory charitable trusts could be struck on the ground that they undermine the conditions for autonomy and thus undermine the very basis for the legal recognition and promotion of charity in the first place (p. 147 of this volume).

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The chapter begins with an analysis of the authorities dealing with discriminatory charitable trusts. It then proceeds to examine the claim that it is not charitable to discriminate in light of how each component of the public benefit requirement – the public component and the benefit component – has been developed in the jurisprudence.

2 Leading authorities dealing with discriminatory charitable trusts

The starting point of the analysis is Lord Simonds' observation in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* that a 'purpose regarded in one age as charitable may in another be regarded differently'.[13] Given the responsiveness of the meaning of charity to social change, one might anticipate that the stance of charity law on the validity of discriminatory charitable trusts might have changed as human rights have increasingly become a reference point for evaluating law and social policy. In fact charity law has indeed moved in the direction of a more restrictive approach to the regulation of discriminatory charitable trusts. Interestingly, however, the law has not accepted as a categorical rule the idea that it is not charitable to discriminate. Instead, the denouncement of discrimination as incompatible with charitable status in some authorities continues to coexist with the acceptance of discriminatory charitable trusts in others.

Several early American authorities upheld overtly discriminatory charitable trusts on the theory that such trusts (at least when the trustees are not public officials) are entirely private arrangements completely unaffected by public law equality norms. Other authorities took a more restrictive approach but did not expressly do so under the guise that discrimination is somehow incompatible with charitable status. For example, in *Re Lysaght*,[14] a testatrix established a testamentary scholarship fund that restricted eligible scholarship candidates to male medical students 'not of Jewish or Roman Catholic faith'. The Royal College of Surgeons, the named trustee of the fund, refused to administer the fund due to the religious restriction.[15] Notwithstanding the well-established principle that no trust can fail for want of a trustee, the Court characterised the College's refusal as something rendering the fund impossible to administer. Relying upon the doctrine of cy-près, the Court was then able to

[13] [1948] AC 31 (*National Anti-Vivisection Society*) at 74.
[14] [1966] Ch 191.
[15] Curiously, no objection was made over the gender restriction.

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modify the terms of the trust so as to remove the discriminatory restriction.[16] Similarly, in *Re Dominion Students Trust*,[17] the Court considered a charitable trust to provide a student hostel for male students 'of European origin'. The trustees sought a cy-près order to remove the ethnic restriction.[18] The Court concluded that the ethnic restriction made the purpose of the fund, promoting community of citizenship, impracticable and thus used its cy-près jurisdiction to remove the ethnic requirement.

The reasoning of *Re Lysaght* and *Re Dominion Students Trust* has an air of artificiality. It is by no means clear that either case involved an impossibility or impracticability as those terms are normally understood in cy-près jurisprudence. Given the somewhat strained reasoning of *Re Lysaght* and *Re Dominion Students Trust*, it has been speculated that both cases were driven by an unspoken concern to rid the trusts of their discriminatory provisions.[19]

However, as time went on courts came to more overtly recognise the potential discordance between discrimination and charitable status. The leading US decision is *Bob Jones University* v. *United States*.[20] In 1970, after a court issued an injunction prohibiting the Internal Revenue Service (IRS) from awarding tax-exempt status to racially discriminatory schools,[21] the IRS released a revenue ruling indicating that such schools could no longer qualify as charities under US tax law.[22] Further to this revenue ruling, the IRS concluded that two religious schools (Bob Jones University and Goldsboro Christian Schools) could not qualify as educational charities under federal income tax law on the grounds that they were discriminatory. These schools engaged in racially discriminatory practices further to sincerely held religious beliefs against interracial dating and marriage.

[16] The Court expressly rejected (at 206) the argument that the impugned provisions of the trust were contrary to public policy. Buckley J acknowledged that the exclusion of Jews and Roman Catholics was 'undesirable' and 'unamiable' but not against public policy.

[17] [1947] 1 Ch 183.

[18] Once again, no objection was made to the gender restriction.

[19] See J. Phillips, 'Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*' (1990) 9(3) *Philanthropist* 3, 19–20; B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (University of Toronto Press, 2000), p. 117; J. Colliton, 'Race and Sex Discrimination in Charitable Trusts' (2002–03) 12 *Cornell Journal of Law and Public Policy* 275, 284; F. H. Newark, 'Trustees Who Dislike the Terms of the Trust' (1966) 17 *Northern Ireland Legal Quarterly* 123; Morris, 'Charities and the Modern Equality Framework', 308.

[20] 461 US 574 (1983) (*Bob Jones*).

[21] See *Green* v. *Kennedy (Secretary of the Treasury)* 309 F Supp 1127.

[22] IRS, Rev. Rul. 71–447, 1971–2 CB 230.

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The US Supreme Court agreed that neither of these educational institutions could qualify as charities for tax purposes.

The majority judgment of Burger CJ drew upon the charity law requirement for public benefit. He observed that a 'corollary to the public benefit principle is the requirement, long recognised in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy'.[23] While emphasising that a charitable trust should be found to violate public policy 'only where there can be no doubt that the activity involved is contrary to a fundamental public policy',[24] he concluded that this test was met in the facts of the case as there could be 'no doubt' that a public policy against racial discrimination existed.[25] There are, he observed, 'few social or political issues' that have 'been more vigorously debated and more extensively ventilated than the issue of racial discrimination'.[26]

The leading Canadian decision, *Canada Trust Co.*,[27] dealt with a scholarship fund (the Leonard Fund) established in 1923 by the late Colonel Reuben Wells Leonard. The recitals in the trust instrument set out the unabashedly discriminatory views of Colonel Leonard on race, religion and citizenship. They stated his belief 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', that the 'progress of the World depends in the future, as in the past, on the maintenance of the Christian religion' and that 'the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire'.[28] The terms of the fund provided that a student could qualify for a scholarship only if he or she was a 'British subject of the White Race and of the Christian Religion in its Protestant form' and only if 'without financial assistance' he or she 'would be unable to pursue a course of study'.[29] No more than one quarter of the scholarship moneys awarded in any given year could be given to women.[30] The racial and religious restrictions also limited who could participate in the management and administration of the fund.[31] In addition, the trustees were directed to

[23] *Bob Jones* 461 US 574 (1983) at 591.
[24] *Ibid.*, at 592. [25] *Ibid.*, at 588. [26] *Ibid.*, at 596.
[27] (1990) 69 DLR (4th) 321. For thorough analyses, see Ziff, *Unforeseen Legacies*; Phillips, 'Anti-Discrimination'; J. C. Shepherd, 'When the Common Law Fails' (1988–89) 9 *Estates and Trusts Journal* 117.
[28] *Canada Trust Co.* (1990) 69 DLR (4th) 321 at [12].
[29] *Ibid.*, at [16]. [30] *Ibid.* [31] *Ibid.*, at [14].

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give preference to scholarship candidates whose parents were employed as clergy, teachers, engineers, military personnel or metallurgists.[32]

The Leonard Fund operated for many years without complaint. In fact, after his death, Colonel Leonard was heralded as 'one of Canada's finest citizens'.[33] Over time several Canadian universities declined to participate in the administration of the Leonard scholarships.[34] The controversy culminated in 1986 when the Ontario Human Rights Commission filed a formal complaint against the Leonard Fund alleging that it violated the Human Rights Code.[35] The trustee of the Leonard Fund sought advice and direction of the court 'as to the essential validity' of the trust.[36]

While the court of first instance upheld the trust,[37] the Ontario Court of Appeal unanimously concluded that the Leonard Fund's discriminatory provisions could not stand. The doctrine of cy-près was applied to remove both the recitals and the eligibility criteria based on race, gender, religion and nationality. The Court declined (without explanation) to remove the direction to prefer candidates on the basis of parental occupation.[38] Perhaps because the invalidity of the trust's discriminatory provisions was perceived to be 'obvious',[39] the majority judgment did not very clearly isolate what specific requirement of charity law was breached by the trust. The majority judgment appears to have been oriented around the idea of public benefit, although, curiously, it does not make use of the phrase public benefit. The judgment instead makes use of the phrase 'public interest' notwithstanding that this phrase lacks any established meaning in charity law. Writing for the majority, Robins JA emphasised that, although the fund 'may have been privately created', it had a 'public or, at the least, a quasi-public character'.[40] He went on to describe the trust's discriminatory provisions as being 'so at odds with today's social values as to make its continued operation in its present form inimical to the public interest'.[41] Since they were not 'conducive to the public interest',[42] the trust's discriminatory provisions were struck.

[32] *Ibid.*, at [16].
[33] *Telegram* (Toronto), 17 December 1930. Quoted in Shepherd, 'When the Common Law Fails', 117.
[34] See Ziff, *Unforeseen Legacies*, pp. 120–1.
[35] SO 1981, c 53.
[36] *Canada Trust Co.* (1990) 69 DLR (4th) 321 at [28].
[37] *Re Canada Trust Co and Ontario Human Rights Commission* (1987) 61 OR (2d) 75.
[38] *Canada Trust Co.* (1990) 69 DLR (4th) 321 at [46], [98].
[39] *Ibid.*, at [37].
[40] *Ibid.*, at [33].
[41] *Ibid.*, at [35].
[42] *Ibid.*, at [38].

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Although the concurring judgment of Tarnopolsky J went somewhat further in addressing the conflict posed by the trust's discriminatory provisions with the legal requirements for charitable status, it too was not as clear on this point as one might have anticipated. Interestingly, Tarnopolsky J expressly concluded that the trust met the essential requirements for charitable status, holding that it was not only established for an exclusively charitable purpose, namely the advancement of education, but also that it met the requirement for public benefit even if this requirement were defined negatively as meaning 'not harmful'.[43] The judgment went on, however, to find that the trust's discriminatory provisions were nevertheless invalid on the basis that they were contrary to the public policy against discrimination.[44] The difficulty is that Tarnopolsky J did not expressly elaborate on exactly how such public policy considerations factor into the test for charitable status. Since conformity with the public policy against discrimination was not included by Tarnopolsky J in the list of specific requirements for charitable status,[45] one might conclude that public policy was assumed to have relevance to all trusts (charitable and otherwise). However, Tarnopolsky J expressly rejected the idea that non-charitable trusts must conform with the public policy against discrimination.[46] It would therefore appear that the judgment treated such public policy considerations as being relevant only inasmuch as they factor into the test for charitable status perhaps by informing the test for the public benefit requirement.[47] Once again, this was not explicit in the text of the judgment and is inconsistent with Tarnopolsky J's conclusion that the trust met the public benefit requirement.

Tarnopolsky J made clear in *Canada Trust Co.* that not all beneficiary restrictions in charitable trusts will vitiate charitableness.[48] Subsequent decisions have embraced this idea by finding that charitable trusts possess a scope for permissible discrimination. For example, in *Re Ramsden Estate*[49] the Court upheld a scholarship fund restricted to Protestants. *Canada Trust Co.* was distinguished on the basis that that case dealt with a trust 'based on blatant religious supremacy and racism'.[50] Likewise,

[43] *Ibid.*, at [79–80]. [44] *Ibid.*, at [95].
[45] *Ibid.*, at [79]. [46] *Ibid.*, at [100].
[47] Debra Morris likewise observes that '[a] trust contrary to public policy should not be for the public benefit': Morris, 'Charities and the Modern Equality Framework', 309.
[48] *Canada Trust Co.* (1990) 69 DLR (4th) 321 at [98].
[49] (1996) 139 DLR (4th) 746 (*Ramsden Estate*).
[50] *Ibid.*, at [13] (MacDonald CJTD).

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University of Victoria v. *British Columbia (A.G.)*[51] upheld a scholarship for practising Roman Catholics. The Court reasoned that a 'scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy'.[52] The Court explicitly rejected the idea that only ameliorative trusts can prefer one segment of society.[53] In addition, the Court emphasised that even scholarship funds restricted to persons of particular faiths have social utility inasmuch as they provide educational opportunities to a segment of society.[54] The importance of protecting testamentary freedom from erosion was also identified as a relevant consideration.[55] Similar to *Ramsden Estate*, *Canada Trust Co.* was distinguished without elaboration on the basis that it dealt with a trust whose provisions were 'clearly offensive'.[56]

Even racial preferences have been upheld since *Canada Trust Co.* In *Kay* v. *South Eastern Sydney Area Health Service*[57] an overtly discriminatory fund for the treatment of white babies was somewhat astonishingly upheld as a valid charitable trust by the Supreme Court of New South Wales. The Court relied upon exemptions from Australian anti-discrimination legislation for institutions providing 'charitable benefits'. Given that this phrase is statutorily defined to mean 'benefits for purposes that are exclusively charitable', these exemptions could apply only if the restricted nature of the fund under review did not disqualify it as charitable in the first place.[58] The Court concluded that the fund fell 'squarely' within the statutory exemptions on the grounds that its essential purpose – to 'treat sick children in hospital' – was indeed charitable at law.[59] On the specific issue of whether it is charitable to discriminate, the Court observed that 'testators can be as capricious as they like and that if they wish to benefit a charity in respect of, or even of, a discriminatory group, they are at liberty to do so'.[60]

More recently, the Civil Marriage Act,[61] which extended the meaning of marriage to include same-sex relationships under Canadian federal law, enacted a new provision (s. 149.1(6.21)) to the Income Tax Act[62] of

[51] [2000] BCJ No. 520. [52] *Ibid.*, at [25] (Maczko J).
[53] *Ibid.*, at [17]. [54] *Ibid.*
[55] *Ibid.* [56] *Ibid.*, at [25].
[57] [2003] NSWSC 292 (*Kay*).
[58] See subss. 8(2) and 8(3) of the Racial Discrimination Act 1975 (Cth) and subss. 55(1) and 55(2) of the Anti-Discrimination Act 1977 (NSW).
[59] *Kay* [2003] NSWSC 292 at [18], [19].
[60] *Ibid.*, at [18]. [61] SC 2005, c 33.
[62] RSC 1985, c 1 (5th Supp) (ITA).

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relevance to charities. This provision provides that, subject to the usual restrictions on political advocacy, charities organised for the advancement of religion will *not* have their charitable registration revoked solely because they or any of their members exercise freedom of conscience and religion in relation to the meaning of marriage.[63] We can abstract from s. 149.1(6.21) the general principle that there is absent a direct link between the restrictions against discrimination applied in charity law (either via the public benefit requirement or via a discrete doctrine of public policy) and the concept of discrimination developed in constitutional equality jurisprudence. The implication is that a charity should not necessarily risk losing its charitable status by taking positions on issues and engaging in practices that constitutional equality jurisprudence prohibits the state from taking. Like *Ramsden Estate*, *University of Victoria* v. *British Columbia (A.G.)* and *Kay*, this reveals that there exists a scope for permissible discrimination by charities.

Recent statutory reforms to English anti-discrimination law impact upon the scope of permissible discrimination by English charities. Under s. 193 of the Equality Act 2010 (UK), charities are prohibited from restricting benefits on the basis of a 'protected characteristic'[64] except where: (1) they are acting in pursuance of a charitable instrument; and (2) they are either redressing historical disadvantage or using proportionate means to achieve a legitimate end.[65] The first point to note is that this statutory rule does not on its face restrain the legal meaning of charity. To the contrary, it speaks to the circumstances in which charities may lawfully discriminate, which is not the same as determining the specific circumstances in which it is charitable to discriminate in the first place. Admittedly, it makes little difference as a practical matter whether discrimination is prohibited at the stage of defining charity or at the stage of applying statutory law to charities, since either way discrimination is restrained. However,

[63] Subs. 149.1(6.21) of the ITA provides as follows: '**(6.21) Marriage for civil purposes** – For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*.'

[64] Defined in s. 4 of the Equality Act 2010 (UK) to mean age, disability, gender reassignment, marriage, civil partnership, pregnancy, maternity, race, religion, belief, sex and sexual orientation.

[65] Section 193. References to colour are nevertheless ignored further to s. 193(4).

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the distinction matters greatly to those studying discriminatory charity from the standpoint of the definition of charity.[66]

The second point to note is that s. 193 of the Equality Act 2010 presupposes the possibility of a trust that is discriminatory but nevertheless charitable at law. This is the only way to make sense of the requirement that discrimination is permissible if it is authorised by a '*charitable* instrument'. If a charitable instrument could not as a matter of law authorise discrimination, the provision would not and could not have application. It is therefore interesting to note that the public benefit requirement is now being interpreted by the Charity Commission in light of s. 193. Conflating the public benefit test with the statutory circumstances in which discrimination is lawful, the Charity Commission has specified that public benefit can coexist with discrimination *only* when it can be justified as either an attempt to redress historical disadvantage or as a proportionate means to achieve a legitimate end.[67] Not surprisingly, this approach to defining charity has militated against the prospect of discrimination passing the test for charitable status under English law. It was, for example, just recently concluded in *Catholic Care (Diocese of Leeds)* v. *Charity Commission for England and Wales* that a Roman Catholic adoption agency could not amend its governing document to expressly provide that adoption services would only be provided to heterosexual couples.[68]

In sum, the cases have progressed from initially ignoring discrimination in charitable trusts to overtly recognising that discrimination can (though does not necessarily) vitiate charitable status. The analysis of discriminatory charity in the authorities has largely been centred around the concept of public benefit. The authorities finding against the charitableness of discriminatory trusts have generally done so on the basis that such trusts lack public benefit in the charity law sense of the term. Given the centrality of the public benefit requirement to this issue, the remaining sections of this chapter consider in greater detail the implications of this requirement for discriminatory charitable trusts.

[66] The distinction is particularly noteworthy in Canada where English authorities regarding the meaning of charity are liberally drawn upon. If English authorities continue in future to define charity with a view to English statutory law, it will be necessary for Canadian authorities to reconsider the authoritative weight of English precedents.

[67] Charity Commission, *Equality Act Guidance for Charities*, December 2012, p. 10, available at: www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/equality-act-guidance-for-charities-restricting-who-can-benefit-from-charities/ (last accessed 23 May 2013).

[68] [2012] UKUT 395 (TCC) (*Catholic Care*).

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3 The *public* component of the public benefit requirement

There are two components to the public benefit test: (1) the public component and (2) the benefit component. The public component is considered in this section and the benefit component is considered in the next.

There are different senses in which one could conceive of the public requirement. One could, for example, say that charities have to be public in the sense of the kind of goods and services they provide, that is, charities must provide goods and services of a public character. Alternatively, one could say that charities have to be public in the sense of whom they benefit, that is charities must benefit 'the public'. Both senses of the term public could in theory be viewed as providing an entry point for equality considerations. If the goods and services provided by charities must be of a public character, one might say that there exists a parallel of sorts between governmental and charitable purposes. Inasmuch as discriminatory purposes and discriminatorily targeted goods and services are beyond the purview of government, they would on this logic likewise fail to qualify as charitable at law. Alternatively, if the goods and services provided by charities must benefit 'the public', then one might say that charities cannot target goods and services to factions of the public on the basis of discriminatory selection criteria since doing so would not benefit the public but rather an inappropriately restricted section of the public.

Putting aside the policy merits (or lack thereof) of such an aspirational understanding of the public requirement, the established jurisprudence is notable for not very clearly supporting it. The cases do not support, at least not formally, the idea that the public requirement means that charities must serve public purposes in the sense of purposes necessarily analogous to governmental purposes. The required character of charitable purposes is taken up by another aspect of the common law test for charitable status, namely the requirement that the purposes being pursued must fall within the four *Pemsel* 'heads' of charity: the relief of poverty; the advancement of religion; the advancement of education; and other purposes beneficial to the community.[69] Admittedly, there is some overlap between purposes falling within these categories and purposes pursued by governmental programming under the modern welfare state. The overlap is exposed by the practice of governments, at times, to deliver charitable programming

[69] *Income Tax Special Purpose Commissioners* v. *Pemsel* [1891] AC 531 (*Pemsel*).

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through charities.[70] However, there are reasons to be wary of embracing an understanding of the public requirement that goes too far in conflating the distinction between charitable and governmental purposes. The single most populous category of legal charity, the advancement of religion, is obviously not of a governmental nature. Further, as the Ontario Law Reform Commission noted in its groundbreaking study of the law of charity, charitable purposes are public not in the sense of being governmental but rather in the sense of being universal.[71] That is, the appeal of charitable goods and services is common in that charitable purposes are concerned with universal forms of human flourishing. The organising principle behind the identification of charitable purposes is universality, not 'governmentality'. As such, charity law itself does not recognise a strong parallel between charitable and governmental purposes.[72] A trust with an express or implied governmental purpose can for that reason alone be disqualified as charitable at law.[73] For these (and other) reasons a conception of charitable programming as public or governmental in nature supplies a tenuous basis for importing equality principles into charity law.

The jurisprudence dealing with the public component of the public benefit test is more concerned with who is to receive a benefit, and, more specifically, the criteria used to determine who is to receive a benefit, rather than with the kind of benefit conferred. The public requirement means that there must be an identifiable public – a community or section of community – benefited by the trust. If it is unclear who benefits from a putative charitable trust, then charitable status will be withheld.[74] The public requirement speaks to the criteria that may be used to delimit the class of objects for a charitable trust. Most of the cases dealing with the public requirement are concerned with differentiating legal charity from private benevolence. What differentiates the two in the view of the law is that the benefactor in the case of private benevolence can target his or her

[70] I leave aside the question of whether charities delivering goods and services on behalf of government should be regulated as though they are government.

[71] Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997), Chapter 6.

[72] See, e.g., Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559.

[73] *Ibid.*, 563.

[74] For example, the trusts in *Keren Kayemeth Le Jisroel Ltd.* v. *Inland Revenue Commissioners* [1932] AC 650 and *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] AC 447 failed to qualify as charitable because, inter alia, it was not clear what community, if any, the trusts would benefit.

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benefaction to ascertained persons specifically identified by the benefactor, including such persons connected to him or her (or to anyone else) through family, relationship or any other bond. The truly charitable act, on the other hand, is restricted to the provision of services or benefits to unascertained persons who are remote to the benefactor.

Another way to say this is to note that charities must benefit *a public* (not necessarily *the public*) in the sense of a group of persons identified other than on the basis of personal selection criteria. In practice, all that this tends to mean is that the settlor of a charitable trust is prohibited from either explicitly naming the beneficiaries or restricting the beneficiaries to persons connected to the settlor or any other specific person via private relationship, for example familial, employment or contractual.[75] The public requirement does not therefore speak to who must benefit from a charitable trust so much as it speaks to the *criteria* that may be used to determine who benefits from a charitable trust. The qualifying criteria must be of a public or impersonal nature, hence the phrase '*public* benefit'. Little would be lost if the phrase 'public benefit' were substituted by the more accurate, though admittedly inelegant, phrase 'impersonal benefit'.[76] Capturing a similar idea, the Ontario Law Reform Commission described the public component as being tantamount to a stranger requirement.[77]

It should therefore be no surprise that the vast majority of the cases dealing with the public requirement reveal that it does not represent a positive requirement for publicness so much as a negative prohibition against (excessive) privateness. So what has emerged from the jurisprudence is an approach that tests for publicness by ruling out privateness.[78] Trusts failing the public requirement are almost always trusts that define the class of beneficiaries using private or personal criteria rather than trusts that otherwise fail to live up to positive indicia of publicness.

Even so, the cases reveal that 'public' is not always understood in charity law as something in contradistinction to 'private' or 'personal'. There are a number of exceptions to the principle that trusts using private criteria to

[75] See, e.g., *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] AC 297.

[76] Courts have from time to time used the terms 'personal' and 'impersonal' to capture the charity law distinction between public and non-public. See, e.g., *Re Compton* [1945] 1 Ch 123 at 129–30 and *Independent Schools Council* v. *The Charity Commission for England and Wales* [2011] UKUT 421 (*Independent Schools Council*) at [141] and [146].

[77] Ontario Law Reform Commission, *Report on the Law of Charities*, pp. 150–2.

[78] Note how Lord Simonds equates public with not private in the following quote from *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] AC 447 at 457: '[T]he principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of private individuals.'

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restrict or define the class of beneficiaries fail the public requirement. It is well established in Canadian law that it is possible to use private criteria to delimit the class of beneficiaries for trusts established for the relief of poverty. For reasons that courts have never made clear, funds established for the relief of poverty have been upheld as charitable even where the class of beneficiaries has been defined on the basis of familial,[79] employment[80] or other private relationships.[81] Nor has the lenient treatment been exclusive to poverty trusts. An orphanage restricted to children of deceased railway employees and a fund for the benefit of widows and children of seamen in Liverpool have been held to be charitable.[82] Similarly, scholarship funds with a direction to prefer descendants of the settlor[83] or employees (or family members of employees) of a particular employer[84] have been upheld as charitable. So too have funds designed to benefit the residents of a particular locality *and their descendants*[85] and trusts for the resettlement of soldiers.[86] So the public requirement does not mean that private selection is categorically inconsistent with charitable status.

What, if anything, does this understanding of the 'public' requirement say about trusts restricting the class of beneficiaries on the basis of discriminatory criteria? Might it be said, consistently with the existing jurisprudence, that discriminatory trusts define their beneficiaries too narrowly to qualify as 'public'? The cases could at least be said to provide a toehold (though a tenuous one) for this line of reasoning. What these cases ultimately establish is that the status of a trust as charitable or non-

[79] See, e.g., *Re Segalman* [1996] Ch 171; *Re Scarisbrick* [1951] Ch 622; *Re Cohn* [1952] 3 DLR 833 (NSSC).

[80] See, e.g., *Dingle* v. *Turner* [1972] AC 601; *Re Gosling* (1900) 48 WR 300; *Gibson* v. *South American Stores Ltd.* [1950] Ch 177; *Jones T. Eaton Co.* [1973] SCR 635.

[81] A trust for the relief of poverty may be limited on the basis of membership in a club (see *Re Young's Will Trusts* [1955] 1 WLR 1269), association (see *Re Lacy* [1899] 2 Ch 149) or society (see *Pease* v. *Pattinson* (1886) 32 Ch D 154).

[82] *Hall* v. *Derby Borough Urban Sanitary Authority* (1885) 16 QBD 163; *Powell* v. *Attorney General* (1817) 3 Mer 48. Charity law apparently distinguishes common employment from a common employer. See, though, *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] AC 297 at 307.

[83] *Caffoor* v. *Income Tax Commissioner* [1961] AC 584; *Permanent Trustee Co. (NSW)* v. *Presbyterian Church (NSW) Property Trust* (1946) 64 WN (NSW) 8; *Herbert* v. *Cyr and Lynch* [1944] 2 DLR 374.

[84] *Re Koettgen's Will Trusts* [1954] Ch 252; *Public Trustee* v. *Young* (1980) 24 SASR 407.

[85] *Re Tree* [1948] Ch 325.

[86] *Verge* v. *Somerville* [1924] AC 496. This arguably represents an exception to the public criterion inasmuch as the class of beneficiaries – soldiers – is defined on the basis of common employment, something that would normally privatise the trust and disqualify it as charitable.

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charitable can turn on the criteria used to define the class of beneficiaries. A fund that would ordinarily be considered charitable, for example a scholarship fund, will instead be considered non-charitable for no other reason than that the class of persons eligible to benefit is restricted in a way, for example on the basis of family or employment relationships, that contradicts the legal conception of charity as something other than private benevolence. Adopting similar reasoning one could posit that a trust using discriminatory criteria to identify eligible beneficiaries should be non-charitable if for no other reason than that allocating goods and services on the basis of such criteria is (or at least should be) inconsistent with the legal concept of charity. The common denominator with the public benefit jurisprudence, so the argument would go, is that charitable status is unavailable where the criteria used to identify eligible beneficiaries departs in some fundamental way from the essence of the truly charitable act.

The question is whether the principle emerging from the public benefit cases is really this broad under current law. I do not think that it is, at least not under established Canadian law. My point is not that discriminatory trusts are necessarily charitable, but rather that, if they are non-charitable, it is not because they clearly fail the public aspect of the public benefit requirement. The public requirement does not exist to police every departure from the law's conception of charity. The cases have assigned it a more limited function. As I have said, the most clearly established goal of the public requirement is to restrict charitable status to trusts benefitting persons constituting *a public* in the sense of persons identified other than on the basis of personal criteria. Restricting the class of beneficiaries on the basis of discriminatory criteria does not obviously fall offside the public requirement because such criteria do not by their nature personalise or privatise the trust.

There has been some suggestion, particularly of late, that the public requirement goes further and also requires that a link exist between the purposes of a charitable trust and the persons eligible for goods and services under the trust. This reasoning evolves out of the dictum of Lord Simonds in *Inland Revenue Commissioners* v. *Baddeley*, where he contemplated a hypothetical trust providing a bridge for impecunious Methodists only.[87] He reasoned that such a trust is 'clearly not a charity' because it fails the public requirement.[88] According to Lord Simonds, '[i]t is not of

[87] [1955] AC 572 (*Baddeley*) at 592.
[88] *Ibid.*

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general public utility: for it does not serve the public purpose which its nature qualifies it to serve'.[89] The implication is that a charitable trust's class of direct beneficiaries must somehow correspond with the trust's purposes. The UK Charity Commission has interpreted this liberally as a prohibition against a charitable trust defining its class of direct beneficiaries using criteria unrelated to its charitable purpose.[90] In the view of the Commission, a link must exist between the class of direct beneficiaries and the purposes of the fund. Similarly, the Canada Revenue Agency has opined that '[w]hen a charity proposes to restrict the beneficiaries of the undertaking in any way, the nature of the restriction must be clearly linked to the proposed benefit'.[91]

Accepting that this accurately reflects established law, this understanding of the public requirement could pose a potential hurdle for the charitableness of discriminatory trusts. Rather than rationally correspond with a fund's charitable purposes, discriminatory eligibility criteria could more readily be viewed as aberrations from those purposes. An educational trust restricted to 'whites only' would, for example, have to contend with the argument that it fails the public requirement because its restricted class of beneficiaries is discordant with its charitable purpose.[92] Such a trust would be similar to a bridge for impecunious Methodists because just as class and religion have no intrinsic link with the purposes served by a bridge, neither does colour have any intrinsic link with education.

[89] *Ibid.* In the same case, Lord Somervell of Harrow observed (at 582) that: 'I cannot accept the principle submitted by the respondents that a section of the public sufficient to support a valid trust in one category must as a matter of law be sufficient to support a trust in any other category. I think that difficulties are apt to arise if one seeks to consider the class apart from the particular nature of the charitable purpose. They are, in my opinion, interdependent.' Various other cases of high authority contain statements to the effect that the specific requirements of the public criterion vary among the four heads of charity. See, e.g., *Dingle* v. *Turner* [1972] AC 601 at 624 (Lord Cross); *Gilmour* v. *Coats* [1949] AC 426 at 449 (Lord Simonds).

[90] Charity Commission, *Analysis of the Law Underpinning Charities and Public Benefit* (London: Charity Commission, 2008), p. 18, available at: www.charitycommission.gov.uk/Library/guidance/lawpb1208.pdf (last accessed 23 May 2013).

[91] Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, CPS-024 (10 March 2006), s. 3.2.2, available at: www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-024-eng.html (last accessed 24 June 2013).

[92] The reference to colour would be struck under English law further to s. 193(4) of the Equality Act 2010 (UK). There is no analogous provision in Canadian law, which is not to say that such a trust would be upheld as charitable in Canada.

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There are, however, limits to how far such an expanded understanding of the public requirement would go in establishing the non-charitableness of discrimination. Under a rule requiring a link between charitable purposes and class of beneficiaries the most proximate cause of non-charitableness for a discriminatory trust would not be discrimination per se, but rather the mismatch between the fund's purposes and its beneficiary class.[93] Such a rule would not therefore directly establish the non-charitableness of discrimination so much as it would pose an impediment to the charitableness of discriminatory trusts. The impediment would not even be insurmountable as there will presumably be contexts in which the rule would actually vindicate charitable programming that might at first appear to be discriminatory. Distinctions that might be suspect in, say, the educational context may have intrinsic relevance to, say, a fund for the advancement of a particular religious dogma.

Compare, for example, a church choosing to perform marriage ceremonies only for heterosexual couples with a scholarship fund restricting eligible recipients to persons in heterosexual marriages. Though both funds share a common concern for the 'true' view of marriage, we might draw very different conclusions about whether they both qualify as charitable at law. Since a theology of marriage is arguably intrinsically related to advancing religious belief, the church meets the requirement for a link between its essential purposes and its beneficiary class.[94] However, since this issue has no obvious relevance to a scholarship fund, the latter might be said to fail the public requirement.

Things get increasingly complicated the more that charitable programming straddles multiple categories of charitable purposes. Does a particular church outreach programme lose the cloak of its religious character when the services being provided dovetail with one or more of the other heads of charity, such as a church soup kitchen relieving poverty or a church orphanage providing adoption services, as in *Catholic Care*? There are limits as to how far a religious link can go in inoculating distinctions that might otherwise be viewed as discriminatory. It is submitted that those limits were exceeded in the facts of *Bob Jones*,[95] but in other cases the determination will be more difficult, drawing upon judgments that go well beyond the proper meaning of charity and extend to policy

[93] Of course, one could say that these are not separate issues, arguing that the mismatch between purpose and beneficiary class is perhaps what makes the fund discriminatory in the first place.

[94] This is presumably one of the rationales behind s. 149.1(6.21) of the ITA.

[95] 461 US 574 (1983).

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preferences pertaining to the relative priority to be assigned to religion versus equality.

Be that as it may, it is not altogether clear that the law actually requires that a charitable trust's class of beneficiaries necessarily correlate with its charitable purposes. It is perhaps helpful to consider the dictum of Lord Simonds in *Baddeley*[96] in greater detail. *Baddeley* dealt with a trust promoting the religious, social and physical well-being of residents of named localities who were (or were likely to become) members of the Methodist church. The majority ruled against the charitableness of the fund on the grounds that its purposes were not charitable. Lords Simonds and Somervell also reasoned that the trust's narrowly defined class of beneficiaries meant that it failed the public requirement. In the course of judgment, Lord Simonds famously commented as follows on the struggle of courts and commentators to come to terms with what precisely it means to say that a charitable trust is 'public':[97]

> the difficulty has sometimes been increased by failing to observe the distinction ... between a form of relief extended to the whole community yet by its very nature advantageous only to the few and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it.

From the context it is clear that Lord Simonds' essential point was that the public requirement does not mean that every member of the public must directly benefit from the fund. A trust may pass the public test even though some members of the public are not within the class of direct beneficiaries. He reasoned, though, that it is necessary to consider the kind of exclusion because some (though not all) exclusions are inconsistent with the public requirement.

Lord Simonds was in effect contemplating two kinds of exclusions – informal and formal. Informal exclusions pose no bar to charitable status. This kind of exclusion is not explicitly provided for in the trust instrument but rather inheres in the nature of the charitable purposes being pursued. This is what Lord Simonds meant when he contemplated a 'form of relief extended to the whole community *yet by its very nature* advantageous only to the few'. Some charitable purposes, though they are formally open to everyone, by their nature exclude those who lack the interest, capability or life circumstances to benefit directly from the purpose. Lord Simonds cited as examples trusts for the provision of sea

[96] [1955] AC 572. [97] *Ibid.*, at 592.

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walls, child welfare and the repatriation of soldiers since these funds are charitable though by their nature they exclude, respectively, inland residents, adults and civilians.

Formal exclusions are different. These kinds of exclusions exist where a good or service that would in the ordinary course correspond with the interests, capabilities or life circumstances of a broad class of beneficiaries is formally restricted to a narrower class by the express terms of the trust. Rather than inhere in the purpose being pursued, formal exclusions restrain the class of direct beneficiaries relative to the class that the trust's purposes (broadly construed) could by their nature support. The concern raised by this kind of exclusion is that it is discordant with the purposes of the trust. This is the context in which Lord Simonds cited the example of a bridge restricted to impecunious Methodists.[98] He observed that such a trust fails the public requirement because the formally restricted class of beneficiaries means that the trust 'does not serve the public purpose which its nature qualifies it to serve'.[99]

There are two interpretations of Lord Simonds' dictum regarding formal exclusions. Under one interpretation, formal exclusions are absolutely prohibited only in connection with charitable purposes of general public utility. A more liberal interpretation (adopted by the Charity Commission) is that Lord Simonds' reasoning supports a general rule against formally restricting the class of beneficiaries using criteria unrelated to the trust's charitable purposes. On this view, the class of beneficiaries for, say, an educational trust can only be defined using educational criteria. This might include demonstrated aptitude for education or evidence of a barrier, for instance a financial barrier, to education. Formal exclusions that go any further fail the public requirement even where the good or service in question is not of general public utility.

I contend there are sound reasons to restrict Lord Simonds' dictum to trusts established for purposes of general public utility. A broader interpretation is arguably not supported by the case law.[100] Lord Simonds' reflections were neither adopted by a majority of the court in *Baddeley*, nor have they subsequently spawned a body of supporting authorities.

[98] *Ibid.* [99] *Ibid.*

[100] Debra Morris makes a similar point: Debra Morris, 'The Long and Winding Road to Reforming the Public Benefit Test for Charity: A Worthwhile Trip or "Is Your Journey Really Necessary?"', in M. McGregor-Lowndes and K. O'Halloran (eds.), *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham: Edward Elgar Publishing, 2010), p. 108.

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In fact, numerous cases have upheld charitable trusts using exclusionary criteria with no obvious relevance to the trusts' charitable purposes. For example, religious affiliation,[101] parental occupation[102] and nationality[103] are among the criteria courts have upheld for educational trusts. Perhaps in some cases these criteria might be positively correlated with a barrier to education and thus related in at least some way to education, but by and large they seem to have no inherent or logical 'link' with education. A similar point may be made of a home for old Christian Scientists,[104] a home of rest exclusive to seamen,[105] a trust exclusive to poor lawyers and their families,[106] a fund to promote marriage among persons of a specified religion,[107] a fund to benefit wounded foreign soldiers of a particular nationality[108] and a fund restricting access to an oyster fishery to freeholders in a particular locality.[109] Whatever else may be said about why courts have upheld these funds (and others like them), it seems apparent that rather than strictly requiring a link between a trust's charitable purpose and its class of beneficiaries, courts have instead tended to protect to at least some degree the freedom of settlors to target the delivery of charitable goods and services.

Another difficulty with applying Lord Simonds' dictum to all charitable purposes is that doing so seems to require something generally absent from charity law – an idealised class of beneficiaries against which to compare and evaluate the settlor's chosen class. It can only be said that a trust's designated class of beneficiaries does not match the trust's charitable purposes where the designated class is narrower than or altogether discordant with the normative class corresponding with those purposes.

[101] *Pemsel* [1891] AC 531; *Ramsden Estate* (1996) 139 DLR (4th) 746; *University of Victoria* v. *British Columbia (A.G.)* [2000] BCJ No. 520.

[102] *Canada Trust Co.* (1990) 69 DLR (4th) 321 (preference to children of clergy, teachers, engineers, military personnel or metallurgists); *German* v. *Chapman* (1877) 7 Ch D 271 (restricted to daughters of missioners); *Hall* v. *Derby Borough Urban Sanitary Authority* (1885) 16 QBD 163 (restricted to children of railway workers).

[103] *Attorney-General (NSW)* v. *Perpetual Trustee Co. Ltd.* (1940) 63 CLR 209 (restricted to Australians); *Re Koettgen's Will Trusts, Westerminster Bank Ltd.* v. *Family Welfare Association Trustees Ltd.* [1954] Ch 252 (restricted to British subjects).

[104] *City of Hawthorn* v. *Victoria Welfare Association* [1970] VR 205; *Re Hilditch* (1985) 39 SASR 469.

[105] *Finch* v. *Poplar Corp.* (1967) 66 LGR 324.

[106] *Re Denison* (1974) 42 DLR (3d) 652.

[107] *Re Cohen* (1919) 36 TLR 16.

[108] *Re Robinson* [1931] 2 Ch 122.

[109] *Goodman & Blake* v. *Saltash Corporation* (1882) 7 App Cas 633; [1881–85] All ER Rep 1076.

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The problem is that such a normative benchmark is only readily available for a limited category of goods and services – those of general public utility. This is probably why Lord Simonds used the example of a bridge restricted to impecunious Methodists. It seems obvious that the normative class of beneficiaries for a good or service of this kind can be only 'the public' and by extension that any narrower a class of beneficiaries somehow runs contrary to the nature of the good being provided. There is therefore something unique about goods and services of general public utility. We can point to a class of beneficiaries – the public at large – and uncontroversially posit that any narrower a class of beneficiaries is discordant with the fund's purposes.

The same point cannot be unequivocally said in relation to most, if not all, other charitable goods and services. The only thing that can be said with certainty in relation to the first three heads of charity – the relief of poverty, the advancement of religion and the advancement of education – is that these purposes must directly benefit, respectively, the poor, the religious and those seeking knowledge. All that we know for certain is that such trusts may exclude, respectively, the non-poor, the atheistic and those lacking the capacity or interest in the pursuit of knowledge. Unlike the case with goods and services of general public utility, it is difficult to draw on the concept of a link between purpose and beneficiary class to establish any further bright lines in these contexts. If Lord Simonds' dictum is going to be applied across all categories of charity, there simply does not seem to be a way of escaping the necessity for a predetermined list of acceptable and unacceptable exclusionary criteria. The jurisprudence dealing with the public requirement has never clearly produced such a list. Courts have commented adversely on capricious class-defining criteria,[110] but have not otherwise gone very far towards determining when exclusionary criteria are inherently inconsistent with the idea of charity.

It was expressly put to the Privy Council in *Davies* v. *Perpetual Trustee Company* that the trust before the Court failed the public component of the public benefit requirement specifically because the beneficiary class was discordant with the trust's educational purposes.[111] The fund was left 'to the Presbyterians the descendants of those settled in the Colony [of New South Wales] hailing from or born in the North of Ireland to be held in trust for the purpose of establishing a college for the education and tuition of their youth'. Finding against the charitableness of the

[110] *Davies* v. *Perpetual Trustee Co* [1959] AC 439 at 456 (Lord Morton).
[111] *Ibid.*

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fund, the Court expressly observed that the class-defining criteria were 'wholly irrelevant to the educational object which the testator had in mind'.[112] While this admittedly lends some support to the view that a link of sorts must exist between the beneficiary class and the purpose being pursued, the broader context of the decision has to be kept in mind. It is clear from the judgment that the Court would have upheld the trust if the class had simply been restricted to Presbyterians. The problem was that the fund went even further and created an arbitrary class within a class through the addition of descendancy and geographic tests to the religious test. So the trust not only distinguished between Presbyterians and non-Presbyterians but further distinguished among Presbyterians using criteria – characterised by the Court as 'capricious'[113] – that would prove highly difficult to administer.[114] The use of a descendancy test was alone sufficient to vitiate the charitableness of the fund because this introduced a personal element to the fund. The case at most reveals that class-defining criteria unrelated to the purpose being pursued *can* cause a trust to fail the public benefit requirement. It does not establish that such criteria necessarily have this effect.

To be clear, my point is not that it would be impossible to refine the public requirement in light of a list of improper exclusionary criteria, including improper discriminatory criteria. Instead, my point is that such a list would not draw upon the logic and doctrines of charity law pertaining to publicness, at least not in the way that is suggested when the exercise is framed as simply requiring a link between charitable purpose and beneficiary class. A children's welfare fund excluding adults is similar to a 'whites only' welfare fund excluding non-whites in the sense that restricting benefits to children and whites, respectively, is clearly linked with the purpose being pursued, at least as that purpose is described in the trust instrument.[115] To be sure, if the purpose is children's welfare, then excluding adults is linked with that purpose in an identical fashion to how excluding non-whites could be said to be linked with the purpose of a whites only welfare fund. Nevertheless, the two funds will be (and should be) viewed quite differently. Why? The disparate reception of these funds will not necessarily be traceable to ideals unique to the charity

[112] *Ibid.* [113] *Ibid.*, at 456.

[114] The Court describes at 453–454 the 'curious' subcategories of Presbyterians contemplated by the fund.

[115] A similar point was argued by the Attorney-General in *Davies* v. *Perpetual Trustee Co* [1959] AC 439 at 451.

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law concept of publicness so much as to ideals originating from beyond the law of charity surrounding the kinds of distinctions that should and should not be viewed as harmful. This does not in and of itself reveal a reason why charity law should welcome discriminatory distinctions, but it does go some distance in exposing the true nature of the argument that discrimination fails (or should fail) the charity law requirement for publicness.

4 The *benefit* component of the public benefit requirement

We have seen that the primary function served by the public component of the public benefit requirement is to restrict charitable status to trusts bestowing benefaction not necessarily upon *the public* but rather upon *a public* in the sense of a class of persons delimited other than on the basis of personal selection criteria. Since it is not clear that discriminatorily defined beneficiary classes necessarily fail to qualify as *a public*, at least on the basis of the most well-established meaning of the term public in Canadian charity law, it is not as easy as one might have anticipated to locate within the public jurisprudence a rule clearly establishing the non-charitableness of discriminatory trusts. Turning now to the benefit requirement, one might anticipate the discovery here of a more pronounced hurdle for discriminatory trusts given that this requirement entails a value judgment acknowledging that the trust under review somehow makes the world a better place. The benefit requirement does not require that a court merely tolerate but rather affirm a putative charitable trust as achieving something worthwhile. How could a court endorse in this manner a trust with discriminatory provisions?

The simple answer is that there are circumstances in which courts cannot endorse discriminatory trusts in this manner. Courts have not to date established bright-line rules regarding what specifically the benefit test requires. In *Gilmour* v. *Coats*, Lord Simonds went so far as to observe that '[n]o court would be rash enough to attempt to define precisely or exhaustively what [the public benefit test's] content must be'.[116] However, courts have at least established the baseline principle that a trust injurious to society will not meet the standard.[117] There will be instances in which the harm posed by a discriminatory trust will be so conspicuous

[116] *Gilmour* v. *Coats* [1949] AC 426 at 446–7. Likewise, see *Independent Schools Council* [2011] UKUT 421 at [44].

[117] See, e.g., *National Anti-Vivisection Society* [1948] 1 AC 31 at 65, 69 (Lord Simonds).

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that the benefit requirement, even when defined negatively as at the very least meaning 'not harmful', will furnish a ready basis for courts to find against the charitableness of the fund. A trust with invidiously discriminatory provisions, such as the scholarship fund under review in *Canada Trust Co.*, supplies an example. Likewise, the racially discriminatory admissions criteria under review in *Bob Jones*,[118] given that they promoted racial segregation in education, did not meet even a minimal 'not harmful' standard.[119]

Once we move beyond circumstances involving conspicuously harmful discrimination, the obviousness of the impediment to charitableness posed by the benefit requirement begins to wane. One reason why discrimination does not necessarily vitiate charitable benefit is because charity courts have concluded that the requirement for benefit does not amount to a complete prohibition against harm. In *National Anti-Vivisection Society*, Lord Wright observed that courts should 'weigh against each other' detriment and benefit and that the impact of a trust 'must be judged as a whole'.[120] The concept that benefit means net benefit was most recently affirmed in *Catholic Care (Diocese of Leeds)* v. *Charity Commission for England and Wales*.[121] Discrimination inherent in affirmative action style programming could be justified on the basis of this reasoning as the premise of such programming is that the harm of denying opportunity to some is outweighed by the benefit of creating opportunities for members of historically disadvantaged groups.[122] Now, if this were all there was to the idea that benefit in charity law means net benefit, we might be reticent to entertain the conclusion that the benefit requirement goes very far in accommodating harm following from discrimination. After all, affirmative action programming does not balance the harm of discrimination against benefits unrelated to the ideal of equality. To the contrary, since the very goal of such programming is to reduce the harm of discrimination, one would not point to the charitableness of affirmative action measures to demonstrate that harm from discrimination does not vitiate charitable benefit.

[118] 461 US 574 (1983).

[119] Surprisingly, conspicuous harm was not considered to disqualify a health care fund expressly restricted to the treatment of white babies in *Kay* [2003] NSWSC 292.

[120] [1948] 1 AC 31 at 47.

[121] [2010] 4 All ER 1041. For a statutory articulation of the net benefit concept, see the Charities and Trustee Investment (Scotland) Act 2005, s. 8.

[122] The concurring judgment of Tarnopolsky J in *Canada Trust Co.* (1990) 69 DLR (4th) 321 at [96] expressly concluded that such programming can qualify as charitable at law.

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It is therefore notable that Lord Wright in *National Anti-Vivisection Society* made clear that benefits and detriments may be balanced even if they are *not* of the same nature.[123] A charitable trust can therefore meet the benefit requirement even if it risks leaving the world worse off in some respect provided that it nevertheless improves the world in some other countervailing though unrelated respect. Since the benefits and detriments need not be of the same nature, it would appear to follow from Lord Wright's reasoning that the harm posed by discrimination can be offset by benefits unrelated to equality. Discrimination is therefore not permissible solely as a means of ameliorating through affirmative action the harm of discrimination. It follows that the specific contexts in which discrimination will not preclude a finding of charitable benefit will be a function of: (1) what charity law considers harmful; (2) what charity law considers beneficial; and (3) how charity law weights benefit versus harm in individual cases.

Dealing first with the issue of harm, we have already discussed the fact that conspicuously harmful discrimination can readily vitiate charitable benefit. At the opposite end of the continuum to such discrimination lies discrimination expressly characterised by human rights law as lawful and, in particular, lawful for charities. Human rights legislation recognises that legal charity represents a protected space in which the usual rules pertaining to discrimination do not apply with the same strictness. For example, s. 18 of Ontario's Human Rights Code[124] expressly allows membership or participation in charitable organisations primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination to be restricted to persons similarly identified.[125] The text of the provision extends to ameliorative programmes in which charitable programming is exclusively targeted at historically disadvantaged groups, but it is not restricted to such programming. Further, s. 24 allows for employment in this kind of organisation to be restricted on the basis of what would ordinarily be considered discriminatory grounds if the nature of the employment makes this a reasonable and bona fide qualification. Section 18.1 dovetails with subsection 149.1(6.21) of the Income

[123] Specifically, Lord Wright observed in *National Anti-Vivisection Society* [1948] 1 AC 31 at 47 that material benefits of vivisection could be weighed against moral benefits of anti-vivisection.

[124] RSO 1990, c H.19.

[125] The prohibited grounds of discrimination include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability, to be restricted to persons similarly identified.

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Tax Act in that it permits a religious organisation to refuse to allow the use of its premises to solemnise a marriage contrary to religious belief. There are somewhat analogous provisions in s. 193 of the Equality Act 2010 (UK).[126]

Since these relieving provisions do not directly speak to the legal definition of charity, they should not be approached as though they are determinative of charitableness. The foremost question for a court to ask is always whether a putative charitable purpose is charitable at law, which is not the same question as whether the circumstances under review entail lawful or unlawful discrimination. Conflating the two issues begs the question by presupposing a direct correspondence between, respectively, what public law identifies as lawful versus unlawful discrimination and what charity law identifies as charitable versus non-charitable. We should not, however, presuppose the non-charitableness of discrimination in the public law understanding of that term any more than we should presuppose the invalidity at common law of discriminatory exercises of property rights. The public law and private law analyses are and should remain distinct.[127] In the charity law context, concluding that discrimination is present goes no further than at most establishing that harm to one degree or another is present. As we have seen, this does not exhaust the analysis but instead leads to a balancing exercise in which the harm of discrimination is balanced against the benefit of the putative charitable programming in order to resolve whether the trust under review is charitable in the sense of conferring a net benefit. Likewise, it does not automatically follow that discrimination regarded by public law (through relieving provisions such as those from the Ontario Human Rights Code[128] identified above) as either not harmful, or not sufficiently harmful to regulate, is for that reason alone incapable of vitiating charitable benefit. The charity law dimension to the problem even here remains one of balancing harm against benefit. Relieving provisions of this sort go no further than (at most) providing an imprecise reference point for considering the amount of weight to be attached to the harm associated with the form of discrimination under review.

[126] See above n. 65 and associated text.

[127] This is not to deny that discrimination can amount to a basis for invalidity in both the charity law and the property law contexts where the harm is conspicuous. The property analogue to *Canada Trust Co.* (1990) 69 DLR (4th) 321 was *Re Drummond Wren* [1945] 4 DLR 674, in which a restrictive covenant prohibiting the sale of land to 'Jews or persons of objectionable nationality' was held void as against public policy.

[128] SO 1981, c 53.

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Of course, the balancing exercise inherent in the charity law concept of net benefit requires a reference point for identifying and weighting not only harm but also benefit. One reason why the topic of discriminatory charity is so challenging is because the charity law concept of benefit is itself shrouded in mystification. A useful, though perhaps counter-intuitive, starting point for understanding the charity law concept of benefit is to lead off by questioning whether benefit is indeed a discrete requirement for charitable status. As it might prove controversial even to ask such a question, let me make clear that I am not implying that purposes altogether lacking benefit or of utterly dubious benefit can and should qualify as charitable at law. All that I am critically reflecting upon is whether the requirement for benefit is necessarily separate and discrete from the requirement that all of a charitable trust's purposes fall within one or more of the established heads of charity.

Although the need for benefit is so well established as to be beyond dispute, the cases are interesting for the fact that they do not as a standard practice expressly consider whether a putative charitable trust's purposes are both: (1) within the established heads of charity; and (2) also of benefit.[129] Periodically a court will expressly comment upon the benefit, or lack thereof, associated with a putative charitable trust. Such was the case in *Re Pinion*, where Lord Harman left no room for doubt when he famously described the art collection under review as 'worthless', 'atrociously bad' and a 'mass of junk'.[130] Likewise, in *Re Hummeltenberg*,[131] the Court concluded that no benefit could be found in a trust established for 'training and developing, suitable persons, male and female, as mediums'. But such cases are the outliers. It is far more commonly the case for the benefit analysis to be subsumed into the analysis of whether the purposes under review amount to poverty relief, religion, education or some other charitable purpose. In other words, the benefit requirement tends to be built into what qualifies as poverty relief, religion or education, in the first place far more than it is approached and enforced as an altogether separate requirement.[132] So, it is not as though benefit is not required. To the contrary, one might say that the test for charitable status is reducible to a

[129] Statutory reforms in England mean that English charities must establish that they achieve *both* a purpose recognised as charitable *and* a public benefit. See Charities Act 2011 (UK), s. 2. Canadian law continues to operate under the common law approach where the two requirements are not clearly treated as separate.

[130] [1965] 1 Ch 85 at 106–7. [131] [1923] 1 Ch 237.

[132] The recent holding in *Independent Schools Council* [2011] UKUT 421 at [42] suggests that the benefit requirement has in 'more recent times' been treated by courts as a 'separately

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public benefit test and that the *Pemsel* categories of charitable purposes are significant only because they represent pursuits considered beneficial by charity law.[133] But regardless of whether we are willing to go quite that far, it should not prove controversial to posit that the various categories of legal charity represent, if nothing else, things considered beneficial by charity law.

This does not exhaust the analysis of the benefit requirement, but it does tell us something about the circumstances in which the charity law requirement for benefit might not altogether disallow discrimination. If harm can be balanced against benefit, and there is high authority to say that it can, and if the charity law understanding of benefit is implicit in each of the heads of charity, and it would be difficult to suggest otherwise, then it would seem that the harm following from discrimination need not vitiate benefit where it can be understood as relating in some way to the particular head of charity being pursued.[134] In such circumstances, the benefit against which to balance the harm of discrimination may be located in the charitable purpose itself. One might condemn this reasoning as amounting to the tautological proposition that it is charitable to discriminate when the definition of charity extends to discrimination. While there is admittedly an element of circularity to the reasoning, there is arguably more structure to it than this retort acknowledges.

For example, this view of the benefit requirement helps make sense of the decision in *Canada Trust Co.* Apart from its conspicuously harmful nature, one reason why the discrimination at issue in that case posed such a problem vis-à-vis the benefit requirement is that it could not very easily be brought within the umbrella of the benefit normally resulting from the advancement of education. The recitals to the trust made clear that scholarships were being used (arguably) not to achieve the charitable purpose of advancing education but rather to achieve the non-charitable goal of perpetuating racial and ethnic privilege. At the very least the trust

identified requirement' for charitable status. The judgment nevertheless acknowledges at [53] that it is 'not clear' whether the authorities truly establish that benefit is indeed a separate and discrete requirement.

[133] See, e.g., P. Luxton, 'Opening Pandora's Box: The Upper Tribunal's Decision on Public Benefit and Independent Schools' (2012) 15 *Charity Law and Practice Review* 27.

[134] It was observed in *Independent Schools Council* [2011] UKUT 421 at [106] that, when balancing harm against benefit, 'great weight is to be given to a purpose which would, ordinarily, be charitable' and that 'before the alleged disadvantages can be given much weight, they need to be clearly demonstrated'.

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revealed that a charitable purpose, the advancement of education through scholarships, coexisted with a collateral non-charitable purpose. Either way the fund fell short of the requirement that it be established for exclusively charitable purposes, which in turn foreclosed the possibility of the discrimination at issue in that case being balanced against the benefit of education.[135] This reasoning does not derive from the blunt proposition that it is simply not charitable to discriminate so much as from the idea that the terms of the trust could not be understood solely in terms of what it means to advance education. Education was not the goal but rather the means to a non-charitable goal.[136]

In other contexts, however, it may be possible to situate that which seems discriminatory squarely within a recognised charitable purpose. Religious charities may, for example, teach doctrines or engage in practices that seem inconsistent on some level with conceptions of equality reflected in public law. They might advance highly traditional teachings on issues such as family, abortion and sexuality that some may say run contrary to the progressive nature of equality rights. As already discussed in this chapter, some churches teach heterosexual theologies of marriage and restrict marriage ceremonies accordingly. In some denominations, women may not be considered eligible for certain leadership positions. Traditional gender roles may be framed by some churches as part of God's intended plan for humanity. These sorts of issues may lead some to question whether certain religious charities truly meet the benefit requirement for charitable status. However, charity law furnishes a basis for concluding that that which falls within the domain of religion can be conceived of as possessing the benefit assumed by charity courts to inhere in religion.[137]

[135] If I am right on this point, it calls into question the Court's use of the doctrine of *cy-près* to correct the defect in the trust as this doctrine is not normally applied to make charitable a fund that fails to meet the requirements for charitable status. Perhaps the case reveals an exception where the fund was considered charitable at the time of its creation and only became non-charitable on a supervening basis.

[136] A similar point could perhaps be made in relation to the health care fund restricted to 'white babies' upheld in *Kay* [2003] NSWSC 292. Was this a fund established for a health care purpose or a fund using health care to achieve a discriminatory purpose? In upholding the fund as charitable, the Court revealed a willingness to balance harm against benefit. Specifically, the Court reasoned at [19] that 'the receipt of a fund to benefit white babies would just mean that more of the general funds of the hospital would be available to treat non-white babies so that, in due course, despite the testatrix's intention things will even up'.

[137] Note the use of the word '*assumed*' rather than '*presumed*'. While courts have assumed as a starting point the benefit of poverty relief, education and religion, they have not gone

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So, in this context the central question might not be whether a particular doctrine or practice is discriminatory per se, but instead whether it is truly religious.[138]

Indeed, this is the very technique by which courts have avoided the conflict posed by the need to find benefit in religion, on the one hand, versus the desirability of remaining neutral on the efficacy of individual religious doctrines, on the other hand. Since religion is accepted by charity law as a universal good, courts have usually been content to go no further than considering whether what is before them qualifies as religion.[139] If it meets this standard, the existence of benefit has tended to be accepted without each doctrine being individually scrutinised. This is the basis on which a particular church or religious institution might meet the benefit requirement, even if some of its teachings and practices do not exactly reveal an enthusiastic acceptance of equality norms developed in the public law context.

There are even recent cases that have upheld what some might regard as discriminatory distinctions, notwithstanding that the discrimination under review could not very readily be said to inhere in the charitable purposes being pursued. Canadian examples include *Ramsden Estate*[140] and *University of Victoria* v. *British Columbia (A.G.)*,[141] both of which upheld academic scholarships restricted on the basis of religious criteria. There was no attempt in these cases to benefit a disadvantaged group, nor was there any rational link between the religious restriction and the nature of the good being provided. These cases and others like them reveal that courts are willing to allow settlors of charitable trusts to manifest a degree of favouritism provided at least that the trust is not invidiously discriminatory. Relating this back to the benefit requirement, it would appear that the requirement for charitable benefit accommodates within limits what,

so far as to establish a formal presumption of benefit. See, e.g., J. Hackney, 'Charities and Public Benefit' (2008) 124 *Law Quarterly Review* 347, 348; *Independent Schools Council* [2011] UKUT 421 at [42]–[113].

138 See, e.g., Hackney, 'Charities and Public Benefit', 348.

139 In *Gilmour* v. *Coats* [1949] AC 426 at 459, Lord Reid articulated the orthodox principle that '[t]he law must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true'. Nevertheless, the religious organisation under review was held to be non-charitable on the grounds that the Court could only find benefit if it were to accept Catholic doctrine regarding intercessory prayer, something the Court was not willing to do. The judgment has been much criticised for its seemingly inconsistent reasoning.

140 (1996) 139 DLR (4th) 746.

141 [2000] BCJ No. 520.

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for lack of a better phrase, might simply be described as settlor preference. At the least, there is a demonstrated reluctance to balance benefits and disadvantages where the suggested disadvantages 'depend on value judgments influenced by social and political agendas'.[142]

Now, some might say that I find myself in a contradiction, having cautioned in the previous section against requiring a link between beneficiary class and charitable purpose but nevertheless having accepted in this section the idea that discovering such a link might somehow be relevant to determining whether discrimination passes the benefit requirement. Why acknowledge the potential relevance of a link in the context of the benefit requirement but not in the context of the public requirement? The primary reason is that this way of understanding the cases does a better job of exposing the discretionary nature of the judgments being drawn in this area of the law. The shortcoming of saying that the *public* requirement *necessitates* a link between the beneficiary class and the charitable purpose is that this frames the principle too concretely. Such a rule, on its face, categorically forbids charitable status where the requisite link between purpose and beneficiary class is absent. So if such a rule does indeed exist, we would not expect to discover, as we do, that courts have upheld charitable trusts targeting charitable goods and services on the basis of criteria unrelated to the charitable purposes being pursued. However, if we instead recognise that the search for a link occurs at the stage of evaluating benefit, and, in particular, as part of the *discretionary* weighting of benefits versus harms implicit in the search for net benefit, then the cases upholding the charitableness of seemingly discriminatory trusts no longer seem as difficult to understand. To the contrary, the existence of such cases would simply reveal that balancing benefits against harms is a highly discretionary and context-sensitive way of evaluating the presence or absence of net benefit. The discretionary nature of the analysis allows charitable trusts to be upheld from time to time, notwithstanding that the beneficiary class seems discordant with the underlying charitable purpose, provided there is at least a net benefit.

More to the point of this chapter, exposing the discretionary nature of charity law's benefit requirement is important because it reveals just how difficult it is to demonstrate clearly that this requirement – unassisted by equality ideals originating from beyond the law of charity – forbids discrimination. The recent decision in *Catholic Care*[143] illustrates the point.

[142] *Independent Schools Council* [2011] UKUT 421 at [107].
[143] [2012] UKUT 395 (TCC).

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As mentioned above, at issue was whether the Roman Catholic charity in question could continue its practice of restricting the provision of adoption services to heterosexual couples. Changes to English equality law meant that this practice could be continued by the charity only if, among other things, the practice was expressly authorised by its charitable instrument.[144] The case centred on whether the charity could amend its charitable instrument accordingly, which in turn required a determination of whether the practice was charitable in the first place. The judgment, which went against the charity, weighed a number of competing values, including the value of religious beliefs in support of the traditional family versus the value of equality for same-sex couples. In deciding the case against the charity, Sales J very clearly prioritised equality rights over the other competing considerations.

Notably, the decision in *Catholic Care* made no appeal to any particular ideal of 'charity', but instead drew heavily upon equality principles developed in the public law context. In part this was because counsel for both sides agreed that the case should not be decided independently of whether the charity's practices amounted to lawful discrimination under s. 193 of the Equality Act 2010.[145] This resulted in the case becoming consumed with whether the charity's practices could be objectively justified as a proportionate means of achieving a legitimate aim.[146] Even if counsel had insisted that the charitableness of the charity's practices be addressed as a discrete issue, which would have been more analytically sound, it is submitted that the case, requiring as it did that the harm of discrimination be balanced against the benefit of a religiously inspired conception of the family, could not in any event have been decided solely on the basis of the doctrines and logic of charity law. From a charity law perspective, there is no magic to the decision as it could just as well have gone the other way without doing violence to any as yet clearly established principle or doctrine of charity law. In and of itself this does not establish that the case was incorrectly decided, but it does reveal a certain shortcoming to the claim that charity law is equipped through its own logic and doctrines to establish the non-charitableness of discrimination. There does not seem

[144] Equality Act 2010 (UK), s. 193.

[145] [2012] UKUT 395 at [7].

[146] Demonstrating that discrimination is a proportionate means for a charity to achieve a legitimate aim is one of the ways for a charity to engage in lawful discrimination under s. 193(2) of the Equality Act 2010.

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to be any escaping the conclusion that values external to charity law play an enormous role in discussions and analyses of discriminatory charity.

5 Conclusion

A distinguishing feature of charitable trusts is that they are alone in the world of trusts for having to conform to a public benefit standard. Notwithstanding the centrality of the concept of public benefit to charitable trusts, it represents one of the least well understood aspects of the law of charity. At least one reason for this is that public benefit is a somewhat loaded phrase in the sense that it conjures up ideals lacking correspondence with how courts have developed it as a concept with meaning distinctive and peculiar to the law of charity. Indeed, the topic of discriminatory charity reveals a discordance between what public benefit is sometimes assumed to mean, or could very well be interpreted to mean without doing violence to conceivable meanings of the terms 'public' and 'benefit', and how charity courts have over time developed the concept. So although the public benefit requirement might be assumed to readily furnish charity courts with a tool uniquely capable of prohibiting discrimination through charitable trusts, the public benefit jurisprudence does not supply a particularly robust impediment directly aimed at curtailing the charitableness of discriminatory trusts. This raises some interesting questions about the nature of the claim that it is not, or should not be, charitable to discriminate.

The point I have attempted to make in this chapter is neither that there is absent any restriction under existing law against discriminatory charity, nor that there should be no such restriction. My point is instead that the elaboration of such a restriction in individual circumstances is in a great many instances not going to be an exercise drawing solely on the logic and doctrines of charity law, at least not as they pertain to the public benefit requirement. It is instead an exercise heavily influenced by discretionary judgments surrounding the relative priority to be assigned to equality versus other competing values vying for consideration. The balancing exercise whereby courts weigh the harm inflicted by a discriminatory charitable trust against its anticipated benefit would seem to take courts beyond the traditionally conceived boundaries of the judicial realm and involve them in what is arguably a legislative-like policy-making exercise. Whatever else might be said of a holding such as that in *Catholic Care*,[147] the reasoning of this case ultimately boils down to the

[147] [2012] UKUT 395.

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value judgment that equality, or at least a particular conception of equality, should take priority over other competing considerations. Likewise, the conclusion in *Kay*[148] reveals an underlying value judgment to prioritise traditional property rights and testamentary freedom over equality. So rather than maintain that charity law is somehow unique in the sense of furnishing courts with the normative resources to prohibit discrimination through charitable trusts, it might be more accurate to posit that charity law simply supplies courts with the means through which equality-oriented considerations may (or just as easily may not) be brought to bear at the discretion of the court. In this sense, the regulation of discriminatory charity does not represent the categorically distinct context that it is sometimes assumed to represent. To the contrary, the kinds of value judgments ultimately being drawn are apt to be very similar to those arising when the relevance of public law equality norms to other branches of private law is considered.

The analysis in this chapter is admittedly not exhaustive as it has not considered all dimensions of the topic. For example, although the idea that it is not charitable to discriminate requires a referent for identifying that which is truly discriminatory, no analysis was offered of how discriminatory charitable trust provisions may be identified in the first place. Neither have all features of charitable trusts that might be construed as posing a unique incompatibility with discrimination been discussed. The state support of charities, especially through income tax concessions, might, for example, be construed as supplying an additional basis on which to conclude against the charitableness of discrimination.[149] In addition, the doctrine of public policy – through which charitable trusts may be struck if they run contrary to public policy – has not been directly analysed, notwithstanding that it has been factored into the judicial analysis of discriminatory charity.[150] The failure to address these facets of the topic is not a denial of their relevance so much as an acknowledgement that the topic of discriminatory charity is so complex and multifactorial

[148] [2003] NSWSC 292.

[149] See, e.g., L. Sugin, 'Tax Expenditure Analysis and Constitutional Decisions' (1998–1999) 50 *Hastings Law Journal* 407 at 407; E. Zelinsky, 'Are Tax "Benefits" Constitutionally Equivalent To Direct Expenditures?' (1998) 112 *Harvard Law Review* 379; Donna D. Adler, 'The Internal Revenue Code, The Constitution, and The Courts: The Use of Tax Expenditure in Judicial Decision Making' (1993) 28 *Wake Forest Law Review* 855; Mirkay, 'Is It "Charitable" to Discriminate?'.

[150] See, e.g., *Bob Jones* 461 US 574 (1983).

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that no single chapter could adequately address all relevant dimensions to the problem.

It is not clear, however, that taking these additional issues into account would ultimately go very far in assuaging my scepticism over whether the law of charitable trusts, unassisted by equality considerations imported from beyond the law of charity, is uniquely equipped precisely to establish either the reasons why or the precise circumstances in which discrimination is unacceptable. To be sure, the search for a referent for what constitutes discrimination in the first place will only lend support to the idea that values external to the law of charity are playing a role here, since such a search will just raise questions over the extent to which, if at all, equality values drawn from public law generally and constitutional law specifically should be imported into charity law. Further, an analysis of the doctrine of public policy will not necessarily yield insights specific to the law of charitable trusts because, unlike the requirement for public benefit, which is unique to charitable trusts, the principle that dispositions offending public policy are invalid applies across various branches of private law. Likewise, an analysis of the various legal privileges exclusive to charitable status, assuming that the extension of such privileges does not in and of itself amount to constitutionally reviewable state action, will not necessarily change the essential questions, which remain whether, when and why discrimination is incompatible with legal charity. It seems unavoidable that the answers to these questions will ultimately turn not solely on principles finding expression in the doctrines of charity law, but will instead entail a balancing exercise in which values originating from beyond the law of charity are pitted against competing considerations. The nature of the analysis therefore shares a surprising amount in common with the analysis of discriminatory provisions in non-charitable trusts. This does not mean that discriminatory charity should be permitted to go without restriction, but it does tell us something about the kinds of considerations informing the conclusion that charity is incompatible with discrimination.

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Tab 18

Form 26
[Rule 5.6]



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

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

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

APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**SUPPLEMENTAL AFFIDAVIT OF RECORDS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

Supplemental Affidavit of Records of the Sawridge Trustees, Sworn by Paul Bujold, Chief Executive Officer of the Sawridge Trusts, on April 27, 2018.

I, Paul Bujold, of Edmonton, Alberta, have personal knowledge of the following or I am informed and do believe that:

1. I am the Chief Executive Officer of the 1985 Sawridge Trust.

2. Since my swearing of the Affidavit of Records on November 2, 2015, the records listed in Schedules 1 and 2 are under the control of the Sawridge Trustees.

3. The Sawridge Trustees object to produce the records listed in Schedule 2 on the grounds of privilege identified in that Schedule.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

Nov 9 3 29 PM '94

November 9, 1994

VIA FAX NUMBER (416) 863-0871

Mr. Maurice C. Cullity, Q.C.
Davies, Ward & Beck
P.O. Box 63, Suite 1400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Sawridge Indian Band Expenditures pursuant to Sections 64 and 66 of the *Indian Act*

Dear Mr. Cullity:

We are in receipt of your letter of October 24th, 1994.

Although we note the concern expressed in your letter regarding the inclusion on the list of amounts for recurring and other expenditures which would not involve the acquisition of specific assets, we should remember that the suggestion for the production of such a statement originated from your letter of April 19, 1994.

We and our client, the Department of Indian Affairs and Northern Development, are concerned regarding the delay in resolving this matter.

In an attempt to accelerate the resolution of the current situation, we are prepared to limit the scope of the statement to be provided by your client's auditors. Accordingly, we hereby request confirmation by way of statement from Sawridge's accountants that all funds that were released for the acquisition of capital assets were in fact used for that specific purpose, and further confirmation that those assets are held in trust, or have been converted into other assets which are held in trust, for the members of the Band. In other words, at this time we do not seek confirmation regarding amounts released for purposes other than the acquisition of capital assets.

.../2

Canada

We would appreciate receiving confirmation of this proposal at your earliest convenience.

Yours very truly,

M. C. McIntosh

Margaret McIntosh
Counsel

DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

VIA TELECOPIER

October 20, 1994

Ms. Margaret McIntosh
Counsel, Legal Services
Indian Affairs and Northern Development
Room 1018
Les Terrasses de la Chaudière
10 Wellington Street
Hull, Quebec
K1A 0H4

Dear Ms. McIntosh:

Sawridge

Further to our recent discussions, I am writing to confirm that I do not believe that the list of expenditures provided with your letter of October 5, 1994 is helpful for the purposes we have discussed. Many of the amounts referred to on the list relate to recurring expenditures, such as legal and other professional fees, and some are as small as $500. They extend back over a period of 20 years and to ask for a statement from the auditors that all were properly expended on the particular purposes referred to in the BCRs would be prohibitively expensive even if, after such a period, it were possible to deal with them.

In my discussion with Mr. Gregor MacIntosh on April 7, 1994, I was told that the Department's concern was to ensure that all funds distributed to the Band pursuant to section 64 or section 69 were either held in trust, or could be traced into assets held in trust, for members of the Band. I suggested that the auditors might be asked to certify that all funds distributed to the band by the Minister pursuant to section 64 or section 69 of the *Indian Act* for the acquisition of specific assets, or property or investments into which those funds have been converted, are now held in trusts for members of the band. In my letter of April 19 to Mr. Van Iterson, I referred too generally to funds distributed to the band for specific purposes pursuant to those sections of the *Indian Act*. A large number of the amounts on the list you have provided refer to section 66 of the Act but, more importantly, many of them were amounts for recurring and other expenditures that would not involve the acquisition of assets and could not be expected to end up in trusts or otherwise in property of the Band.

DAVIES, WARD & BECK

In order to try to resolve this matter without further delay and expense, I wonder whether it would be an acceptable solution to ask the auditors to confine their attention to amounts on your list of $500,000 or more that were advanced for the purpose of acquiring specific assets. If this is not satisfactory from the viewpoint of the Department, perhaps you would suggest another alternative.

As I have indicated to you on a number of occasions, we do not agree that the Department is entitled to demand details of expenditures made by the band in the past or with respect to the assets that it now holds. At the same time, in the interests of avoiding the litigation that will be inevitable if your client intends to make unreasonable demands, I have attempted to find a solution that will satisfy the Department without involving the Band in unnecessary expense. I still wish to do this if it is possible.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: M. McKinney, Esq.

Department of Justice Canada / Ministère de la Justice Canada

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudière
10 Wellington Street
Hull, Québec
K1A 0H4

July 7, 1994

Mr. Maurice C. Cullity, Q.C.
DAVIES, WARD, BECK
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Please be advised that since my colleague Mr. McNaught has assumed other duties in the Department of Justice, I have taken over carriage of the above-noted matter.

Your letter of April 19, 1994 addressed to W. (Bill) Van Iterson of our client, the Department of Indian Affairs and Northern Development, proposed that the Department be provided with a written statement from the auditors of the Sawridge Band to the effect that the funds distributed to the Band pursuant to sections 64 and 69 of the *Indian Act* are held in trust for the Band. Mr. McNaught's letter of May 20, 1994 set out our understanding that the statement would also confirm that these funds were used for the purposes for which they were authorized by the Minister. I understand that this was subsequently confirmed in a telephone conversation between yourself and Mr. McNaught.

Canada

My client would be pleased to receive the proposed statement at your early convenience. I would appreciate if you would contact me upon your return to advise me of when we may anticipate its receipt. I may be reached at (819) 953-2288.

We thank you for your assistance in this matter and we look forward to hearing from you.

Margaret McIntosh
Counsel

07/08/94 09:00 ☎416 863 0871 D W B (D) 004

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
K1A 0H8

Legal Services
Indian Affairs and Northern Development
Room 1018, Les Terrasses de la Chaudiere
10 Wellington Street
Hull, Quebec
K1A 0H4

August 29, 1994

Mr. Maurice C. Cullity, Q.C.
Davies, Ward Beck
P.O. Box 63, Suite 4400
1 First Canadian Place
Toronto, Ontario
M5X 1B1

Subject: Sawridge Trusts

Dear Mr. Cullity:

Further to our telephone conversation of August 9, 1994, we continue to anticipate a statement from the auditors of the Sawridge Indian Band to the effect that funds released to the Band pursuant to sections 64 and 69 of the *Indian Act* are being held in trust for the members of the Band, and that any funds were used for the purposes for which they were authorized by the Minister of Indian Affairs and Northern Development.

My client is anxious to have this matter settled as expeditiously as possible. Accordingly, I respectfully request some written indication of when this information will be available.

Thank you for your consideration of this matter.

Margaret McIntosh
Counsel

Canada

Sawridge

March 21, 1994

Davies Ward & Beck
Barristers & Solicitors
Box 63, 44th Floor
1 Canadian Place
Toronto, Ontario
M5X 1B1

ATTENTION: M. Cullity

Dear Sir:

RE: Sawridge Trusts

Further to our recent telephone conversation, we wish to confirm that the Department was aware of the existence of Trusts for the benefit of Sawridge Band Members for quite some time. This knowledge can be attributed to the Department from several sources including:

1. Annual Audits
2. Capital Project Funds Requests
3. Self-Government Negotiations
4. Early Trust discussions

1. Annual Audits

The annual audit reports show an amount each year as "*Distributions to Band Members*". In the March 31, 1984 statement Note #16 reads:

> *16. Distributions to Band Members*
>
> *On December 17, 1983 the Members of the Band transferred certain assets with a carrying value of $17,951,590 to "The Sawridge Band Trust", a trust formed for the benefit of the members of the Sawridge Indian Band".*

HEAD OFFICE: BOX 326, SLAVE LAKE, ALBERTA, T0G 2A0 • TEL: (403) 849-4311 • FAX: (403) 849-3446
BRANCH OFFICE: # 766, 10201 JASPER AVENUE, EDMONTON, ALBERTA, T5J 3N7 • TEL: (403) 421-4845 • FAX: (403) 428-7022

In the March 31, 1985 and 1986 statements Note #11 showed a breakdown of the "Distribution to Band Members" setting out the amounts for:

1. Assets transferred to Sawridge Band Trust; and
2. Regular Distributions to Band Members.

In the statements after 1986, there are no notes explaining this item ("Distribution to Band Members"), but the item is included on each statement.

The Department is given a copy of the Band's Audited Financial Statement each year. We provide it on a trust condition that it is not copied, transmitted or removed from the regional office and that its contents are not disclosed to anyone other than the personnel charged with the audit review. This practice began in the late 80's after the Access to Information case ended. We cannot confirm that the 84-86 statements were provided to the Department or what conditions there may have been.

The audits are provided as required by the Department. In our requests for funds from our account in Ottawa we are required to insert the following:

> *"The funds will be expended as stated in the Band Council Resolution and accounted for in our Band's Annual Audit. The Band will provide the Department with a copy of the audited financial statements in accordance with "The Accounting Guide for Indian Bands in Canada" within 90 days of the fiscal year end in the same manner as in previous years".*

I believe we added the qualifier on the end in the late 1980's to cover off our trust conditions.

2. Capital Project Funds Requests

a) Fort McMurray

In 1988 the Band requested funds from its capital account held by the Department for the purchase of a hotel in Fort McMurray. The following correspondence is attached.

i) January 29, 1988 letter from the Department which requests information including:

"The name of the purchaser for the Band (Bands cannot buy real estate directly. They generally do this through Band owned corporations or a Trustee)".

ii) March 24, 1988 letter from the Department which indicated the Department required "confirmation that shares in the corporation are held under written agreement "in trust" for the Band Members.".

iii) March 24, 1988 letter from Mike McKinney to Gregor MacIntosh confirming that "the shares in the above corporation are held in trust under a written declaration of trust for the members of the Band".

There was a letter from Gregor MacIntosh quite some time later stating that we had not yet forwarded a copy of the trust agreement as we had allegedly undertaken to do. We wrote back advising that this undertaking had not been made. We cannot locate this exchange of correspondence.

b) Grocery Store

In 1989 the Band requested funds from its capital account held by the Department for the construction and set-up of a grocery store in Slave Lake. During this transaction we advised the Department that the company that owned the Grocery Store would be owned by another company in trust for the Band (the grocery store trust). As part of this transaction we disclosed that this company (the Trustee) was itself held in trust for members of the Band. The Department requested this documentation but we refused to supply it as it was not relevant to the transaction. We did provide the grocery store trust to them.

3. Self-Government Negotiations

Although the parties involved are different the fact of the existence of trusts was disclosed to departmental officials during negotiations. The provisions of the sub-agreements which speak of "existing trusts" were circulated in the Department to officials interested in financial administration which would likely be people in Lands, Revenues and Trusts.

4. Early Trust Discussions

Back in the early 1980's, the Band had discussions with the Department regarding the establishment of the Sawridge Band Capital Trust which would hold all of the Band's property and the trust funds held by Ottawa. There were discussions with the Province including a tentative agreement to amend the Perpetuities Act to allow the trust to be perpetual. While there is correspondence from two ministers on this topic, we have not located any evidence that the formation of the trusts was disclosed. We will attempt to find out from Mr. Fennell if this was disclosed in any of his meetings.

These are all the areas we have considered where trusts were disclosed to the Department. If any other areas occur to us, we will let you know. If you have any questions or concerns, please do not hesitate to contact us.

Yours truly,



Michael R. McKinney, B. Comm., LL.B.
Executive Director

MM/dd

encl.\docs\cullity

BY DEX

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

2/3

MAR 24 1988

Your file Votre référence

Our file Notre référence

Chief Walter Twinn
Sawridge Band
Sawridge Group of Companies
Box 326
Slave Lake, Alberta
T0G 2A0

RE: BCR 1987-88-03
Ramada Hotel in Fort McMurray

Dear Chief Twinn:

With respect to the band's proposed hotel purchase we require the following information in order to complete our assessment and to make a recommendation to the Minister:

1. A financial plan for the next three years which details the additional cash that may be required to operate the hotel, including:

   (a) temporary cash flow deficiencies;
   (b) increased marketing costs;
   (c) refurbishing and renovation costs;
   (d) income tax payments (if any);
   (e) any final payments on closing under clause 4 of the Offer to Purchase.

2. As discussed on March 21, 1988, a decision to release capital funds must show a benefit to the band. In this regard we require:

   (a) the name of the corporation that will hold the hotel for the band;
   (b) a description of its share structure;
   (c) written confirmation that the company is wholly owned by the band; and
   (d) confirmation that shares in the corporation are held, under written agreement, "in trust" for the band members.

... /2

Canada

3/3

3. Since BCR 1988-89-03 does not specify the date of the band council meeting, we require this information on an original BCR. In addition, since the BCR identifies Sawridge Holdings Ltd. as the purchaser on behalf of the band we will require a new BCR should the purchaser change.

I trust this will be of assistance in preparing the required materials.

Gregor MacIntosh
Director General
Membership, Revenues and
Band Governance

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

FIRD TRUSTS

MAR 3 0 1994

RECEIVED
APR - 8 1994
Sawridge

Mr. Maurice C. Cullity
Davies, Ward & Beck
Barristers & Solicitors
P.O. Box 63, Suite 4400
1 First Canadian Place
TORONTO ON M5X 1B1

Dear Mr. Cullity:

Thank you for your letter of March 16, 1994 concerning the existence of trusts that were apparently established on behalf of members of the Sawridge Band. I appreciate your willingness to meet to discuss this matter.

A meeting is desirable because of the Minister's statutory responsibilities for ensuring that moneys released to the band, pursuant to sections 61 to 69 of the *Indian Act*, are used for the benefit of the band and its members.

It may be that a relatively small amount of infomation on the above trusts, the existence of which was unknown to the Minister, will provide sufficient assurances that the above concerns have been met. We may also be assured that the assets are being held in those trusts for the benefit of all band members, including those who may be entitled to membership, as will be determined by the current related litigation.

To make the necessary arrangements for the meeting, would you please contact my office at (819) 953-5577.

Yours sincerely,

Original by/par
W. VAN ITERSON

W. (Bill) Van Iterson
A/Assistant Deputy Minister
Lands and Trust Services

c.c.: Chief Walter Twinn
Gregor MacIntosh
Ken Kirby
Chris McNaught

Canada

ORIGINAL in Capital/Red file 93-94

Lice Trusts ORIGINAL IN TRUST

COPY

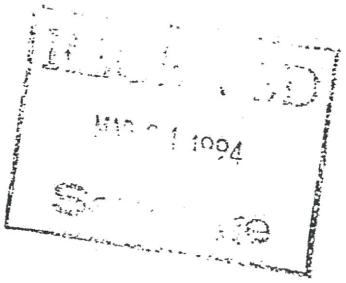
DAVIES, WARD & BECK
BARRISTERS & SOLICITORS

MAURICE C. CULLITY, Q.C.
DIRECT LINE (416) 863-5522

File No. 21902

March 16, 1994

W. Van Iterson, Esq.
A/Assistant Deputy Minister
Lands and Trust Services
Indian and Northern Affairs Canada
Ottawa, Ontario
K1A 0H4



Dear Sir:

Sawridge Indian Band

I refer to the letters of May 7, 1994 and December 23, 1993 addressed to Chief Walter Twinn. Sb March

For some years we have been retained to advise the Band with respect to, among other matters, any trusts established for its members. Accordingly, I have been instructed to respond to any questions you may have in connection with such trusts to the extent that you are entitled to receive answers.

You will understand that the Band, like any other community, organization or entity engaged in business and other activities for the benefit of its members is reluctant to release financial information relating to such activities to anyone other than such members unless it determines that this is in its best interests or is required by law. For this reason, although I have no objection to meeting with individuals from your department, it would be helpful if you would indicate in advance why you believe such a meeting to be desirable and the grounds, if any, on which you believe you are entitled to receive information about the trusts referred to in the letter from Ms. Porteous.

It would be appreciated if you would address your reply and any further correspondence or questions on this matter to this office.

Yours very truly,

Maurice C. Cullity

MCC/dp

cc: Chief Walter Twinn

bcc: M. Henderson

P.O. BOX 63, SUITE 4400 1 FIRST CANADIAN PLACE, TORONTO, ONTARIO, CANADA M5X 1B1
TELEPHONE (416) 863-0900 FAX (416) 863-0871

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

RECEIVED
JAN 03 1994

DEC 23 1993

Chief Walter Twinn
Sawridge Band
P.O. Box 326
SLAVE LAKE AB T0G 2A0

Dear Chief Twinn,

As a result of the proceedings of the Bill C-31 legal action which is now before the courts, I have recently been informed of the existence of trusts which have been established on behalf of the members of the Sawridge Band.

I understand that these trusts hold substantial sums which, to a large extent, have been derived from band capital and revenue moneys previously released by the Minister of the Department of Indian Affairs and Northern Development. The capital and revenue moneys were expended pursuant to sections 64 and 66 of the *Indian Act*, for the benefit of the members of your band.

Along with Ken Kirby and Gregor MacIntosh from this department, I would be pleased to meet with you and your band council or other representatives in Alberta, preferably sometime in January 1994, to discuss these trusts.

I trust you will find this satisfactory. My office will contact you in January 1994, to make the necessary arrangements.

Yours sincerely,

Wendy Porteous

Wendy F. Porteous
Assistant Deputy Minister
Lands and Trust Services

Canada

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada
Indian and Inuit Affairs / Affaires indiennes et inuit

Chronological No. – Numéro consécutif
454-117-85/86

File Reference – Nº de réf. du dossier

BAND COUNCIL RESOLUTION
RÉSOLUTION DE CONSEIL DE BANDE

NOTE: The words "From our Band Funds" "Capital" or "Revenue", which ever is the case, must appear in all resolutions requesting expenditures from Band Funds
NOTA: Les mots "des fonds de notre bande "Capital" ou revenu" selon le cas doivent paraître dans toutes les résolutions portant sur des dépenses à même les fonds des bandes

THE COUNCIL OF THE / LE CONSEIL DE LA BANDE INDIENNE: SAWRIDGE BAND
AGENCY
DISTRICT: LESSER SLAVE LAKE
PROVINCE: ALBERTA
PLACE / NOM DE L'ENDROIT: SLAVE LAKE
DATE: 15 (DAY – JOUR) 04 (MONTH – MOIS) AD 19 85 (YEAR – ANNÉE)

Current Capital Balance / Solde de capital $
Committed – Engagé $
Current Revenue balance / Solde de revenu $
Committed – Engagé $

DO HEREBY RESOLVE:
DÉCIDE, PAR LES PRÉSENTES:

WHEREAS Chief Walter P. Twinn holds as trustee for the Sawridge Indian Band a certain debenture dated the 21st day of January, 1985;

AND WHEREAS the aforesaid trust was created to protect the interests of the members of the Sawridge Indian Band;

AND WHEREAS it is deemed expedient and in the interest of the said members to pass this Resolution:

AND UPON IT BEING MOVED by George Twin and seconded by Walter Felix THEREFORE BE IT UANIMOUSLY RESOLVED at this duly convened and constituted meeting of the Sawridge Band Council at the Band Office in Slave Lake, Alberta, this 15th day of April, A.D. 1985, that Chief Walter P. Twinn is hereby directed and authorized to transfer the aforesaid debenture to the Trustees of the trust dated the 15th day of April, A.D. 1985, to be held by the said Trustees as an accretion to the assets of the trust and subject in all respects to the terms and provisions thereof.

A quorum for this Bande / Pour cette bande le quorum est
consists of 2 / fixé à
Council Members / Membres du Conseil

(Chief – Chef) Walter P. Twinn
(Councillor – conseiller) George Twin
(Councillor – conseiller) Walter Felix Twin
(Councillor – conseiller)
(Councillor – conseiller)
(Councillor – conseiller)
(Councillor – conseiller)
(Councillor – conseiller)
(Councillor – conseiller)
(Councillor – conseiller)

FOR DEPARTMENTAL USE ONLY – RÉSERVÉ AU MINISTÈRE

1. Band Fund Code / Code du compte de bande	2. COMPUTER BALANCES – SOLDES D'ORDINATEUR A. Capital $	B. Revenue – Revenu $	3. Expenditure / Dépenses $	4. Authority – Autorité Indian Act Sec / Art. de la Loi sur les Indiens	5. Source of Funds / Source des fonds ☐ Capital ☐ Revenue / Revenu
6. Recommended – Recommandable			Approved – Approuvable		
Date	Recommending Officer – Recommandé par		Date	Approving Officer – Approuvé par	

7-2

Tab 19

Canada Federal Statutes
Constitution Act, 1982
Schedule B — Constitution Act, 1982
I — Canadian Charter of Rights and Freedoms (ss. 1-34)
Application of Charter

Most Recently Cited in: R. v. Mamouni, 2017 ABCA 347, 2017 CarswellAlta 2016, 58 Alta. L.R. (6th) 283, [2017] A.W.L.D. 6138, [2017] A.W.L.D. 6139 | (Alta. C.A., Oct 25, 2017)

R.S.C. 1985, App. II, No. 44, Sched. B, Pt. I, s. 32

s 32.

Currency

32.

32(1)Application of Charter

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.

32(2)Exception

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

Currency

Federal English Statutes reflect amendments current to February 28, 2019
Federal English Regulations are current to Gazette Vol. 153:5 (March 6, 2019)

End of Document

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Tab 20

Most Negative Treatment: Distinguished
Most Recent Distinguished: Nortel Networks Corp., Re | 2017 ONSC 700, 2017 CarswellOnt 1120, 31 C.C.P.B. (2nd) 1, 44 C.B.R. (6th) 265, 275 A.C.W.S. (3d) 692 | (Ont. S.C.J. [Commercial List], Jan 30, 2017)

1986 CarswellBC 411
Supreme Court of Canada

Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580

1986 CarswellBC 411, 1986 CarswellBC 764, [1986] 2 S.C.R. 573, [1986] S.C.J. No. 75, [1987] 1 W.W.R. 577, [1987] D.L.Q. 69 (note), 25 C.R.R. 321, 2 A.C.W.S. (3d) 243, 33 D.L.R. (4th) 174, 38 C.C.L.T. 184, 71 N.R. 83, 87 C.L.L.C. 14,002, 9 B.C.L.R. (2d) 273, J.E. 87-81

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 580, PETERSON and ALEXANDER v. DOLPHIN DELIVERY LTD. et al.

Dickson C.J.C., Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

Heard: December 6 and 7, 1984
Judgment: December 18, 1986
Docket: No. 18720

Counsel: *F. Schroeder*, for appellants.
P. Gall and *D. Jordan*, for respondent.
J.M. Mabbutt and *P.K. Doody*, for intervener the Attorney General of Canada.
J. Giles, Q.C. and *R. McDonell*, for intervener the Attorney General of British Columbia.
B.R. Burrows, for intervener the Attorney General for Alberta.
J.L. Thistle and *D.E. Fry*, for intervener the Attorney General of Newfoundland.

Subject: Torts; Labour; Constitutional
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.2 Scope of application
XI.2.a Bodies subject to Charter
XI.2.a.vii Miscellaneous
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.i Nature and scope of expression
Labour and employment law
I Labour law
I.4 Industrial disputes
I.4.b Picketing
I.4.b.i Legality
I.4.b.i.B Effect of Charter of Rights and Freedoms
Labour and employment law
I Labour law

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I.4 Industrial disputes
I.4.b Picketing
I.4.b.i Legality
I.4.b.i.E Secondary picketing
I.4.b.i.E.5 Effect of Charter of Rights and Freedoms

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Scope of application — Bodies subject to Charter

Labour law — Industrial disputes — Strikes — Legality — Secondary picketing — Plaintiff obtaining injunction restraining secondary picketing — Peaceful picketing a form of expression involving exercise of right of freedom of expression — Charter not applying to action between private parties based on common law tort of inducing breach of contract.

Civil liberties and human rights — Enforcement under Charter of Rights and Freedoms — Scope and interpretation of Charter — Parties — Charter not applying to action between private parties which does not rely on any government action.

Civil liberties and human rights — Enforcement under Charter of Rights and Freedoms — Scope and interpretation of Charter — Limitations on guaranteed rights and freedoms — Injunction enjoining secondary picketing constituting reasonable limit on freedom of expression.

Civil liberties and human rights — Enforcement under Charter of Rights and Freedoms — Scope and interpretation of Charter — Charter applying to common law.

Injunctions — Injunctions generally — Quia timet injunctions — Injunction enjoining peaceful secondary picketing infringing freedom of expression but justifiable under s. 1 of Charter — In any event Charter not applying to action between private parties which does not rely on any government action.

The defendant union was involved in a labour dispute with P. Inc., a courier company based in Ontario with operations in British Columbia, which had locked out its employees. The plaintiff courier company which had previously performed delivery work for P. Inc. then commenced doing deliveries for a new firm with a corporate connection to P. Inc. The union applied to the British Columbia Labour Relations Board for a declaration that the plaintiff was an ally of P. Inc. Such a declaration would have made picketing of the plaintiff by the union lawful. The board held that it was without jurisdiction as the dispute was governed by the Canada Labour Code. Because the Canada Labour Code makes no provision for ally picketing, the legality of the picketing fell for determination under the common law. When notified that the union intended to picket the plaintiff's premises, the plaintiff obtained a quia timet injunction. The chambers judge found that the plaintiff was a third party and that the purpose of the intended picketing was tortious and its primary intent was to injure the plaintiff rather than to disseminate information and to protect the union's interest. The union's appeal, in which it argued that the enjoined picketing was an exercise of rights of freedom of association and expression guaranteed by the Canadian Charter of Rights and Freedoms, was dismissed and the union further appealed.

Held:

Appeal dismissed.

Per MCINTYRE J. (DICKSON C.J.C., ESTEY, CHOUINARD and LE DAIN JJ. concurring): The Canadian Charter of Rights and Freedoms does not apply to private litigation which is without any connection with government. Section 32 specifies the actors to whom the Charter applies, and it is clear from the language of the section that the Charter applies to the Parliament and government of Canada and to the legislatures and governments of the provinces in respect of all matters within their respective authorities. Where "government" is used in the section, it refers to the executive or administrative branch of government. Accordingly, the Charter applies to the legislative, executive and administrative branches of government whether their action is invoked in public or private litigation. As well, the Charter applies to the common law as well as to legislation: the language of s. 52(1), particularly in its French version, is broad enough to include the common law, and to adopt a construction of the section which excluded the whole of the common law would be unrealistic and contrary to the language of the section. However, there must be some element of governmental intervention before the Charter is applicable. Although it is difficult to define the necessary element of governmental intervention, and the Charter may apply to many forms of delegated legislation, regulations, orders in council and possibly municipal by-laws, where one private party sues another private party relying on the common law and where no

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act of government is relied upon, the Charter will not apply. This case involved a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint as inducing breach of contract but did not involve any exercise of or reliance upon governmental action. Accordingly, the Charter did not apply.

In any event, were the Charter applicable, although picketing involves at least some element of expression and peaceful picketing is therefore an exercise of the right of freedom of expression protected by the Charter, the injunction in this case would have been justified under s. 1. On the evidence before the chambers judge, it was clear that the plaintiff's concern was pressing and substantial in that it would have suffered in the absence of the injunction. Although this economic interest might not by itself suffice to justify the injunction as a reasonable limitation on the right of freedom of expression, picketing causes social disruption which is tolerable only as an inevitable corollary to collective bargaining. Accordingly, it is reasonable to restrain secondary picketing so that the conflict does not escalate beyond the actual parties and harm others. Moreover, the injunction in this case was an interim injunction and met the requirement of proportionality.

Per BEETZ J.: In the circumstances of this case, the enjoined picketing would not have been a form of expression and therefore no question of infringing s. 2(*b*) of the Charter arose.

Per WILSON J.: Although the Charter did not apply in the circumstances of this case, the test under s. 1 when weighing a principle of common law against a protected fundamental freedom is objective and in this case would involve objectively determining whether the tort of inducing a breach of contract represents a reasonable limit under s. 1 on the freedom of expression in the labour relations context, and if so, whether it should be granted in this particular case, giving some consideration to the freedom of speech of the picketers.

Table of Authorities

Cases considered:

Abrams v. U.S., 250 U.S. 616, 63 L. Ed. 1173 (1919) — *considered*

Blainey v. Ont. Hockey Assn. (1985), 52 O.R. (2d) 225, 21 D.L.R. (4th) 599, 6 C.H.R.R. D/3016, reversed 54 O.R. (2d) 513, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 21 C.R.R. 44, 14 O.A.C. 194 (C.A.) [leave to appeal to S.C.C. refused 10 C.P.R. (3d) 450n, 21 C.R.R. 44n] — *distinguished*

Boucher v. R., [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C. 1, [1951] 2 D.L.R. 369 [Que.] — *considered*

Cat Productions Ltd. v. Macedo, [1985] 1 F.C. 269, 5 C.I.P.R. 207, 5 C.P.R. (3d) 71 (T.D.) — *considered*

Channel Seven T.V. Ltd. v. N.A.B.E.T., [1971] 5 W.W.R. 328, 21 D.L.R. (3d) 424 (Man. C.A.) — *considered*

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*) [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 2 C.P.R. (3d) 1, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241 — *referred to*

Milk Wagon Drivers Union of Chicago, Loc. 753 v. Meadowmoor Dairies Inc., 312 U.S. 287, 85 L. Ed. 386 (1941) — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 — *referred to*

R. v. Oakes, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 — *considered*

Ref. re Alta. Legislation, [1938] S.C.R. 100, [1938] 2 D.L.R. 81 [affirmed [1939] A.C. 117, [1938] 3 W.W.R. 337, (sub nom. *A.G. Alta. v. A.G. Can.*) [1938] 4 D.L.R. 433] — *considered*

Switzman v. Elbling, [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337 [Que.] — *considered*

Thornhill v. Alabama, 310 U.S. 88, 84 L. Ed. 1093 (1940) — *referred to*

Statutes considered:

Canada Labour Code, R.S.C. 1970, c. L-1

Canadian Charter of Rights and Freedoms

s. 1

s. 2(b), (d)

s. 15(1)

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s. 32

Constitution Act, 1867

s. 12

s. 16

s. 132

Constitution Act, 1982

s. 52(1)

Human Rights Code, S.O. 1981, c. 53

s. 19(2)

Labour Code, R.S.B.C. 1979, c. 212

s. 85(3) [am. 1982, c. 59, s. 4(c)]

s. 88

Authorities considered:

Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter" (1983), 13 Man. L.J. 505.

Gibson, "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213.

Hogg, Constitutional Law of Canada, 2nd ed. (1985), pp. 670-78, 713.

Manning, Rights, Freedoms and the Courts (1983).

McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 25 Alta. L. Rev. 361, p. 367.

Mill, On Liberty (1859), On Liberty and Considerations on Representative Government (1946), pp. 14, 16.

Milton, Areopagitica: A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England (1644).

Swinton, "Application of the Canadian Charter of Rights and Freedoms", Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), pp. 44-45, 47-48.

Tarnopolsky, "The Equality Rights", Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), pp. 422-23.

Weiler, Reconcilable Differences (1980), pp. 64-65, 80.

Words and phrases considered:

FREEDOM OF EXPRESSION

Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for historical development of the political, social and educational institutions of western society. Representative

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democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

. . . . .

Is freedom of expression involved in this case? In seeking an answer to this question, it must be observed at once that in any form of picketing there is involved at least some element of expression. The picketers would be conveying a message which at a very minimum would be classed as persuasion, aimed at deterring customers and prospective customers from doing business with the respondent.

. . . . .

The freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct. We need not, however, be concerned with such matters here because the picketing would have been peaceful. I am therefore of the view that the picketing sought to be restrained would have involved the exercise of the right of freedom of expression.

GOVERNMENT

Section 32(1) [of the *Charter*] refers to the Parliament and Government of Canada and to the legislatures and governments of the provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in s. 32 it refers not to government in its generic sense — meaning the whole of the governmental apparatus of the state — but to a branch of government. The word "government", following as it does the words "parliament" and "legislature", must then, it would seem, refer to the executive or administrative branch of a government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word "government" is used in s. 32 of the *Charter* in the sense of the executive government of Canada and the provinces. This is the sense in which the words "Government of Canada" are ordinarily employed in the sections of the *Constitution Act, 1867* [(30 & 31 Vict.), c. 3]. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words "Government of Canada", particularly where they follow a reference to the word "Parliament", almost always refer to the executive government.

GOVERNMENTAL ACTION

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation.

LAW

The English text [of s. 52 of the *Constitution Act, 1982*] provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect". If this language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "elle rend inopérantes les dispositions incompatibles de tout autre règle de droit". . . . To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

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observed as well that the French text adds strong support to this conclusion in its employment of the words "elle rend inoperantes les dispositions incompatibles *de tout autre regle de droit*" (emphasis added). To adopt a construction of s. 52(1) which would exclude from Charter application the whole body of the common law, which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.

Does the Charter apply to private litigation?

33 This question involves consideration of whether or not an individual may found a cause of action or defence against another individual on the basis of a breach of a Charter right. In other words, does the Charter apply to private litigation divorced completely from any connection with government? This is a subject of controversy in legal circles and the question has not been dealt with in this court. One view of the matter rests on the proposition that the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the government. It was intended to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.

34 Support for this view is found in Peter W. Hogg, above, at pp. 670-78, and in an article by Katherine Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms: Commentary.

35 At pp. 674-75 in his text, Professor Hogg says:

> The rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights. The Charter regulates the relations between government and private persons, but it does not regulate the relations between private persons and private persons. Private action is therefore excluded from the application of the Charter. Such actions as an employer restricting an employee's freedom of speech or assembly, a parent restricting the mobility of a child, or a landlord discriminating on the basis of race in his selection of tenants, cannot be breaches of the Charter, because in no case is there any action by the Parliament or government of Canada or by the Legislature or government of a province. In cases where private action results in a restriction of a civil liberty, there may be a remedy for the aggrieved person under a human rights code, under labour law, family law, tort law, contract law or property law, or under some other branch of the law governing relations between private persons; but there will be no breach of the Charter.

36 In her discussion of this question, Professor Swinton has pointed out that certain sections of the Charter might support the proposition that it could apply in private litigation, but she makes it clear on an overall view of the Charter that its application to private litigation is, in her view, excluded. She has pointed out that the Charter is not designed to be employed in private litigation and by its very nature it is not suited for that purpose. At pp. 47-48, she says:

> Moreover, in considering whether the Charter should be directly applicable, the courts should bear in mind its drawbacks as a method of dealing with private action and the advantages of leaving the regulation of such conduct to human rights legislation or other legal controls. Legislation can be tailored to deal with the tension between privacy rights and equality or that between freedom of expression and prohibition of hate literature. It can expressly limit the applicability of equality guarantees to services or to areas open to the public, or specify the right to set *bona fide* job qualifications. The Charter is not so refined, and provides no guidelines for its application. These would have to be judicially determined.
>
> As well, statutes such as particular human rights and equal pay laws contain an administrative structure designed to promote mediated settlements of disputes, rather than resort to litigation. There is an elaborate structure of conciliation preceding adjudications by an administrative tribunal, which can have an educative effect between the parties. The Charter will be interpreted for the most part in the courts, where there is no built-in mechanism to encourage settlement.

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Tab 21

2003 ABQB 152
Alberta Court of Queen's Bench

Horse Lake First Nation v. Horseman

2003 CarswellAlta 272, 2003 ABQB 152, [2003] 8 W.W.R. 473, [2003] C.N.L.R. 193, [2003] A.J. No. 227, 121 A.C.W.S. (3d) 429, 17 Alta. L.R. (4th) 93, 223 D.L.R. (4th) 184, 337 A.R. 22 at 34

HORSE LAKE FIRST NATION, as represented by its Chief and Council, CHIEF DION HORSEMAN and COUNCILLORS DEAN HORSEMAN, RICK HORSEMAN, PRISCILLA HORSEMAN and PETER JOACHIM (Applicants / Plaintiffs) and FAYE HORSEMAN, CHARLOTTE LYNN HORSEMAN, NORMA HORSEMAN, FRANCIS CROSS also known as FRANCIS PARSONS, JUDY BELCOURT, GAIL BELCOURT and MAVIS BELLEROSE (Defendants / Respondents)

Lee J.

Heard: January 29-31, 2003
Judgment: February 13, 2003
Docket: Edmonton 0303-01739

Proceedings: additional reasons to (2003), 2003 ABQB 114, [2003] 2 C.N.L.R. 180 (Alta. Q.B.)

Counsel: Heather L. Treacy for Plaintiffs

Subject: Public; Constitutional; Civil Practice and Procedure; Human Rights

Related Abridgment Classifications

Aboriginal and Indigenous law
I Constitutional issues
I.6 Canadian Charter of Rights and Freedoms
Aboriginal and Indigenous law
IV Self-government of Indigenous people
IV.2 Self-governing bodies
IV.2.a Bands and First Nations
Civil practice and procedure
XXIV Costs
XXIV.2 Jurisdiction and discretion as to costs
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.b Freedom of expression
XI.3.b.i Nature and scope of expression

Headnote

Native law --- Constitutional issues — Rights under constitutional statutes generally — Canadian Charter of Rights and Freedoms

Defendants, members of plaintiff First Nation, occupied its offices demanding forensic audit, copies of Band Council resolutions, "mandatory drug testing for Chief and Council," and other relief — Plaintiffs brought action in defamation and trespass and applied for interim injunction restraining seven named defendants from interfering with its ongoing business operations and governance — Plaintiffs filed supplementary affidavits providing further details as to prejudicial effects of disruption on Band members as whole, and negative effects of defendants' alleged improper actions on Band's

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reputation in business and general community — Interim conclusion was reached that Charter applies to aboriginal reservations and Bands and protects freedom of expression respecting Band Council matters — Application of Charter to aboriginal Native Band Councils is unsettled area, and was critical to plaintiffs' action — Section 32 of Charter applies to both Parliament and provincial Legislatures, preventing them from enacting laws inconsistent with Charter — It follows that any body exercising statutory authority is bound by Charter — Indian Bands and Band Councils, which have authority to govern and regulate persons and activity on reserves, derive their authority to act from Indian Act — Band Councils fall within definition of federal board, commission or tribunal in Federal Court Act — Accordingly, Charter should apply to by-laws and actions of Band Councils, and Band members should be able to assert Charter rights against Band Councils — Defendants whom Band sought to restrain from protesting should be able to raise freedom of expression against Band Council — Matter adjourned for hearing respecting interim injunction.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Freedom of expression — Nature and scope of expression

Plaintiffs brought action in defamation and trespass and applied for interim injunction restraining seven named defendants from interfering with its ongoing business operations and governance — Plaintiffs filed supplementary affidavits providing further details as to prejudicial effects of disruption on Band members as whole, and negative effects of defendants' alleged improper actions on Band's reputation in business and general community — Interim conclusion was reached that Charter applies to aboriginal reservations and Bands and protects freedom of expression respecting Band Council matters — Application of Charter to aboriginal Native Band Councils is unsettled area, and was critical to plaintiffs' action — Section 32 of Charter applies to both Parliament and provincial Legislatures, preventing them from enacting laws inconsistent with Charter — It follows that any body exercising statutory authority is bound by Charter — Indian Bands and Band Councils, which have authority to govern and regulate persons and activity on reserves, derive their authority to act from Indian Act — Band Councils fall within definition of federal board, commission or tribunal in Federal Court Act — Accordingly, Charter should apply to by-laws and actions of Band Councils, and Band members should be able to assert Charter rights against Band Councils — Defendants whom Band sought to restrain from protesting should be able to raise freedom of expression against Band Council — Matter adjourned for hearing respecting interim injunction.

Native law --- Constitutional issues — Bands and band government

Plaintiffs brought action in defamation and trespass and applied for interim injunction restraining seven named defendants from interfering with its ongoing business operations and governance — Plaintiffs filed supplementary affidavits providing further details as to prejudicial effects of disruption on Band members as whole, and negative effects of defendants' alleged improper actions on Band's reputation in business and general community — Interim conclusion was reached that Charter applies to aboriginal reservations and Bands and protects freedom of expression respecting Band Council matters — Application of Charter to aboriginal Native Band Councils is unsettled area, and was critical to plaintiffs' action — Section 32 of Charter applies to both Parliament and provincial Legislatures, preventing them from enacting laws inconsistent with Charter — It follows that any body exercising statutory authority is bound by Charter — Indian Bands and Band Councils, which have authority to govern and regulate persons and activity on reserves, derive their authority to act from Indian Act — Band Councils fall within definition of federal board, commission or tribunal in Federal Court Act — Accordingly, Charter should apply to by-laws and actions of Band Councils, and Band members should be able to assert Charter rights against Band Councils — Defendants whom Band sought to restrain from protesting should be able to raise freedom of expression against Band Council — Matter adjourned for hearing respecting interim injunction.

Practice --- Costs — Jurisdiction and discretion as to costs

Plaintiffs brought action in defamation and trespass and applied for interim injunction restraining seven named defendants from interfering with its ongoing business operations and governance — Plaintiffs filed supplementary affidavits providing further details as to prejudicial effects of disruption on Band members as whole, and negative effects of defendants' alleged improper actions on Band's reputation in business and general community — Court invited counsel to make further submissions on whether it should exercise its jurisdiction to make pre-emptive order for costs on one-time basis to allow unrepresented defendants to have order reviewed at plaintiffs' expense — When pre-emptive costs are awarded on exceptional basis, legal and factual issues are usually so complex that defendants' ability to defend

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themselves would otherwise be undermined — Inference could be drawn from defendants' demands for "forensic audits" and "mandatory drug testing for Chief and Band Council" that there were more complex issues underlying basic action — Matter would then be equivalent to constitutional challenge or "matter of great public importance" — Charter should apply to by-laws and actions of Band Councils, and defendants whom Band sought to restrain from protesting should be able to raise freedom of expression against Band Council — Possible application of trust and pension cases was unsettled area of some complexity that might require preliminary funding of defendants' legal expenses so that they could properly advance these issues — Any decision as to pre-emptive funding would take place only after thorough analysis of law in this area, determination as to whether defendants were raising any complex issues, their financial circumstances, and related questions.

Table of Authorities

Cases considered by *Lee J.*:

British Columbia (Minister of Forests) v. Okanagan Indian Band, 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.) — referred to

Canada (Human Rights Commission) v. Gordon Band Council, 2000 CarswellNat 1514, 190 D.L.R. (4th) 418, 257 N.R. 254, [2001] 1 F.C. 124, 2000 CarswellNat 3286, 184 F.T.R. 320 (note), 27 Admin. L.R. (3d) 286, [2001] 1 C.N.L.R. 1, 39 C.H.R.R. D/60 (Fed. C.A.) — referred to

Corbiere v. Canada (Minister of Indian & Northern Affairs), 239 N.R. 1, 1999 CarswellNat 663, 1999 CarswellNat 664, (sub nom. *Corbière v. Canada (Minister of Indian & Northern Affairs)*) 173 D.L.R. (4th) 1, (sub nom. *Canada (Minister of Indian & Northern Affairs) v. Corbiere*) 61 C.R.R. (2d) 189, [1999] 3 C.N.L.R. 19, [1999] 2 S.C.R. 203, 163 F.T.R. 284 (note) (S.C.C.) — referred to

Horse Lake First Nation v. Horseman, 2003 ABQB 114, 2003 CarswellAlta 220, [2003] 8 W.W.R. 457 (Alta. Q.B.) — referred to

Nakochee v. Linklater (April 29, 1993), Whalen J. (Ont. Gen. Div.) — referred to

Paul Band (Indian Reserve No. 133) v. R. (1983), (sub nom. *R. v. Paul Indian Band*) 50 A.R. 190, 29 Alta. L.R. (2d) 310, [1984] 2 W.W.R. 540, (sub nom. *R. v. Paul Indian Band*) [1984] 1 C.N.L.R. 87, 1983 CarswellAlta 212 (Alta. C.A.) — considered

R. v. Hatchard (1991), [1993] 1 C.N.L.R. 96, 1991 CarswellOnt 1059 (Ont. Gen. Div.) — considered

Scrimbitt v. Sakimay Indian Band Council (1999), [2000] 1 F.C. 513, 1999 CarswellNat 2176, [2000] 1 C.N.L.R. 205, 69 C.R.R. (2d) 295, (sub nom. *Scrimbitt v. Sakimay Indian Band*) 179 F.T.R. 210, 1999 CarswellNat 3011 (Fed. T.D.) — considered

Spracklin v. Kichton, 2003 ABCA 9, 2003 CarswellAlta 32, 220 D.L.R. (4th) 766 (Alta. C.A.) — considered

Whitebear Band v. Carpenters Provincial Council (Saskatchewan), [1982] 3 W.W.R. 554, [1982] 3 C.N.L.R. 181, 15 Sask. R. 37, 135 D.L.R. (3d) 128, 1982 CarswellSask 153 (Sask. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — considered

s. 7 — considered

s. 8 — referred to

s. 15 — referred to

s. 24 — referred to

s. 32 — considered

Canadian Human Rights Act, R.S.C. 1985, c. H-6

s. 67 — referred to

Federal Court Act, R.S.C. 1985, c. F-7

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Generally — referred to

s. 2(1) "federal board, commission or other tribunal" — considered

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 2(1) "band" — referred to

s. 2(1) "council of the band" — referred to

s. 81(1) — considered

s. 81(2) — considered

s. 81(3) — considered

Matrimonial Property Act, R.S.A. 2000, c. M-8

Generally — referred to

s. 1(e) "spouse" — referred to

Narcotic Control Act, R.S.C. 1985, c. N-1

s. 4(2) — referred to

Words and phrases considered:

Indian Band Councils

Indian Band Councils fall within the definition of a federal board, commission or tribunal in the *Federal Court Act*, R.S.C. 1985, c. F-7.

ADDITIONAL REASONS to judgment reported at 2003 ABQB 114, 2003 CarswellAlta 220, [2003] 2 C.N.L.R. 180, [2003] 8 W.W.R. 457 (Alta. Q.B.), considering whether Charter applies to native band councils and general law respecting pre-emptive costs orders

***Lee J.*:**

1 In my written Reasons for Judgment dated February 5, 2003 now reported at *Horse Lake First Nation v. Horseman*, 2003 ABQB 114 (Alta. Q.B.) [17 Alta. L.R. (4th) 78], I discussed two issues, namely whether the Charter applied to Aboriginal Band Councils such as the Horse Lake First Nation ("HLFN"); and the general law with respect to pre-emptive cost orders.

2 Counsel for the HLFN has now filed further written submissions with the Court on February 7, 2003 addressing the issue of interim costs in advance of trial. These submissions concede that costs are usually in the discretion of the trial Judge, and that the Court has an inherent jurisdiction to order one party to pay costs in advance of trial in exceptional cases. Counsel submits that this extraordinary remedy should not be applied in this case.

3 One point that counsel has raised that has not previously been dealt with is that when Courts do on an exceptional basis award pre-emptive costs, it is usually in the case where the legal and factual issues are so complex that the Defendants' ability to defend themselves is undermined without an interim order for costs. In the case at bar, counsel for the HLFN submits that the legal and factual issues are not complex, as this is a trespass and defamation action.

4 This may be the case, however it is open for one to draw the inference that there may be greater and more complex issues underlying the basic so-called trespass and defamation aspects of this suit. This inference can be drawn based on the fact that the "occupation" of the HLFN Band Offices appears to have been motivated by demands by the Respondents for

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"forensic audits", and for mandatory drug testing for the Chief and Band Council, which both would connote allegations of poor management.

5 If the latter is in fact what the Respondents are challenging, the matter can be complicated, and is equivalent to the "constitutional challenge or a case that is a matter of great public importance" that counsel for the HLFN seems to concede could attract a pre-emptive costs order in paragraph 8 of her written submissions.

6 This is particularly the case if there is an argument, as there appears to be in this case, as to whether or not the Charter applies to Aboriginal Band Councils. I will be discussing this whole issue as to the Charter's applicability to Aboriginal Band Councils later in these Supplementary Reasons.

7 As for the various other cases that have been cited by counsel for the HLFN, one does bear some special mention in these Supplementary Reasons.

8 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2001] B.C.J. No. 2279 (B.C. C.A.) was applied by Watson, J. in *Spracklin v. Kichton*, [2003] A.J. No. 29, 2003 ABCA 9 (Alta. C.A.). Counsel for HLFN correctly describes in paragraph 18 of her latest submissions that the plaintiff in the case before Watson, J. had been involve in a common-law relationship with the defendant, and claimed that she should be considered a "spouse" for the purposes of the *Matrimonial Property Act*. She commenced a Charter application alleging that her equality rights were infringed by the *Act*.

9 Watson, J. added the Provincial Crown as a party, and he granted the Order for Interim Costs against the Provincial Crown for purposes of the Charter challenge.

10 Watson, J.'s decision was reversed on appeal, primarily because the Court of Appeal noted that the issues raised by the plaintiff had recently been addressed by the Supreme Court of Canada thereby significantly resolving the exceptional nature of the litigation.

Powers of Aboriginal/Indian Bands and Band Councils

11 In contrast to the *Spracklin* analysis, a number of the items that I have discussed in my previous Reasons for Judgment, and will further amplify in these Supplementary Reasons, have not really be settled upon. For example the application of Section 32 of the Charter cited by counsel for HLFN at the beginning of these proceedings to Aboriginal Native Band Councils, is a somewhat unsettled area, and is also a critical area for purposes of the Respondents in terms of the HLFN's defamation and trespass action.

12 Section 32 applies to both Parliament and the provincial Legislatures, and accordingly these bodies "have lost the power to enact laws that are inconsistent with the Charter. . . . It follows that any body exercising *statutory authority*, for example, . . . municipalities [and] administrative tribunals, . . . is also bound by the Charter": P.W. Hogg, *Constitutional Law of Canada*, Loose-leaf ed. (Toronto: Carswell, 1997), p. 34-12.1 (emphasis added).

13 According to Hogg, "[t]he distinctive characteristic of action taken under statutory authority is that it involves a power of compulsion that is not possessed by a private individual or organization. . . . Where the Parliament or Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate": p. 34-12.1. It is equally clear that the Charter does not regulate the relations between private persons and private persons: p. 34-25; Nor does it "apply to the rules of the common law that regulate relationships between private parties": p. 34-19.

14 Indian Bands and Band Councils, which have authority to govern and regulate persons and activity on reserves, derive their authority to act, where their scope of action is greater than that of a private citizen or corporation, from the *Indian Act*, R.S.C. 1985, c. I-5.

15 The *Indian Act* defines the terms "Band" and "Council of the Band" and gives Bands, through their Band Councils, authority to govern and regulate many aspects of Band life. For example, s. 81. (1) provides that "[t]he council of a

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band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for . . ." activities ranging from health, to traffic, to maintenance of roads, to allotment of reserve land among members and so on.

16 Further, the Band Council has authority to enforce its by-laws. Section 81(2) provides that:-

> (2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.
>
> (3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by court action at the instance of the band council.

17 Indian Band Councils fall within the definition of a federal board, commission or tribunal in the *Federal Court Act*, R.S.C. 1985, c. F-7. Section 2(1) of the *Federal Court Act* provides that a "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867."

18 The Alberta Court of Appeal in *Paul Band (Indian Reserve No. 133) v. R.* (1983), [1984] 1 C.N.L.R. 87 (Alta. C.A.) held that "[b]and councils are created under the Indian Act and derive their authority to operate qua band councils exclusively from that Act. In the exercise of their powers they are concerned with the administration of band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power. Band councils are thus within the exclusive legislative jurisdiction and control of the Parliament of Canada over 'Indians, and Lands reserved for Indians' . . . and such councils are thus immune to provincial legislation": p. 7 of 8.

19 Consequently, the Charter should apply to the by-laws and actions of Band Councils; and members of Bands should be able to assert rights, such as the right to freedom of expression, against Band Councils.

Case law that suggests that the Charter applies to native band councils

20 In *Scrimbitt v. Sakimay Indian Band Council*, [1999] F.C.J. No. 1606 (Fed. T.D.) the applicant sought judicial review of the Band Council's decision to refuse to let her vote in the Band Council election. She claimed that the decision violated her Charter rights under ss. 7 and 15.

21 The Court stated that "[i]t is well settled that an Indian band council is a 'federal board, commission or other tribunal' as defined by subsection 2(1) of [the *Federal Court Act*] when it acts pursuant to the Indian Act": para. 22. The Court held that "refusing the applicant the right to vote breached her rights under subsection 15(1) of the Charter by discriminating against her because of her gender and her marital status at an earlier date": para. 53, but that her s. 7 rights were not violated: para. 62.

22 In *Nakochee v. Linklater*, [1993] O.J. No. 979 (Ont. Gen. Div.) the Band Council passed a by-law prohibiting people from selling or possessing alcohol on the reserve. The plaintiff, upon entering the reserve, was searched.

23 The Court held that the search was reasonable but did not decide if the Charter applied. However, the Court stated that "[a]lthough none of the parties raised the issue, it is likely that the Charter applies, as the search was conducted by members of the police in response to the direction of a statutorily mandated body with legislative authority.

24 In *Canada (Human Rights Commission) v. Gordon Band Council*, [2000] F.C.J. No. 1175 (Fed. C.A.) it was held that Section 67 of the *Human Rights Act* prevented judicial review of the Band Council's housing allocations.

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25 However, the Court stated in obiter that "it is possible . . . to challenge Gordon Band Council decisions on the basis of an infringement of the *Canadian Charter of Rights and Freedoms* . . . as was successfully done in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203": para. 32. In *Corbiere* [*Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.)], the Court had struck down a provision in the *Indian Act*.

26 In *R. v. Hatchard* (1991), [1993] 1 C.N.L.R. 96 (Ont. Gen. Div.) the accused was charged with possession of narcotics contrary to s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 after he was searched upon entering a reserve. The accused argued that the evidence discovered during the search was inadmissible because the search contravened s. 8 of the Charter.

27 The Court, without deciding if the Charter applied, held that the evidence need not be excluded pursuant to s. 24 of the Charter: p. 20 of 20. However, the Court also stated that "the scheme of the *Indian Act*, in relation to elected band councils, introduces a semblance of government-like organization in a 'body of Indians' specifically recognized by statute. That degree of organization and that kind of structure does not comport well with most notions of 'private citizen' activity": p. 14 of 20.

28 The Saskatchewan Court of Appeal in *Whitebear Band v. Carpenters Provincial Council (Saskatchewan)*, [1982] S.J. No. 312 (Sask. C.A.) held at para. 13, 14 and 19 that:-

> [13] As municipal councils are the "creatures" of the Legislatures of the Provinces so Indian Band Councils are the "creatures" of the Parliament of Canada. Parliament in exercising the exclusive jurisdiction conferred upon it by Section 91.24 of the British North America Act to legislate in relation to "Indians and Lands Reserved for the Indians" enacted the Indian Act which provides - among its extensive provisions for Indian status, civil rights, assistance, and so on and the use and management of Indian Reserves - for the election of a Chief and twelve councillors by and from among the members of an Indian Band resident on an Indian Reserve. These elected officials constitute Indian Band Councils who in general terms are intended by Parliament to provide some measure - even if rather rudimentary of Local Government in relation to life on Indian Reserves and to act as something of an intermediary between the Band and the Minister of Indian Affairs.
>
> [14] More specifically Section 81 of the Act clothes Indian Band Councils with such powers and duties in relation to an Indian Reserve and its inhabitants as are usually associated with a rural municipality and its Council: a Band Council may enact bylaws for the regulation of traffic; the construction and maintenance of public works; zoning; the control of public games and amusements and of hawkers and peddlers; the regulation of the construction, repair and use of buildings, and so on. Hence a Band Council exercises - by way of delegation from Parliament - these and other municipal and governmental Powers in relation to the Reserve whose inhabitants have elected it.
>
> . . . . .
>
> [19] Summary, an Indian Band Council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power - delegated to it by Parliament - in relation to the Indian Reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the Minister and the representative of the Band with respect to the administration and delivery of certain Federal programs for the benefit of Indians on Indian Reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the Minister of certain of his statutory authority relative to the Reserve.

CONCLUSION

29 The Charter should apply to any decision or by-law or action the Band Council or the Band makes under the authority of the *Indian Act* because the Band is using its statutory authority to regulate the life of its members. Therefore, the women whom the Band seeks to restrain from protesting should be able to raise freedom of expression against the Band Council.

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30 There are circumstances where the decisions of the Band should not be subject to the Charter. For example, if the Band or Band Council is contracting with a private party for goods or services, the relationship is one that would likely be governed by private contract law.

31 Equally so the applicability of the trust and pension cases that I discussed in great detail in my previous Reasons for Judgment, and their possible applicability to the case at bar, is also an unsettled area of some complexity that may well require the Respondents to have some preliminary funding of legal expenses in order for them to properly advance these issues before me, if they so wish.

32 As I stated previously, any such decision as to pre-emptive funding would only take place after a thorough analysis of the law in this area, as well as a determination as to whether or not the Respondents are raising any complex issues, whether or not they wish funding, what their personal financial circumstances are, whether Legal Aide is available to them, and other related areas of examination.

33 This matter will now return to court for an *inter partes* hearing in respect of the interim injunction to be held on Friday, February 28, 2003 at 4 p.m..

Order accordingly.

End of Document

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Tab 22

HOUSE OF COMMONS DEBATES

OFFICIAL REPORT

FIRST SESSION—THIRTY-THIRD PARLIAMENT

33-34 Elizabeth II

VOLUME II, 1985

COMPRISING THE PERIOD FROM THE TWENTY-FIRST DAY OF JANUARY, 1985
TO THE FIFTEENTH DAY OF MARCH, 1985

INDEX ISSUED IN A SEPARATE VOLUME

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Mr. Speaker: Shall the remaining questions be allowed to stand?

Some Hon. Members: Agreed.

GOVERNMENT ORDERS

[*English*]

INDIAN ACT

MEASURE TO AMEND

Hon. David Crombie (Minister of Indian Affairs and Northern Development) moved that Bill C-31, an Act to amend the Indian Act, be read the second time and referred to the Standing Committee on Indian Affairs and Northern Development.

He said: Mr. Speaker, 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.

In the early days of Confederation, Canada consisted only of the Maritime Provinces, parts of Ontario and parts of Quebec. The balance of the great land was the territory of the aboriginal people. At that time, the Parliament of Canada took upon itself to define through the Indian Act who it would recognize as having Indian status. As Canada took over those Indian lands, hundreds of thousands of people and their descendants fell unknowingly into a category of people whose lives would become dominated almost totally by the federal Government.

The legal definition of who was an Indian reflected the nature of Canadian society at the time. A woman followed her husband's status. He alone had civil and political rights and he alone could pass them to his children. This 19th century view was reflected throughout the Indian Act. An Indian woman would, parliamentarians of the day reasoned, be taken care of by her white man and therefore would no longer need to be an Indian. She was enfranchised, to use the terminology of the Act. For her, the price of marriage was her status as an Indian.

It is sad to say that these legal definitions continue to the present day. The result is a lengthy list of hotly debated issues. These include questions like who is an Indian, who determines who belongs to a band, who should be registered as having Indian status, what should be done with people who lost status unfairly and with their children, and what is enfranchisement and why do we still have it. All of these issues mean little to most Canadians but they are critical, urgent and important questions to Indian people. That is why the federal Government has been under pressure from many fronts for many years, both in and out of Parliament, to remove sexual discrimination from the Indian Act.

In the legislation which I am tabling today, that removal is being effected. If this was all that had to be done, it would be done simply. However, removing discrimination raises two other questions: what about those who have lost their rights as a result of discriminatory legislation, and who really should control the membership in the bands? To discuss these questions, I need to step back a moment and explain certain facts.

I might say parenthetically, Mr. Speaker, that you would find as I did, if you were to travel throughout Indian communities and deal with organizations that deal with matters related to Indian people, that the amount of ignorance which exists about certain facts with respect to these definitions is striking. That is why I wish to spend a short time dealing with them.

The Indian Act deals with three basic things: who is considered to be an Indian within the meaning of the Act; who can be a member of a particular Indian nation; and who can live on reserves. Status defines those individuals whom the federal Government wishes to include within the meaning of the Indian Act. It is the right of the federal Government to make that decision. As a result of certain government policies, these individuals who have status are eligible as individuals for certain programs, most particularly those in the fields of education and health.

Band membership is a qualitatively different matter. Band membership is a collective right because it gives access to the common assets and the decision-making process of the band. Residency on the reserve goes to the heart of the participation in the daily life of Indian people in Indian communities. That is why flowing to those resident people is access to housing and other community services. That is also why it has been clear to me for some time that the intimate decisions regarding membership and residency must be made by the people most concerned and most affected.

I know that some people have felt that the resistance of some Indian people to having discrimination removed from the Indian Act was nothing more than male chauvinism. I wish to take this opportunity to explain that in all of my hours and days of meeting with Indian people on this and other subjects, I have not found that to be true. Many First Nations have long preceded Canada in the creation of egalitarian, non-discriminatory societies, and the recognition of the rights of women. Many Indian women had strong political rights in their nations long before non-Indian Canadian women had the right to vote. Indian people have long been on record as being in support of the principle of sexual equality and have joined with others in condemning discriminatory federal actions which have deprived persons of their rights without their consent or without the consent of their communities.

• (1210)

Indian people have consistently objected to the federal Government intruding into the governing of their communities and nations. What greater intrusion can there be than the arrogance of assuming the right to tell another people of another culture and tradition who is and who is not a member of their

community and who can and who cannot live on their own lands?

The Prime Minister (Mr. Mulroney) has said that as a Conservative—indeed, I think this matter reflects the feelings of all Members of the House—there has been too much intrusion by the federal Government into the daily lives of Canadians. Indians have been a special target and victim of that heavy hand for over a century.

In removing the discrimination from the Indian Act we are starting a new relationship with the people of Indian First Nations. Walter Currie, an Indian educator, has commented on the old relationship upon which federal policy until now has been based. He said:

> Unhappily, for both the white man and the Indian especially, it is not working. I wonder what would happen if Canada would accept us, would be aware of us as Indians, would accept us as a people, would share with us pride in our heritage—for it is Canada's heritage also . . . If we cannot cure the ills of today, heaven help us tomorrow.

I have tried to cure the ills of today in this Bill. I have tried to do so in a way which accepts Indian people as people with a right to determine who they are. All of this is a part of a new awakening, both on the part of Indian people, and I think increasingly on the part of non-Indian Canadians as well. Times have changed. We have all come a long way in our thinking. I know my own thinking has changed from the time when I thought we could simply eliminate discrimination from the Indian Act by putting a bold black line through Section 12(1)(b).

When the Leader of the Opposition (Mr. Turner) was Attorney General of Canada over a decade ago, he had the responsibility to defend the legal situation of the day in the Supreme Court case of Jeannette Corbière Lavell, who sought relief from the discriminatory provisions of Section 12(1)(b). Yet I am sure that he would join with me today in supporting the principles upon which this bill rests.

It has only been recently that many in my own Party Have fully understood the need to respect the demand of Indian communities to determine their own membership. However, interestingly, John Diefenbaker foresaw today's legislation. In commenting the Lavell decision, he characterized the decision as unjust and retrograde. He said:

> I agree with the dissenting judges. In the years ahead, the dissent of today will be the cornerstone of the future.

In 1977, Harold Cardinal, a Cree political leader in Alberta, published an essay in his book entitled *The Rebirth of Canada's Indians*. In that book he said:

> Trimmed to the bare bone (our rebirth) means we must regain control over the basic decisions affecting our everday lives, our communities, our children, our futures.
>
> Parents must regain the right to make decisions about the lives of our children, their education, the values they grow up with, their preparation for life. We are talking about the right to make the decisions that will allow our communities to flourish—

He was making a declaration which most Canadians would regard as a given right. Surely, one of the ways in which Indian people can do that is to control the membership of their own First Nations and to be unburdened from the sexually discriminatory provisions of the Act.

In November, 1983 the Parliamentary Task Force on Indian Self-Government, made up of members of all Parties, made a unanimously accepted recommendation which stated:

> The Committee asserts as a principle that it is the rightful jurisdiction of each Indian First Nation to determine its membership according to its own particular criteria.

In the legislation I have tabled today, that has been done.

The legislation is based on certain principles, which are the cornestones that John Diefenbaker identified. The first principle is that discrimination based on sex should be removed from the Indian Act.

The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.

The third principle is that no one should gain or lose their status as a result of marriage.

The fourth principle is that persons who have acquired rights should not lose those rights.

The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership. Those are the principles of the Bill.

It is clear that there is little disagreement on the first principle. Sexually discriminatory sections should be removed from the Indian Act. Where there is disagreement, it is on the question of reinstatement of those persons who have been affected in the past by the discriminatory provisions. Some say there should be no reinstatement in any way, shape or form. On the other hand, there are others who want reinstatement to revert to Confederation, giving Indian status and band membership to anyone with any degree of Indian ancestry.

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. 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.

This legislation also wipes out forever the concept of enfranchisement, which forced many Indian people to give up their status and band membership against their will. Incredibly, in the past some people lost their Indian status simply as a result of the fact that they enlisted in the Armed Forces, received a university education, or became a member of the clergy. When I told that to my neighbours in Toronto, they could hardly believe that this was the law of the land.

There is another very important matter which I should raise. That is the matter of determining resources which communities will need as a result of these legislative changes. No one knows how many people will apply for restoration of their rights or how many of those who do have their rights restored will decide to return to live in their communities. It is certain that the impact will be different from one Indian community to another from coast to coast to coast. The legislation does not contain a provision regarding resources simply because the entire question of resources is not addressed in the Indian Act.

● (1220)

I would like to say that currently, and speaking generally, existing levels of service and resources in Indian communities are already appallingly inferior to those received by Canadians in general. That is why I have been taking some vigorous, and I think even creative measures recently to achieve efficiencies within the spending of my own Department to try to free up funds in the next fiscal year from administration expenditures in order to move them to programs for Indian communities.

Some Hon. Members: Hear, hear!

Mr. Crombie: I have also begun, Mr. Speaker, to implement policy changes which will allow Indian communities to have a much greater control over expenditures according to their own priorities or what they themselves refer to as "block" or "global" funding. The question of resources and lands will be part of a larger review within Indian First Nations to determine actions which should be taken by the federal Government in order to ensure there is sufficient land and fiscal resources to meet federal responsibilities and obligations for all the people residing there, including those who have been restored to membership in each community by this legislation. I am sure this House would not want me to proceed on a well intentioned attempt to redress injustices of the past which would end up inflicting an even greater injustice and irreparable damage upon the resources and people of the existing Indian communities.

Following the policy of my Government to consult fully, I have received advice and guidance on this legislation from individuals, from written submissions, women's organizations, Indian groups, bands and chiefs, non-status Indian groups, national organizations, from my Department and from my colleagues in this House. Following the policy of my Government to seek consensus, I have encouraged parties to talk to each other, to attempt to reconcile their differences and to accommodate each other's concerns. I have spent many hours trying to understand and develop a course of wisdom. I invite, indeed I encourage, those who may see better approaches to present them to the Standing Committee on Indian Affairs and Northern Development for its consideration.

While there may be other ways to reach these objectives, I have to reassert what is unshakeable for this Government with respect to this 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 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.

This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.

In conclusion, I would like to make one or two points of a general nature and which I believe are important. Decolonizing is not a painless process. No one comes out a 100 per cent winner. We can never go back to square one and start over. We have to begin with the realities we confront today. While we can celebrate the ending of a long-standing injustice, we can grieve that the injustice ever existed at all. Some persons have expressed to me surprise that the Government's approach has not been to claim partisan credit for this Bill. I have seen cases in the past where solutions to injustice died because of an effort to exploit them for political advantage. We in this House should refrain from doing so because no one should claim pride in doing something which common decency says should have been done years ago.

Some Hon. Members: Hear, hear!

Mr. Crombie: We should refrain from doing so because the task of creating a new relationship with the aboriginal peoples of Canada is far from complete and because this legislation should be supported by all the peoples of Canada, male and female, Indian and non-Indian, and all political Parties.

I call upon all of those political Parties to support this legislation. In doing so, Canada can bring to an end sexist discrimination in the Indian Act and at the same time begin to bring to an end colonial intrusion into the affairs of the people of the First Nations.

Some Hon. Members: Hear, hear!

Mr. Keith Penner (Cochrane-Superior): Mr. Speaker, it was Doctor Samuel Johnson, the great literary figure of the 18th century England, who once said: "Of all the ills that human hearts endure, how small the part that laws may cause or cure". It is arrogant of me, I know, and I do hesitate to disagree with such an eminent English literary figure, but when one considers the misery which has been caused in this country by the various provisions of the Indian Act, it is very difficult indeed to accept the wisdom even of such a notable man as Doctor Samuel Johnson. The effects of the Indian Act have been alarming and disturbing in the extreme.

For thousands of years before there was European immigration to this country, there existed in North America many

Tab 23

SAWRIDGE MEMBERSHIP RULES

1. These Rules shall come into force on the day on which the Band gives notice to the Minister pursuant to subsection 10(6) of the Act. **[PASSED JULY 4, 1985]**

2. On and after the day these Rules come into force the Band List of the Band shall be maintained by the Band under the direction and supervision of the Band Council and only those persons whose names are included therein, or who have rights to have their names entered therein, pursuant to these rules shall be members of the Band. **[PASSED JULY 4, 1985]**

3. Each of the following persons shall have a right to have his or her name entered in the Band List; **[PASSED JULY 4, 1985]**

(a) any person who, but for the establishment of these rules, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band List required to be maintained in the Department and who, at any time after these rules come into force, either

(i) is lawfully resident on the reserve; or

(ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

(b) a natural child of parents both of whose names are entered on the Band List;

(c) with the consent of the Band Council, any person who

(i) has applied for membership in the Band;

(ii) is entitled to be registered in the Indian Register pursuant to the Act;

(iii) is the spouse of a member of the Band, and

(iv) is not a member of another band;

(d) with the consent of the Band Council, any person who

(i) has applied for membership in the Band,

(ii) was born after the date these rules come into force, and

(iii) is the natural child of a member of the Band, and

(e) any member of another band admitted into membership of the Band with the consent of the council of both bands and who thereupon ceases to be a member of the other band.

4. For the purpose of section 3(a)(i) and section 6 the question whether a person is lawfully resident on the reserve shall be determined exclusively by reference to by-laws made by the Band Council pursuant to section 81 of the Act except that, at any time when there are no such applicable by-laws in force, no person shall be considered to be lawfully resident on the reserve for the purpose of section 3(a)(i) and section 6 unless the residence of such person on the reserve has been approved or ratified by a resolution of the Band Council that is expressed to be made for the purpose of these Rules. **[PASSED JULY 4, 1985]**

5. In considering an application under section 3, the Band Council shall not refuse to enter the name of the applicant in the Band List by reason only of a situation that existed or an action that was taken before these Rules came into force. **[PASSED JULY 4, 1985]**

6. The Band Council may at any time delete from the Band List the name of any person who has applied to the Band Council to have his or her name deleted from the Band List or the name of any person who is not then lawfully resident on the reserve and who, in the judgment of the Band Council, either does not have a significant commitment to the history, customs, traditions, culture and communal life of the Band or has a character or lifestyle that would cause his or her continued membership in the Band to be seriously detrimental to the future welfare or advancement of the Band; provided that, before a decision to delete the name of any person from the Band List is made under this section, otherwise than pursuant to an application by such person, the Band Council shall give fifteen days notice to such person who shall then be entitled to make representation to the Band Council in writing, in person or through an agent or counsel within such period of fifteen days. **[PASSED JULY 4, 1985]**

7. Where the name of a person is deleted from the Band List pursuant to section 6, the names of his or her minor children may, in the discretion of the Band Council, also be deleted from the Band List. **[PASSED JULY 4, 1985]**

8. Notwithstanding section 6 the Band Council shall delete from the Band List the name of any person who has been admitted into membership of another band with the consent of both the Band council and the admitting band. **[PASSED JULY 4, 1985]**

9. Except as otherwise expressly provided in these Rules, no application shall be required before the Band Council may enter in the Band List the name of any person who has a right to have his or her name entered in the Band List pursuant to these Rules. **[PASSED JULY 5, 1985]**

10. Where, pursuant to section 3 of these Rules, an application is required before a person has a right to have his or her name entered in the Band List, such application may be made in such manner and form as the Band Council may determine from time to time and, for greater certainty, the Band Council may permit applications to be made

under section 3(d) by a parent or guardian of a natural child referred to therein who is an infant at the time the application is made. **[PASSED JULY 5, 1985]**

11. The Band Council may consider and deal with applications made pursuant to section 3 of these Rules according to such procedure and at such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the Band Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion. **[PASSED JULY 5, 1985]**

12. Any person whose application for membership in the Band pursuant to section 3 of these Rules has been denied, or whose name has been deleted from the Band List pursuant to section 6, by the Band Council may appeal such decision to the electors of the Band by delivering notice in writing to the Band Council at the office of the Band within 15 days after communication to him or her of the decision of the Band Council. **[PASSED JULY 5, 1985]**

13. Within 60 days after receipt of a notice of appeal pursuant to section 12 of these Rules the Band Council shall convene a meeting of the electors of the Band for the purpose of disposing of the appeal and the applicant shall be entitled to be present at such meeting and make representations thereto in person or through an agent or counsel. **[PASSED JULY 5, 1985]**

14. Each discretionary power conferred upon the Band Council under these rules shall be exercised by the Band Council in good faith, without discrimination on the basis of sex and in accordance with its judgment of the best interests and welfare of the Band. **[PASSED JULY 5, 1985]**

15. No person shall have a right to have his or her name entered in the Band List except as provided in section 3 of these Rules **[PASSED JULY 5, 1985]** and, for greater certainty, no person shall be entitled to have his or her name included in the Band List unless that person has, at some time after July 4, 1985, had a right to have his or her name entered in the Band List pursuant to these Rules. **[PASSED JUNE 24, 1987]**

16. In the event that any of the foregoing provisions of these Rules is held by a court of competent jurisdiction to be invalid in whole or in part on the ground that it is not within the power of the Band to exclude any particular person or persons from membership in the Band, these Rules shall be construed and shall have effect as if they contained a specific provision conferring upon each such person a right to have his or her name entered in the Band List, but for greater certainty, no other person shall have a right to have his or her name entered or included in the Band List by virtue of the provisions of this Section and, in particular, no person referred to in Subsection 11(2) of the Act shall be entitled to membership in the Band otherwise than pursuant to Section 3 of these Rules. **[PASSED JUNE 24, 1987]**

17. In the event that any provision, or part of any provision, of these Rules is held to be invalid or of no binding force or effect by any court of competent jurisdiction, these Rules shall be construed and applied as if such provision or part thereof did not apply to or in the circumstances giving rise to such invalidity and the effect of the remaining provisions, or parts thereof, of these Rules shall not be affected thereby. **[PASSED JUNE 24, 1987]**

Constitution

of the

Sawridge First Nation

This Constitution was ratified by
the Electors of the Sawridge First Nation
in a Referendum held for that purpose on

August 24, 2009

Article 3: Membership

Control of Membership

3.(1) The First Nation has the inherent right to control its own Membership in accordance with its own laws, codes, customs, practices, traditions and traditional values and principles.

Transitional

(2) Members of the Sawridge Indian Band recorded on the Membership List of the Sawridge Indian Band and maintained by the Band in accordance with the Membership Rules of the Sawridge Indian Band are the Members of the First Nation on the day that this Constitution is adopted.

Membership Code

(3) Until amended in accordance with this Constitution, membership in the First Nation shall be determined by the Membership Rules that were in force immediately before the day on which this Constitution came into force with such modification as are required by the Constitution. The Membership Rules shall thereafter be called "the Membership Code".

Members of other First Nations

(4) No member of another Band or another First Nation may be a member of the First Nation at the same time.

Amendment

(5) The Membership Code may only be amended in the same manner as the Constitution may be amended.

Tab 24

Court of Queen's Bench of Alberta



Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377

Date: 20170705
Docket: 1103 14112
Registry: Edmonton

In the Matter of the Trustee Act, R.S.A. 2000, C. T-8, as amended

And in the matter of the Sawridge Band, Inter Vivos Settlement, created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust" or "Trust")

Between:

Patrick Twinn, on his behalf, and on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley; and Shelby Twinn; and Deborah A. Serafinchon

Applicants

Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

Catherine Twinn

Respondent

Case Management Decision (Sawridge #5)
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a case management decision on an application filed on August 17, 2016 (the "Application") by Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon ("Applicants") to be added as full parties in Action No. 1103 14112 (the "Action"), for payment of all present and future legal costs and an accounting to existing Beneficiaries. The application by Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn and his wife, Melissa Megley, appears to have been abandoned and, in order to keep the record clear, is dismissed. The balance of the Application by the Applicants is also dismissed, although the claims for an accounting from the Trustees by Patrick and Shelby Twinn are dismissed on a without prejudice basis.

II Background

[2] This Action was commenced by Originating Notice, filed on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application".

[3] The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"), ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176, ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***") (collectively the "***Sawridge Decisions***"). Some of the terms used in this decision ("***Sawridge #5***") are also defined in the previous ***Sawridge Decisions***.

[4] I had directed that this Application be dealt with through the filing of written briefs, subject to requests for clarification through correspondence between the Court and counsel. These letters have been added to the court file in this Action in a packet described as "**Sawridge #5 Correspondence**" and are listed in Schedule 'A' Part II to this decision.

III The Applicants

[5] Some factual background in relation to the three remaining Applicants is set out below and has been derived from the Affidavits forming part of the materials filed by the participants as described in Schedule 'A' Part I to this decision.

A Patrick Twinn

[6] Patrick Twinn was born on October 22, 1985. His father, Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

[7] His mother is Sawridge Trustee, Catherine Twinn, who is also a member of the SFN.

[8] Patrick is also a member of the SFN and acknowledges that he is currently and will remain a Beneficiary of the 1985 Sawridge Trust even if the Trustees are successful in their application to vary the definition of 'beneficiary'.

[9] Patrick Twinn also acknowledges that his beneficial interest in the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the Trust.

B Shelby Twinn

[10] Shelby Twinn was born on January 3, 1992 and resided on the SFN Reserve for the first 5 years of her life. She is a granddaughter of Chief Walter Twinn and the daughter of Paul Twinn, a son of Chief Walter Twinn. Paul Twinn is recognized as an Indian by the Government of Canada under the *Indian Act* and is a member of the SFN. The mother of Shelby Twinn was married to Paul Twinn at the time of Shelby's birth.

[11] Shelby Twinn is registered as an Indian under the *Indian Act*. She is not listed as a member of the SFN and claims that she may lose her entitlement as a Beneficiary if the application of the Trustees to vary the definition of 'beneficiary' under the 1985 Sawridge Trust succeeds. Shelby Twinn acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust.

C Deborah Serafinchon

[12] Deborah Serafinchon claims to be the daughter of Chief Walter Twinn and Lillian McDermott, the latter being recognized as an Indian under the *Indian Act*.

[13] Deborah Serafinchon states that she was born an illegitimate child, was placed in foster care at birth and was raised in that system. Deborah Serafinchon asserts that Patrick Twinn is her brother and co-applicant.

[14] Deborah Serafinchon notes that if the current definition of 'beneficiary' under the 1985 Sawridge Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", she will then be included as a 'beneficiary' under the 1985 Sawridge Trust. She expresses concern about any proposed definition which would have the effect of excluding her as a 'beneficiary' being accepted by the Court.

IV Positions of the Parties

[15] The materials filed on this Application and reviewed by me are extensive. They are described in Schedule 'A'. The written briefs forming part of this array of materials contain the arguments of the various participants.

[16] The initial position of the Public Trustee of Alberta ("OPTG") on the Application is set out in a short letter, dated October 31, 2016, as supplemented by clarification letters of June 23 and 30, 2017 and are all included in the "Sawridge #5 Correspondence" packet.

[17] The Application is also supported by Sawridge Trustee Catherine Twinn, who is the mother of the Applicant, Patrick Twinn. She disassociates herself from the opposition to the Application by the other Trustees.

[18] The Sawridge Trustees (except Catherine Twinn) oppose the Application in its entirety.

V Issues

[19] The issues to be decided on this Application are:

a Whether some or all of the Applicants should be made a Party to this Action?

b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

[20] While claims for an accounting by the Trustees have been made by some of the Applicants, no submissions were made on this remedy.

VI Disposition of the Application

[21] I confirm that the claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn, and his wife, Melisa Megley, have been abandoned and, for clarity of record purposes, are dismissed.

[22] I also dismiss the claims of the remaining Applicants for the reasons which follow.

A Applicability of Rules 3.74 and 3.75 of the *Alberta Rules of Court*, Alta Reg 124/2010

[23] *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*" or individually a "*Rule*") *Rules* 3.74 and 3.75 provide for the procedure for the addition of parties to an action commenced by a statement of claim or originating notice, respectively.

[24] The Trustees characterize the Applicants as "third parties" and argue that they cannot be added as parties, because they are not persons named in the original litigation. They rely on the decision of Poelman, J in ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2011 ABQB 51 at para 48, 2011 CarswellAlta 108 ("***Manson Insulation***").

[25] ***Manson Insulation*** involves an action commenced by statement of claim. This Action was commenced by an originating notice, a procedure under which all participants are not known at the outset and it is also less clear as to when the 'pleadings' close. I do not accept that the Applicants are barred by application of *Rule* 3.74(2)(b) because they may be "third parties".

[26] However, *Rules* 1.2 and 3.75(3) do have application to the circumstances here. I must be satisfied that an order should be made to add the Applicants as parties and I must also be satisfied that the addition of these Applicants as parties will not cause prejudice to the primary Respondents, the Trustees.

[27] The Advice and Direction Application has been underway for almost six years. There have been a number of complex applications resulting in a variety of decisions (See the ***Sawridge Decisions***). The Trustees assert that some of the Applicants have chosen not to abide by deadlines imposed by this Court. In turn the Applicants take issue with the effectiveness of the early notifications in respect to the Advice and Direction Application. All of that said it is clear that this proceeding has gone on for a long time. I agree with the Trustees that the addition of more participants will make an already complex piece of litigation more complicated, not only in terms of potential new issues, but also in terms of more difficult logistics in coordinating additional counsel and individual parties and prolonging the procedural steps in this litigation, for example, even more questioning. All of that will in turn result in increased costs likely to be borne one way or another by the 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the Applicants, namely Patrick and Shelby Twinn.

[28] In my decisions to date I have attempted to narrow and define the issues in this litigation. To allow additional parties at this stage will expand the lawsuit rather than create a more focussed set of issues for determination by a trial judge who will ultimately be tasked with determining this litigation.

[29] Further, I am not satisfied that the Applicants can pay the costs if they are unsuccessful and are not awarded an indemnity against paying the Trustees and, therefore, the costs of the

Trust. In other words, if this attempted entry into this Action is unsuccessful, then the Trust and its beneficiaries are left again to pay the bill.

[30] In conclusion, the Applicants have not satisfied me that their addition to this proceeding as full parties will not cause prejudice to the Trustees and the 1985 Sawridge Trust. Delay in bringing this litigation to a conclusion and expanding its scope are not, in my view, capable of being remedied by costs awards.

B Is it necessary to add Patrick and Shelby Twinn as Parties?

[31] The Trustees take the position that the interests of Patrick and Shelby Twinn are already represented in the Advice and Direction Application and that their addition would be redundant.

[32] In respect to Patrick Twinn, I agree that it is unnecessary to add him as a party. Patrick Twinn takes the position that he is currently, and will remain a Beneficiary of the 1985 Sawridge Trust. The Trustees confirm this and I accept that is correct and declare him to be a current Beneficiary of the Trust.

[33] Patrick Twinn understands and accepts that his beneficial interest under the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the 1985 Sawridge Trust. There is no circumstance that I can foresee where his status as a Beneficiary will be eliminated and there is no need to add him as a party to this Action. In fact, adding him to the litigation will only result in the Trust's resources being further reduced, to the detriment of all current and future beneficiaries.

[34] Further, counsel for the OPTG in her letters of June 23 and June 30, 2017 has confirmed that the Public Trustee continues to represent minors who have become adults during the course of this litigation. As a result, both Patrick and Shelby Twinn will have their interests looked after by the OPTG in any event.

[35] Shelby Twinn is in a similar situation. She acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust. The Trustee states at para 24 of its Brief, filed October 31, 2016, that:

> Shelby and her sister, Kaitlyn Twinn, are both **current beneficiaries** of the 1985 Trust. (Emphasis added.)

[36] I accept the Trustees' confirmation and declare Shelby Twinn to be a current Beneficiary of the Trust.

[37] As with Patrick Twinn, I cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated. Her participation through her own lawyer offers no benefit other than to dissipate the Trust's property through the payout of another set of legal fees.

[38] For these reasons, there is no need to add Shelby Twinn as a party to this Action.

[39] A further reason of more general application for not adding Patrick and Shelby Twinn as parties to this Action is that to do so would have the effect of making this lawsuit a more adversarial process. Since both of these Applicants are already recognized as Beneficiaries by the Trustees and now by the Court, I observe that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees and their legal

counsel and through a positive dialogue with the Trustees to ensure that their status as Beneficiaries is respected.

C Should Deborah Sarafinchon be added as a Party?

[40] On the evidence presented to me, Debora Sarafinchon is not currently a Beneficiary under the 1985 Sawridge Trust. She accepts that she is not an Indian under the *Indian Act* and is not a member of the SFN. She has not applied for membership in the SFN and apparently has no intention of making such an application.

[41] As I have said in my earlier decisions in ***Sawridge #3***, it is not appropriate for this Court to get involved in disputes over membership in the SFN. Apart from the jurisdictional issues which might arise if I was tempted to address membership issues. it would be contrary to my position that this litigation should be narrowed rather than unnecessarily expanded.

[42] I will give Ms. Sarafinchon the benefit of the doubt and will not characterize her application to be added as a party as being a collateral attack on SFN membership issues. However, I am concerned about the Court being drawn into that sort of contest in this long-running litigation.

[43] There is nothing stopping Ms. Sarafinchon from monitoring the progress of this litigation and reviewing the proposals which the Trustees may make in respect to the definition of 'beneficiary' under the 1985 Sawridge Trust and providing comments to the Trustees and the Court. I also repeat my concern about increasing the adversarial nature of this Advice and Direction Application.

[44] For all these reasons, I decline the request by Ms. Sarafinchon to be added as a party to this Action.

VII Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such that they ought to be entitled to party status?

[45] It is not necessary for me to address this issue in deciding this Application and I decline to do so.

VIII Should the Applicants be entitled to advance costs?

[46] In light of my decision to refuse to add all of these Applicants as parties to this Action, it is not necessary for me to decide the issue of awarding them advance costs.

IX Costs

[47] As is apparent from my analysis, I have concluded that Patrick and Shelby Twinn, who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit. In coming to this conclusion I observe that Patrick and Shelby Twinn were not interested in paying for their own litigation costs. They instead sought to offload that on the Trust, which would then have to pay for their representation in this litigation. I would not have permitted that, even if I had concluded these were appropriate litigation participants, which they are not.

[48] There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs. In that type of litigation a cost award of that kind means someone inside the group of intended beneficiaries loses, usually the residual beneficiary. Moen J in ***Babchuk v Kutz***, 2007 ABQB 88, 411 AR 181, affirmed *en toto* 2009

ABCA 144, 457 AR 44, conducted a detailed review of the principles that guide when an estate should indemnify an unsuccessful litigant. That investigation investigates the role and need for the unsuccessful litigant's participation, for example by asking who caused the litigation, whether the unsuccessful litigant's participation was reasonable, and how the parties as a whole conducted themselves.

[49] Here I have concluded that Patrick and Shelby Twinn had no basis to participate, and, worse, that their proposed participation would only end up harming the pool of beneficiaries as a whole. Their appearance is late in the proceeding, and they have not promised to take steps to ameliorate the cost impact of their proposed participation, other than to shift it to the Trust.

[50] *Rule* 1.2 stresses this Court should encourage cost-efficient litigation and alternative non-court remedies. The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 2, [2014] 1 SCR 87 has instructed it is time for trial courts to undergo a "culture shift" that recognizes that litigation procedure must reflect economic realities. In the subsequent ***R v Jordan***, 2016 SCC 27, [2016] 1 SCR 631 and ***R v Cody***, 2017 SCC 31 decisions Canada's high court has stressed it is time for trial courts to develop and deploy efficient and timely processes, "to improve efficiency in the conduct of legitimate applications and motions" (***R v Cody***, at para 39). I further note that in ***R v Cody*** the Supreme Court at para 38 instructs that trial judges test criminal law applications on whether they have "a *reasonable* prospect of success" [emphasis added], and if not, they should be dismissed summarily. That is in the context of *criminal* litigation, with its elevated protection of an accused's rights to make full answer and defence. This Action is a civil proceeding where I have found the Addition of the Applicants as parties is unnecessary.

[51] This is the new reality of litigation in Canada. The purpose of cost awards is notorious; they serve to help shape improved litigation practices by creating consequences for bad litigation practices, and to offset the litigation expenses of successful parties. By default successful litigation parties are due costs for that reason: *Rule* 10.29(1). The Court nevertheless retains a broad jurisdiction to vary costs depending on the circumstances (*Rule* 10.33), and naturally should make cost awards to encourage the *Rules* overall objectives and purposes (*Rule* 1.2).

[52] Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196.

[53] I conclude one aspect of Canada's litigation "culture shift" is that cost awards should be used to deter dissipation of trust property by meritless litigation activities by trust beneficiaries. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of the Trustees in responding to this Application.

[54] In respect to Deborah Serafinchon, she was outside the Trust relationship and though I have rejected her application she has not litigated as an 'insider' who has done nothing but attempt to diminish resources of the Trust. I therefore award costs against Deborah Serafinchon in favour of the Trustees on a party/party basis. If there is any dispute over the resolution of the amount of costs in both cases, I retain jurisdiction to resolve that problem should it arise.

[55] In closing, I confirm the OPTG representation of minors who have become adults will be subject to the existing indemnity and costs exemption orders. This direction shall be included in the formal order documenting this judgment.

Heard and decided on the basis of the written materials described in Schedule 'A'.
Dated at the City of Edmonton, Alberta this 5th day of July, 2017.

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

Submissions in writing from:

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for the Applicants Patrick Twinn et al.

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for The 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for the OPTG

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
for Catherine Twinn

Schedule 'A'

Part I - Materials filed by the participants in the Application by Patrick Twinn et al.

FILING DATE	DESCRIPTION
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 – Borden Ladner Gervais ("BLG").
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Sarafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.
October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon – Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. – Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 – Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.

November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn. Shelby Twinn and Deborah Serafinchon – BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold – Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 – Dentons.

Part II - List of Correspondence

DATE	FROM	TO
June 09, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding
June 16, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 19, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 20, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 22, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding, QC and Ms. Janet Hutchison
June 22, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 23, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 27, 2017	Ms. Doris C.E. Bonora	Justice D.R.G. Thomas
June 28, 2017	Ms. Karen A. Platten, QC	Justice D.R.G. Thomas
June 29, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 30, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

Included in a filed packet described as "Sawridge #5 Correspondence".

Tab 25

TRUSTS, WILLS AND PROBATE LIBRARY

LEWIN ON TRUSTS

NINETEENTH EDITION

But they thinke it against al right and iustice, that men shuld be bound to those laws, which other be in numbre mo then be able to be readde, or els blinder and darker, then that any man can well understand them.

Sir Thomas More
Bencher of Lincoln's Inn
Utopia, book II

BY

LYNTON TUCKER, M.A., B.C.L.
Barrister of Lincoln's Inn

NICHOLAS LE POIDEVIN, Q.C., M.A., LL.B.
Bencher of Lincoln's Inn

JAMES BRIGHTWELL M.A., LL.M.
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ASSISTED BY

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Barrister of Lincoln's Inn

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public authority in relation to his administration of such trusts.[79] The recognition of the Convention rights[80] as part of English law no doubt has an indirect "horizontal" influence on the future development of the principles of equity through the mechanism of section 6 of the 1998 Act, which forbids the courts, as public authorities,[81] to act in a manner incompatible with the Convention rights.[82] At present, however, we cannot see that the 1998 Act has had any effect in this context, although it has touched on other aspects of the law of trusts.[83] That said, the interlocutory procedure under Part 64 of the Civil Procedure Rules, carried on in the absence of affected parties, could be vulnerable under the fair trial provisions of Article 6 of the Convention in some circumstances.[84]

Consequences of unlawful trust provisions

5–023 An individual provision of a trust instrument may be void as being against the policy of the law in any of the ways described above.[85] That does not affect the validity of the rest of the trust instrument if the provision can be severed, as it usually can.

Gift unlawful as a whole

5–024 If a gift in a will or a lifetime settlement is unlawful as a whole, subsequent limitations, if any, are accelerated; otherwise, in the case of a will, there may be a lapse into residue or a partial intestacy, or, in the case of a lifetime settlement, there may be a resulting trust in favour of the settlor or his estate. The position is considered elsewhere[86] in connection with gifts void for perpetuity and we think that similar principles apply where a gift is wholly void for illegality on other grounds. The case where a part of the fund is held on unlawful trusts and the remainder on lawful trusts is considered below.[87]

Unlawful conditions

5–025 The authorities on unlawful conditions concern wills but we think that the same rules must apply to lifetime settlements. Where land is devised on a void condition, the consequences depend on whether the condition is precedent or subsequent. If precedent, the gift itself is void;[88] if subsequent, the devise is absolute.[89]

[79] See Human Rights Act 1998, s.6(5), which states that the act of any person certain of whose functions of a public nature is not a public authority if the nature of the act is private.

[80] Defined by Human Rights Act 1998, s.1(1) as meaning the rights and fundamental freedoms under Arts 2–12 and 14 of the Convention and Arts 1–3 of the First Protocol and Arts 1 and 2 of the Sixth Protocol, all of which are set out in Sch.1.

[81] See Human Rights Act 1998, s.6.

[82] See Hunt, *The Horizontal Effect of the Human Rights Act* [1998] P.L. 423. For the effect of the Human Rights Act 1998 on property rights generally, see Goymour [2006] C.L.J. 696; Howell (2007) 123 L.Q.R. 618.

[83] See § 6–046 to 6–048 on the impact of the Human Rights Act 1998 on the interpretation of trusts for children.

[84] See §§ 27–051 to 27–054.

[85] See §§ 5–004, 5–005, 5–007 to 5–010, 5–013, 5–014, 5–017 and 5–019.

[86] See §§ 5–102 to 5–111.

[87] See § 5–030.

[88] Shep. Touch., pp.132, 133.

[89] *ibid*; Co.Litt. 206; *Jarman on Wills* (8th edn), Vol.2, p.1457.

With other property, a further distinction is drawn between *malum in se* and *malum prohibitum*, though the distinction has not been precisely defined.[90] The rule is stated in *Jarman on Wills* in a passage[91] twice judicially approved,[92] which so far as relevant is as follows: **5–026**

> "Where personal estate is bequeathed on a void condition, if the condition is subsequent, the same rule applies as in the case of a devise of land, that is to say, the bequest is absolute. . . . [W]here a condition precedent . . . is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where it is illegal as involving *malum in se*, both gift and condition are void."

Malum in se in this context denotes conduct intrinsically immoral, such as killing someone, burning his house or the like.[93] *Malum prohibitum* denotes conduct treated as contrary to the public interest, whether at common law or by statute.[94]

If the gift is void in accordance with the foregoing rules, then there is an acceleration of subsequent limitations or else a falling into residue or a resulting trust, as with a gift unlawful as a whole. **5–027**

Where a gift is made partly of land and partly of other property, the foregoing rules apply separately to the two kinds of property.[95] **5–028**

Limitations

Gifts subject to unlawful conditions must be distinguished from limitations involving unlawful elements. Thus, for example, a limitation of income to X *while* he lives apart from his wife or young children is void, as directly encouraging the separation of husband and wife, or of parent and child; but a limitation of income to X *until* bankruptcy or attempted assignment, or until marriage, is valid and terminates accordingly, even though a direction that a longer interest should not be available to X's creditors, or should be unassignable, would be ineffective, and an annuity to X terminable on his marriage would be void.[96] **5–029**

Part only of property applicable to unlawful purpose

If property is given upon trust to apply part for an unlawful purpose and to hold or apply the remainder for a lawful purpose, then if the amount intended to be applied for the unlawful purpose cannot be so far ascertained as to make it clear **5–030**

[90] *Re Piper* [1946] 2 All E.R. 503.
[91] Now in 8th edn (published in 1951). See Vol.2, p.1457.
[92] *Re Moore* (1888) 39 Ch.D. 116 at 128, 129, CA; *Re Piper*, above, at 505.
[93] *Roper on Legacies* (3rd edn), Vol.1, p.653; no such case appears to have come before the courts.
[94] *Lloyd v Lloyd* (1852) 2 Sim. (N.S.) 255 (total restraint of marriage); *Re Moore*, above (separating husband and wife); *Re Beard* [1908] 1 Ch. 383 (discouraging entry into the armed forces); *Re Piper*, above (separating parent and child); *Re Elliott* [1952] Ch. 217 at 212–222 (rule against perpetuities).
[95] *Reynish v Martin* (1743–54) 3 Atk. 330.
[96] See § 5–015.

Tab 26

2011 NSSC 327
Nova Scotia Supreme Court

Sprott Estate, Re

2011 CarswellNS 590, 2011 NSSC 327, 206 A.C.W.S. (3d) 644, 307 N.S.R. (2d) 107, 72 E.T.R. (3d) 191, 975 A.P.R. 107

An Ex-Parte Application by the University of Melbourne, Trustee of a certain trust under the Last Will and Testament of Samuel Ernest Sprott, deceased, for an Order seeking the variation of certain terms of the Will

Joseph P. Kennedy C.J.N.S.

Heard: February 21, 2011
Judgment: August 25, 2011
Docket: Hfx 343317

Counsel: Hugh Wright, Ryan Conrod for Applicant

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
II Trusts
II.5 Purpose trust
II.5.a Charitable purpose
Estates and trusts
III Trustees
III.2 Powers and duties of trustees
III.2.k Supervision by court
III.2.k.iv Administration of trust
Estates and trusts
V Charities
V.6 Administration of charities
Headnote
Estates and trusts --- Trusts — Purpose trust — Charitable purpose
Deceased was retired English Language and Literature professor — On May 20, 2009, deceased died, having executed will — Deceased bequeathed initial 50 per cent of residue of his estate to trustee, University of Melbourne, to be held in trust — Portion of annual income was to be paid as fellowship to Australian scholars — Trustee brought application for variation of certain terms of will — Application granted in part — Two of three amendments sought were made to will — Court had jurisdiction to alter administrative terms of charitable trusts — Altering terms to give trustee permission to not award fellowship in year without suitable candidates addressed deceased's intent that award be given to outstanding scholars — Deceased would have likely been distressed had his directions to award fellowships resulted in level of scholarship that was less than anticipated — Changing restriction from awarding fellowship to scholars between ages 35 and 45 only, to awarding fellowship to scholars under age of 45, also protected level of scholarship that deceased anticipated — However, court did not have jurisdiction to increase rate of remuneration for trust that had already been established — This proposed change could not be justified by reference to spirit of deceased's trust.
Estates and trusts --- Charities — Administration of charities
Deceased was retired English Language and Literature professor — On May 20, 2009, deceased died, having executed will — Deceased bequeathed initial 50 per cent of residue of his estate to trustee, University of Melbourne, to be held

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in trust — Portion of annual income was to be paid as fellowship to Australian scholars — Trustee brought application for variation of certain terms of will — Application granted in part — Two of three amendments sought were made to will — Court had jurisdiction to alter administrative terms of charitable trusts — Altering terms to give trustee permission to not award fellowship in year without suitable candidates addressed deceased's intent that award be given to outstanding scholars — Deceased would have likely been distressed had his directions to award fellowships resulted in level of scholarship that was less than anticipated — Changing restriction from awarding fellowship to scholars between ages 35 and 45 only, to awarding fellowship to scholars under age of 45, also protected level of scholarship that deceased anticipated — However, court did not have jurisdiction to increase rate of remuneration for trust that had already been established — This proposed change could not be justified by reference to spirit of deceased's trust.

Estates and trusts --- Trustees — Powers and duties of trustees — Supervision by court — Administration of trust

Deceased was retired English Language and Literature professor — On May 20, 2009, deceased died, having executed will — Deceased bequeathed initial 50 per cent of residue of his estate to trustee, University of Melbourne, to be held in trust — Portion of annual income was to be paid as fellowship to Australian scholars — Trustee brought application for variation of certain terms of will — Application granted in part — Two of three amendments sought were made to will — Court had jurisdiction to alter administrative terms of charitable trusts — Altering terms to give trustee permission to not award fellowship in year without suitable candidates addressed deceased's intent that award be given to outstanding scholars — Deceased would have likely been distressed had his directions to award fellowships resulted in level of scholarship that was less than anticipated — Changing restriction from awarding fellowship to scholars between ages 35 and 45 only, to awarding fellowship to scholars under age of 45, also protected level of scholarship that deceased anticipated — However, court did not have jurisdiction to increase rate of remuneration for trust that had already been established — This proposed change could not be justified by reference to spirit of deceased's trust.

Table of Authorities

Cases considered by *Joseph P. Kennedy C.J.N.S.*:

Dominion Students' Hall Trust, Re (1946), [1947] Ch. 183 (Eng. Ch. Div.) — considered

J.W. Laing Trust Stewards' Co. v. Attorney-General (1983), [1984] Ch. 143 (Eng. C.A.) — considered

Killam Estate, Re (1999), 38 E.T.R. (2d) 50, 185 N.S.R. (2d) 201, 575 A.P.R. 201, 1999 CarswellNS 456 (N.S. S.C. [In Chambers]) — followed

Lysaght v. Royal College of Surgeons (1965), [1966] 1 Ch. 191, [1965] 3 W.L.R. 391, [1965] 2 All E.R. 888 (Eng. Ch. Div.) — considered

Stillman Estate, Re (2003), 2003 CarswellOnt 5329, 5 E.T.R. (3d) 260 (Ont. S.C.J.) — considered

Statutes considered:

Trustee Act, R.S.N.S. 1989, c. 479

s. 61 — considered

s. 61(1) — considered

s. 61(2) — considered

s. 62 — considered

University of Melbourne Act 2009, No. 78 (Vic), 2009

Generally — referred to

APPLICATION by trustee for variation of certain terms of deceased's will.

***Joseph P. Kennedy C.J.N.S.*:**

1 By this application the University of Melbourne ("the University") seeks the variation of certain terms of a will.

Background:

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2 Samuel Ernest Sprott, late of Halifax, Nova Scotia, retired Professor English Language and Literature at Dalhousie University, died on May 20, 2009, having executed his Last Will and Testament ("the Will").

3 Royal Trust Corporation of Canada ("the Executor") is one of two personal representatives named in the Will. The other, Dr. Douglas Barbour, is named the "Literary Executor" and in this role is responsible for the disposition of all books, papers and other related materials and records. The Executor is referred to as the sole Executor and Trustee of the Will and in this role is responsible for the disposition of the remainder of the estate.

4 The Executor is aware of this application and takes no position.

5 Dr. Sprott bequeathed an initial 50% of the residue of his estate to the University to be held in trust ("the Melbourne Trust"), a portion of the annual income therefrom to be paid as a fellowship to Australian scholars ("the Fellowship").

6 The University was established in 1853 and is one of Australia's premier institutions of higher learning, with over 35,000 students. It acts as trustee to approximately 800 trusts.

7 The Will also establishes a Life Fund in favour of Dr. Sprott's two sisters, Winifred Barro Sprott and Mary Florence Sprott. Winifred Barro Sprott is deceased. On the death of Mary Florence Sprott, the Melbourne Trust will be enlarged by the addition of the balance of the Life Fund.

8 The relevant provisions of the Will read as follows:

> 11) I GIVE, DEVISE, AND BEQUEATH all the rest and residue of my estate, both real and personal of whatsoever kind and wheresoever situate, to my Trustee upon trust for the following uses and purposes:
>
> . . .
>
> b) As soon as convenient, and if possible within One (1) year of my death, to divide the remainder of the rest and residue of my estate into Two (2) equal funds to be applied as follows:
>
> (i) To hold one such fund in securities and other property authorized for the investment of the funds of my estate and to pay Seventy-five Per Cent (75%) of the annual income therefrom in each year in equal shares to my sisters WINIFRED BERYL SPROTT and MARY FLORENCE SPROTT throughout their lifetimes and after the death of one of them to pay Seventy-five Per Cent (75%) of the annual income to the survivor of them throughout her lifetime, and in each case to accumulate the remaining Twenty-five Per Cent (25%) of the income in the fund; after the death of the survivor of my sisters WINIFRED and MARY, to add the balance of this fund to the capital of the fellowship fund established pursuant to subparagraph 11 (b)(ii) of this my Will.
>
> (ii) To pay the other fund to the University of Melbourne, Victoria, Australia, or if the University of Melbourne does not accept it to the National University of Australia, Canberra, F.C.T., Australia, to be held by it in trust and, while any of my sisters is alive, to pay at least Ninety-five Per Cent (95%) of the annual income therefrom as a fellowship to be awarded annually to an Australian citizen who is an outstanding scholar not less than Thirty-five (35) nor more than Forty-five (45) years of age at the time of the award for scholarly study outside of Australia intended to lead to a book relating to dramatic or non-dramatic English Literature of the sixteenth or seventeenth centuries; and to pay up to Five Per Cent (5%) of the annual income from this fund to defray actual expenses incurred by the institution in administering the fellowship; after the death of my last surviving sister and after this fund has been enlarged by the addition of the balance of the fund referred to in subparagraph 11 (b)(i), to continue to hold this fund and to pay Seventy Per Cent (70%) of the annual income therefrom as a fellowship with the conditions and purposes hereinbefore stipulated, and to pay Two Per Cent (2%) of that income to defray actual expenses incurred by the institution in administering the fellowship, and of the remaining Twenty-eight Per Cent

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(28%) to accumulate as part of the capital fund the maximum amount legally permitted in any year to add the difference, if any, between that maximum amount and Twenty-eight Per Cent 28%) of the income for that year to the annual fellowship award.

9 The approximate value of the residue to be distributed is $1.8 million, divided evenly between the Life Fund and the Melbourne Trust. The University has received partial funds of $637,116.50 to establish the Melbourne Trust.

10 The University has reviewed the terms of the Will and has accepted the Melbourne Trust, but prefers to make three amendments to its terms.

11 These three amendments and the reasons the University gives for each are as follows:

(a) that the Fellowship be open for award annually rather than be awarded on a strictly annual basis. The Will stipulates that the Fellowship is to be awarded to an "outstanding" candidate. This proposed change is directed at years for which there are no outstanding candidates. In such instances the University, at its discretion, would apply the amount of the award to the capital fund or to an award in the next year;

(b) that the University be permitted to award the Fellowship to an outstanding scholar under the age of 45 years, as opposed to being required to award the Fellowship to scholars between the ages of 35 and 45 only. The purpose of this amendment is to broaden the pool of potential recipients so that the Fellowship may be awarded to outstanding scholars as often as possible; and finally

(c) the University is requesting an alteration to the calculation of the annual administrative commission. The Will provides for a deduction of a commission of 2% of the annual uncapped income as set out in the Will, once the University receives the remaining 50% of the residual estate. This is a different method than the University's current procedure for similar funds, but does not, says the University, necessarily result in a higher or lower commission in any given year. For reasons of administrative efficiency, the University is seeking to make the Will consistent with its current practice in calculating and receiving commission. The University requests firstly that income should be capped at 5.5% per year (or such other percentage as the University determines from time to time for University charitable trusts generally), with the excess added to the capital amount. Of the capped income amount, it should then be allowed to deduct the lesser of the amount it deducts for similar funds (currently 2.5%) and 5% of the annual income. The change would ease the administrative burden on the University as trustee and is, it submits, consistent with the purposes of the Melbourne Trust. The University says it operates hundreds of trusts and it would avoid unnecessary administrative complexity and cost if the administrative fees for the Melbourne Trust were equal to the fees applied to the University's other trusts. The desired change would result in an administrative commission that may be higher or lower in any given year.

12 The University submits that the proposed changes to the terms of the Melbourne Trust will better achieve its purposes.

13 It therefore seeks an amendment to the Will to effect these three changes in provision 11(b)(ii) of the Will.

The Law

Inherent Jurisdiction

14 The University submits that this Court has an inherent jurisdiction to approve a variation in the administrative terms or machinery of charitable trusts. It cites *Killam Estate, Re* (1999), 38 E.T.R. (2d) 50 (N.S. S.C. [In Chambers]) as authority for this proposition. I wrote that decision.

15 In *Killam Estate, Re*, the deceased had established trusts for the benefit of institutions including several universities. Under the terms of the will, only the income derived from the trust property was to be distributed and the trusts were to continue in perpetuity. However, economic and other factors led to a request by the trustees and beneficiaries to

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encroach on the capital gains of the fund to supplement the income. Consequently, the trustees and beneficiaries brought an application for implementation of a new administrative scheme on the basis that the Court had an inherent jurisdiction broad enough to allow the variation, although the result would be contrary to the explicit directions of the deceased. It was submitted that the new scheme would be in accord with the spirit of the gift and would ultimately better accomplish the deceased's purposes.

16 I concluded that the Nova Scotia Supreme Court had the inherent jurisdiction to alter the administration or the "machinery" of the trusts in the way that was requested and emphasized that the new scheme was reasonable, prudent and in accordance with the purposes of the trusts. I stated at paras. 78-82:

> [78] I am satisfied that I do have the inherent jurisdiction to alter the administration, "the machinery" of these charitable trusts, and that it is so extensive as to allow the specific changes that "the agreement" accomplishes.
>
> [79] I conclude that the use of this Court's inherent jurisdiction to allow the distribution of both income and capital growth is a progression that comes rationally and naturally from the use of jurisdiction by the English and Commonwealth Courts.
>
> [80] Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I conclude that this Court should use its inherent jurisdiction to approve and enable "the agreement" to be accomplished.
>
> [81] Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute "income only", I am influenced by the cases cited, such as: *re J. W. Laing Trust*, [1984] 1 Ch. 143, *re Dominion Students' Hall Trust*, [1947] 1 Ch. 183 and *re Lysaght, decd. Hill and Another v. The Royal College of Surgeons and Others*, [1966] 1 Ch. 191 in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.
>
> [82] I am convinced that the variations accomplished by "the agreement" are in accord with the "spirit of the gift".

17 In *J.W. Laing Trust Stewards' Co. v. Attorney-General* (1983), [1984] Ch. 143 (Eng. C.A.), the will required distribution of trust funds within ten years of the death of the Testator. The Executors applied to distribute the capital over an indefinite period, rather than within the ten years. The Court held that it had jurisdiction to regulate the administrative machinery of a trust when it is expedient in the interests of the beneficiaries. In *J. W. Laing Trust Stewards' Co. v. Attorney-General*, Mr. Justice Peter Gibson made the point that distributing the capital within a certain period was not the purpose of the trust.

18 The Court concluded that it had the power to amend the machinery by which a trust was administered, provided that the purpose of the trust continued to be served. Justice Gibson stated at p. 155:

> ... I have no hesitation in reaching the conclusion that the court should, in the exercise of its inherent jurisdiction, approve a scheme under which the trustees for the time being of the charity will be discharged from the obligation to distribute the capital within 10 years of the death of the settlor.

19 In *Lysaght v. Royal College of Surgeons* (1965), [1966] 1 Ch. 191 (Eng. Ch. Div.), the Testatrix established a trust in her will out of which an endowment fund was to be paid to the Royal College of Surgeons. The Testatrix, though, directed that any student to receive money under the trust could not be Jewish or of the Roman Catholic faith. The College informed the executors that it would accept the bequest according to the terms in the will only if this clause was omitted.

20 Buckley J. reviewed the clause in order to determine the Testatrix's true intention. He stated at p. 204:

> ... In my judgment, upon the proper construction of clause 11 of the testatrix's will the essentials of her intention expressed in that clause were (a) to found medical studentships which (b) should be administered by the governing

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> body of the college (c) for the purposes set out in paragraph (E) of clause 11. These parts of the clause state her objective, and in them, in my judgment, the heart of her intention is to be found. The remaining provisions of clause 11 may not unfairly be said to deal with the machinery of the trust....

21 Buckley J. found that where it was the intention of the Testatrix that the College act as the trustee for the endowment fund, insistence on maintaining paragraph 11(d) would override the paramount intention of the Testatrix. The Court ordered the deletion of the words "and not of the Jewish or Roman Catholic faith" in clause 11(d) so as to make this bequest acceptable to the Council of the College and to facilitate the administration of the trust.

22 Re *Dominion Students' Hall Trust, Re* (1946), [1947] Ch. 183 (Eng. Ch. Div.) involved a company that ran a hostel for male students. Originally, the benefit of the charity was restricted solely to "dominion students of European origin". The company asked for the approval of a scheme by which the charity could be administered so as to benefit students of all racial origin and brought a petition asking for the confirmation of a special resolution to change its memorandum of association in relation to its object by removing the words "of European origin".

23 In deciding to approve the new administrative scheme, the Court considered the intention of the charity, to promote "community of citizenship, culture and tradition among all members of the British Commonwealth of Nations". The Court found that times had changed since the charity first came into being, and concluded that failing to approve the proposed scheme, and maintaining the original provisions would effectively defeat the charity's main object. The Court also found that the original beneficiaries would receive a greater benefit from the charity if the proposed administrative changes were approved. The Court authorized the scheme.

24 *Killam Estate, Re* has been considered by an Ontario case, *Stillman Estate, Re* (2003), 5 E.T.R. (3d) 260 (Ont. S.C.J.). *Stillman Estate, Re* involved an issue similar to the one raised in *Killam Estate, Re*. The issue addressed by the Court was whether to allow encroachment on the capital of an endowment fund in contravention of the specific terms of the trust. The terms of the trust did not include a power to encroach on capital and, as a result, the trust had been unable to meet its quota. The Applicants requested the approval of an administrative scheme that would allow for a total return investment policy.

25 The Ontario Superior Court found that such a variation went beyond the merely mechanical or administrative terms and that to approve such a departure from the Testator's intention under the administrative scheme-making power of the Court would require "a leap of some magnitude". However, that Court recognized the value of this proposed scheme in that it would permit the trustee to increase the overall return on the trust investments and allow the trustee to better realize on the intentions of the Testatrix. Recognizing the benefits of this proposed scheme, the Court opted to apply the cy-près doctrine in order to approve the proposed scheme.

26 Although the courts in *Killam Estate, Re* and *Stillman Estate, Re* applied a different approach, each case had the same end result. In both cases, the Court approved a scheme in order to alter the terms of the trust to allow for the better administration of the trust.

27 Having found in *Killam Estate, Re* a broad inherent jurisdiction to amend the administrative terms of a charitable trust, I am prepared to consider the use of that power therein.

28 This is not a situation in which the cy-près doctrine is applicable. The Trust can function, albeit less well, if the terms remain unaltered. What is sought in the present circumstances is a variation of the administrative terms so that it can be implemented in a better way to advance the intentions of the Testator.

29 I find the University's proposed amendments fall within this Court's jurisdiction to alter the administrative terms of charitable trusts.

30 I conclude that, if an administrative change would better accomplish the charitable purpose of the late Dr. Sprott, the Court can authorize a change in the mechanism by which the purpose is accomplished.

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31 In *Killam Estate, Re*, the Court recognized its inherent jurisdiction to alter the administrative terms of a charitable trust where the amendments were reasonable, prudent and in accordance with the purpose of the gift and for the ultimate benefit of the beneficiaries. The University submits that each of the proposed amendments meets these conditions.

32 It says that each of the proposed amendments goes to the administration of the Trust and does not interfere with the purpose.

33 Clause 11(b)(ii) confirms that Dr. Sprott's intention in drafting this provision was to provide "outstanding scholars" with the opportunity to study outside of Australia. "Outstanding" would seem to be central to Dr. Sprott's intent. It is possible that scholars of this calibre interested in pursuing this area of study will be uncommon. This would seem especially so when the age restriction is considered.

The Variations Sought

(a) The Award should be open for awarding annually

34 The University's first request is that the Fellowship be open for award annually as opposed to being required to award this Fellowship every year. Should an "outstanding" candidate not be available, it would be problematic if the University is required to award a Fellowship. Altering the terms to give the University permission to not award a Fellowship in a year when there are no suitable candidates addresses Dr. Sprott's intent that the award be given to outstanding scholars.

35 The Will as it presently reads risks diminishing the significance of the Fellowship and compromising the quality of scholarship.

36 It is probable that Dr. Sprott would be distressed should his directions as to the awarding of the Fellowships result in a level of scholarship that was less than he clearly anticipated.

37 I am convinced that this amendment would support the obvious intent central to the creation of the Fellowship and I direct that the Will be amended as suggested.

(b) The Age requirements of the Award should be broadened to under 45 years of age

38 The University requests that it be allowed to award the Fellowship to an outstanding scholar under the age of 45 as opposed to being restricted to award the Fellowship to scholars between the ages of 35 and 45 only. Confining eligible candidates to this narrow age range will limit the pool of possible recipients which could cause a reduction in the quality of the recipients.

39 I will make the amendment as suggested, again to protect the level of scholarship under the Fellowships that Dr. Sprott anticipated.

40 This amendment will increase the pool of talented individuals eligible for the Fellowship and predictably reduce the number of years in which the University will be unable to award the Fellowship based on a lack of eligible "outstanding" recipients.

(c) The Commission for the administration of the Melbourne Trust should be calculated the same way as for similar University funds

41 The University requests that once it receives the remaining 50% of the residue of the estate from the Life Fund, it be permitted to take the lesser of the amount it deducts for similar funds, currently 2.5% of the annual income of the Melbourne Trust, with income in any given year capped at 5.5% or such other percentage as the University from time

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to time determines for charitable trusts generally. This is as opposed to the 2% of the annual uncapped income as set out in the Will.

42 The University is the trustee to approximately 800 charitable trusts. The *Melbourne University Act 2009* entitles the University to commonly invest these trust funds and proportionately apply the income. The Melbourne Trust would be invested commonly with these other funds. This, it says, will allow for more efficient administration of the Melbourne Trust.

43 Generally, a court has the authority to award an amount of compensation to a trustee that is fair and reasonable. However, if a rate of remuneration has been set in the trust instrument, then the Court does not have jurisdiction to increase this amount for a trust that has already been established. Section 62 of the Nova Scotia *Trustees Act* states:

> **Remuneration of trustee or guardian**
>
> 62 (1) Trustees or guardians shall be entitled to such fair and reasonable remuneration for their care, pains and trouble, and their time expended in and about the estate, and in such proportions where there is more than one trustee, as is determined by the Court or judge, or by any local judge of the Court or referee to whom the matter is referred.
>
> (2) A judge may, on application to him for the purpose, settle the amount and apportionment of such remuneration, although the estate is not before the Court in any action or proceeding.
>
> (3) Nothing in this Section shall apply to any case in which the rate of remuneration is fixed by the instrument creating the trust. R.S., c. 479, s. 62.

44 The University emphasizes that s. 62 of the *Trustee Act* is not a prohibition. Ss. 61(1) and ss. 61(2) are rendered inapplicable where, as here, the rate of remuneration is fixed in the Will. However, s. 61 does not prohibit the present application nor purport to oust the broad inherent jurisdiction of the Court, as set out in *Killam Estate, Re*.

45 The University says this is not a request for an increase in the amount of commission, but a variation in the manner of its calculation. It demonstrated that in some years there may be an increase. However, in other years it is possible that the University would receive less as a result of the proposed change.

46 The University says its request to change the manner of the calculation of the commission in order to administer the Melbourne Trust is an appropriate reasonable change to "machinery" of this Trust. It is requesting a manner of compensation calculation that is comparable to the amount it receives to administer similar funds. It says the purpose of the request is to reduce administration complexity and therefore cost, not to increase commission.

47 There are obviously practical advantages to be accomplished by this proposed amendment. If allowed, the Trust would be easier for the University to manage and its interest in accomplishing this change is understandable.

48 However, unlike the other amendments sought, I do not find that this proposed change can be justified by reference to the "spirit of the Trust".

49 The argument that has persuaded this Court to make the first two amendments sought is not applicable to this third requested change.

50 It is my view that the use of the Court of its inherent jurisdiction to alter the terms of the Will should be restricted to changes that address the "spirit of the Trust" and not be employed to address administrative efficiency.

51 I will not be making the third amendment sought by this application.

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52 The Will will be amended to accomplish the first two changes sought by this application - there will be no requirement that the Fellowship be awarded annually and there will no longer be a minimum age for candidates.

53 I am satisfied that the two amendments that this Court is making will allow the University to maximize the benefit that the Trust can provide to "outstanding scholars" and will not interfere with the charitable purposes of the Trust.

54 I believe that Dr. Sprott would have agreed with these reasonable amendments and would have been pleased that the University shared his interest in the facilitation of outstanding scholarship.

Application granted in part.

End of Document

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Tab 27

Most Negative Treatment: Distinguished
Most Recent Distinguished: Lemieux c. Aon Parizeau inc. | 2018 QCCA 1346, 2018 CarswellQue 7399, EYB 2018-300197, 297 A.C.W.S. (3d) 95 | (C.A. Que, Aug 20, 2018)

2009 SCC 6
Supreme Court of Canada

KRG Insurance Brokers (Western) Inc. v. Shafron

2009 CarswellBC 79, 2009 CarswellBC 80, 2009 SCC 6, [2009] 1 S.C.R. 157, [2009] 3 W.W.R. 577, [2009] B.C.W.L.D. 700, [2009] B.C.W.L.D. 701, [2009] B.C.W.L.D. 790, [2009] B.C.W.L.D. 792, [2009] B.C.W.L.D. 793, [2009] S.C.J. No. 6, 173 A.C.W.S. (3d) 151, 2009 C.L.L.C. 210-010, 265 B.C.A.C. 1, 301 D.L.R. (4th) 522, 383 N.R. 217, 446 W.A.C. 1, 52 B.L.R. (4th) 165, 68 C.C.L.I. (4th) 161, 70 C.C.E.L. (3d) 157, 87 B.C.L.R. (4th) 1, J.E. 2009-241, D.T.E. 2009T-86

Morley Shafron (Appellant) and KRG Insurance Brokers (Western) Inc. (Respondent)

McLachlin C.J.C., Binnie, LeBel, Deschamps, Abella, Charron, Rothstein JJ.

Heard: October 16, 2008
Judgment: January 23, 2009
Docket: 31981

Proceedings: reversing *KRG Insurance Brokers (Western) Inc. v. Shafron* (2007), 45 C.C.L.I. (4th) 163, 2007 C.L.L.C. 210-012, 236 B.C.A.C. 116, 390 W.A.C. 116, 2007 CarswellBC 276, 2007 BCCA 79, 25 B.L.R. (4th) 193, 64 B.C.L.R. (4th) 125, 68 C.C.E.L. (3d) 23, Chiasson J.A., Huddart J.A., Thackray J.A. (B.C. C.A.); reversing *KRG Insurance Brokers (Western) Inc. v. Shafron* (2005), 2005 BCSC 1611, 2005 CarswellBC 2758, 12 B.L.R. (4th) 90, 30 C.C.L.I. (4th) 187, 68 C.C.E.L. (3d) 45, Parrett J. (B.C. S.C.); additional reasons at *KRG Insurance Brokers (Western) Inc. v. Shafron* (2007), 2007 BCCA 471, 2007 CarswellBC 2335, 69 B.C.L.R. (4th) 201, 34 B.L.R. (4th) 33, 53 C.C.L.I. (4th) 170, 68 C.C.E.L. (3d) 42, Chiasson J.A., Huddart J.A., Thackray J.A. (B.C. C.A.)

Counsel: Neo J. Tuytel, Valerie S. Dixon for Appellant
Frank G. Potts, Timothy J. Delaney for Respondent

Subject: Employment; Public; Insurance
Related Abridgment Classifications
Labour and employment law
II Employment law
II.3 Interpretation of employment contract
II.3.j Particular covenants
II.3.j.i Restrictive covenants
II.3.j.i.A Whether covenant reasonable
Labour and employment law
II Employment law
II.3 Interpretation of employment contract
II.3.j Particular covenants
II.3.j.i Restrictive covenants
II.3.j.i.C Miscellaneous

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Headnote

Labour and employment law --- Employment law — Interpretation of employment contract — Particular covenants — Restrictive covenants — Whether covenant reasonable

Insurance agent MS sold his Vancouver agency in 1987 and continued to be employed under contract which was renewed repeatedly, and which included non-competition clause applicable to "Metropolitan City of Vancouver" — MS left his employment in 2000 and in January 2001 began working as insurance agent for another agency in Richmond — Trial judge dismissed employer's action for breach of restrictive covenant, finding term "Metropolitan City of Vancouver" neither clear nor certain, and in any event, unreasonable — Court of Appeal reversed trial judge's decision, finding restrictive covenant reasonable and enforceable, and applying doctrine of notional severance, construing term "Metropolitan City of Vancouver" as applying to "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby" — MS appealed — Appeal allowed — Court of Appeal erred in rewriting restrictive covenant as it did — Term "Metropolitan City of Vancouver" was ambiguous and there was no context or other evidence demonstrating mutual understanding of parties at time contract was entered into as to what geographic area it covered — As trial judge found restrictive covenant was unreasonable, it was inappropriate for Court of Appeal to rewrite geographic scope in restrictive covenant to what it thought was reasonable.

Labour and employment law --- Employment law — Interpretation of employment contract — Particular covenants — Restrictive covenants — Miscellaneous

Insurance agent MS sold his Vancouver agency in 1987 and continued to be employed under contract which was renewed repeatedly, and which included non-competition clause applicable to "Metropolitan City of Vancouver" — MS left his employment in 2000 and in January 2001 began working as insurance agent for another agency in Richmond — Trial judge dismissed employer's action for breach of restrictive covenant, finding term "Metropolitan City of Vancouver" neither clear nor certain, and in any event, unreasonable — Court of Appeal reversed trial judge's decision, finding restrictive covenant reasonable and enforceable, and applying doctrine of notional severance, construing term "Metropolitan City of Vancouver" as applying to "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby" — MS appealed — Appeal allowed — Court of Appeal erred in rewriting restrictive covenant as it did — Term "Metropolitan City of Vancouver" was ambiguous and there was no context or other evidence demonstrating mutual understanding of parties at time contract was entered into as to what geographic area it covered — As trial judge found restrictive covenant was unreasonable, it was inappropriate for Court of Appeal to rewrite geographic scope in restrictive covenant to what it thought was reasonable.

Droit du travail et de l'emploi --- Droit de l'emploi — Interprétation d'un contrat d'emploi — Clauses en particulier — Clauses restrictives — Détermination du caractère raisonnable de la clause

Agent d'assurance MS a vendu son agence située à Vancouver en 1987 et a conclu un contrat d'emploi qui a constamment été renouvellé et qui contenait une clause de non-concurrence applicable à « l'agglomération de la ville de Vancouver » — MS a quitté son emploi en 2000 et en 2001 a débuté un nouvel emploi à titre d'agent d'assurance pour une autre agence située à Richmond — Juge du procès a rejeté l'action déposée par l'employeur pour la violation de la clause restrictive et a conclu que l'expression « l'agglomération de la ville de Vancouver » était ni claire ni précise et, à tout événement, déraisonnable — Cour d'appel a infirmé la décision du juge de première instance, a conclu que la clause restrictive était raisonnable et susceptible d'application et a recouru à la théorie de la divisibilité fictive pour interpréter l'expression « l'agglomération de la ville de Vancouver » comme désignant « la ville de Vancouver, la dotation foncière universitaire de l'Université de la Colombie-Britannique, Richmond et Burnaby » — MS a formé un pourvoi — Pourvoi accueilli — Cour d'appel a eu tort de récrire la clause restrictive comme elle l'a fait — Expression « l'agglomération de la ville de Vancouver » était ambiguë et il n'existait aucun contexte ni autre élément de preuve établissant que les parties s'étaient entendues, au moment de la conclusion du contrat, sur le secteur géographique visé par cette expression — Puisque le juge de première instance a conclu que la clause restrictive était déraisonnable, la Cour d'appel ne pouvait pas reformuler la portée géographique de la clause restrictive selon ce qui lui semblait raisonnable.

Droit du travail et de l'emploi --- Droit de l'emploi — Interprétation d'un contrat d'emploi — Clauses en particulier — Clauses restrictives — Divers

Agent d'assurance MS a vendu son agence située à Vancouver en 1987 et a conclu un contrat d'emploi qui a constamment été renouvellé et qui contenait une clause de non-concurrence applicable à « l'agglomération de la ville de Vancouver »

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— MS a quitté son emploi en 2000 et en 2001 a débuté un nouvel emploi à titre d'agent d'assurance pour une autre agence située à Richmond — Juge du procès a rejeté l'action déposée par l'employeur pour la violation de la clause restrictive et a conclu que l'expression « l'agglomération de la ville de Vancouver » était ni claire ni précise et, à tout événement, déraisonnable — Cour d'appel a infirmé la décision du juge de première instance, a conclu que la clause restrictive était raisonnable et susceptible d'application et a recouru à la théorie de la divisibilité fictive pour interpréter l'expression « l'agglomération de la ville de Vancouver » comme désignant « la ville de Vancouver, la dotation foncière universitaire de l'Université de la Colombie-Britannique, Richmond et Burnaby » — MS a formé un pourvoi — Pourvoi accueilli — Cour d'appel a eu tort de récrire la clause restrictive comme elle l'a fait — Expression « l'agglomération de la ville de Vancouver » était ambiguë et il n'existait aucun contexte ni autre élément de preuve établissant que les parties s'étaient entendues, au moment de la conclusion du contrat, sur le secteur géographique visé par cette expression — Puisque le juge de première instance a conclu que la clause restrictive était déraisonnable, la Cour d'appel ne pouvait pas reformuler la portée géographique de la clause restrictive selon ce qui lui semblait raisonnable.

The defendant MS was an insurance agent who was the owner and sole salesperson of an insurance agency, MSA Ltd., in Vancouver. On December 31, 1987, MS sold his shares in MSA Ltd. to KRG Insurance Brokers Inc. The name of the business was changed from MSA Ltd. to KRG Insurance Brokers (Western) Inc. (KRG Western), and MS continued to be employed in the business. In 1988, MS entered into a contract with KRG Insurance Brokers Inc. and its owner KRG Management Inc., which included a non-competition clause stating that upon leaving the employment of MSA Ltd. or KRG Insurance, he would not be employed in the insurance brokerage business for three years thereafter within the "Metropolitan City of Vancouver." On February 28, 1991, MS entered into a further employment contract with the respondent KRG Western, which contained a similar non-competition clause which stated that upon his leaving the employment of KRG Western or KRG Management, he would not be employed in the insurance brokerage business for three years thereafter within the "Metropolitan City of Vancouver."

On July 31, 1991, II Corp. acquired the shares of KRG Western, and on August 1, 1991, another employment contract was entered into with the same restrictive covenant, but only deleting reference to KRG Management. Two further renewals of the employment contract, including the restrictive covenant, occurred in 1993 and 1998. In December 2000, as the 1998 employment contract was about to expire, MS left KRG Western's employment, and in January 2001 he began working as an insurance agent for another agency in Richmond.

The trial judge dismissed KRG Western's action against MS for breach of the restrictive covenant, finding that the term "Metropolitan City of Vancouver" was neither clear nor certain, and in any event, was unreasonable.

The Court of Appeal reversed the trial judge's decision, finding that the restrictive covenant was reasonable and enforceable. While the term "Metropolitan City of Vancouver" was ambiguous, it was possible to apply the doctrine of "notional" severance to construe it as applying to the City of Vancouver and municipalities contiguous to it, which would cover the City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby. MS appealed.

Held: The appeal was allowed; the judgment of the trial judge was restored.

The Court of Appeal erred when it rewrote the restrictive covenant to substitute for the "Metropolitan City of Vancouver" the "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby". The term "Metropolitan City of Vancouver" was ambiguous and there was no context or other evidence demonstrating the mutual understanding of the parties at the time they entered into the contract as to what geographic area it covered. Furthermore, the trial judge found that the restrictive covenant was unreasonable, and it was inappropriate for the Court of Appeal to rewrite the geographic scope in the restrictive covenant to what it thought was reasonable.

The general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable. The doctrine of notional severance does not apply in respect of restrictive covenants in employment contracts, because there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable, and applying the doctrine invites the employer to impose an unreasonable restrictive covenant on the employee with the only sanction being that if the covenant is found to be unreasonable, the court will still enforce it to the extent of what might validly have been agreed to.

A restrictive covenant is prima facie unenforceable unless it is shown to be reasonable. However, if the covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to

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demonstrate that it is reasonable. Thus, an ambiguous restrictive covenant is, by definition, prima facie unreasonable and unenforceable. Only if the ambiguity can be resolved is it then possible to determine whether the unambiguous restrictive covenant is reasonable. The trial judge found that there was no legal or judicial definition of the term "Metropolitan City of Vancouver", and that the language of the restrictive covenant was neither clear nor certain. The Court of Appeal agreed that the term "Metropolitan City of Vancouver" was ambiguous, but determined that what likely was in the parties' reasonable contemplation when they made the agreement was the "City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby." The Court of Appeal in effect read down the covenant according to its notion of reasonableness and what it thought the parties might have intended; however, notional severance does not permit a court to rewrite a restrictive covenant in an employment contract in order to reflect its own view of what the parties' consensus ad idem might have been or what the court thinks is reasonable in the circumstances.

The doctrine of rectification did not apply. There was nothing to indicate what the parties intended by the use of the term "Metropolitan" when they entered into the covenant and nothing to indicate that they agreed on an area and then mistakenly wrote down "Metropolitan." KRG Western could not point to any prior agreement that explained the term "Metropolitan City of Vancouver". Rectification is used to restore what the parties' agreement actually was, were it not for the error in the written agreement. Here there was no indication that the parties agreed on something and then mistakenly included something else in the written contract. Rather, they used an ambiguous term in the written contract.

Le défendeur MS, un agent d'assurance, était propriétaire d'une agence d'assurance, MSA Ltd. située à Vancouver, dont il était le seul vendeur. Le 31 décembre 1987, MS a vendu ses actions dans MSA Ltd. à KRG Insurance Brokers (Western) Inc. (KRG Western) tandis que MS continuait d'être à l'emploi de l'entreprise. En 1988, MS a signé un contrat avec KRG Insurance Brokers Inc. et son propriétaire, KRG Management Inc., comportant une clause de non-concurrence prévoyant que suivant son départ de MSA Ltd. ou KRG Insurance, il n'occuperait aucun emploi dans le domaine du courtage en assurance durant les trois années subséquentes à l'intérieur des limites de l'« agglomération de la ville de Vancouver ». Le 28 février 1991, MS a signé un nouveau contrat d'emploi avec l'intimé KRG Western qui contenait une clause de non-concurrence similaire laquelle prévoyait que suivant son départ de KRG Western ou KRG Management, il n'occuperait aucun emploi dans le domaine du courtage en assurance durant les trois années subséquentes à l'intérieur des limites de l'« agglomération de la ville de Vancouver ».

Le 31 juillet 1991, II Corp. a acquis les actions de KRG Western et, le 1er août 1991, un autre contrat d'emploi a été signé contenant la même clause restrictive mais ne faisant cette fois pas référence à KRG Management. Le contrat d'emploi a été renouvellé en 1993 et 1998, comportant toujours la clause restrictive. En décembre 2000, alors que le contrat d'emploi de 1998 venait à échéance, MS a quitté son emploi avec KRG Western et, en janvier 2001, a commencé à travailler à titre d'agent d'assurance pour une autre agence à Richmond.

Le juge de première instance a rejeté l'action déposée par KRG Western à l'encontre de MS pour violation de la clause restrictive en concluant que l'expression « agglomération de la ville de Vancouver » n'apparaissait ni claire ni précise et qu'à tout événement, était déraisonnable.

Le Cour d'appel a infirmé la décision du juge de première instance en concluant que la clause restrictive était raisonnable et susceptible d'application. Bien que l'expression « agglomération de la ville de Vancouver » était ambiguë, il était possible de recourir à la théorie de la divisibilité « fictive » pour l'interpréter comme désignant la ville de Vancouver et les municipalités limitrophes, soit la ville de Vancouver, la dotation foncière universitaire de l'Université de la Colombie-Britannique, Richmond et Burnaby. MS a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli et la décision du juge de première instance a été rétablie.

La Cour d'appel a eu tort de récrire la clause restrictive pour remplacer « l'agglomération de la ville de Vancouver » par « la ville de Vancouver, la dotation foncière universitaire de l'Université de la Colombie-Britannique, Richmond et Burnaby ». L'expression « l'agglomération de la ville de Vancouver » était ambiguë et il n'existait aucun contexte ni autre élément de preuve établissant que les parties s'étaient entendues, au moment de la conclusion du contrat, sur le secteur géographique visé par cette expression. Qui plus est, le juge de première instance a conclu que la clause restrictive était déraisonnable et la Cour d'appel ne pouvait pas reformuler la portée géographique de la clause restrictive selon ce qui lui semblait raisonnable.

La règle générale doit être qu'une clause restrictive ambiguë ou déraisonnable figurant dans un contrat de travail est nulle et inapplicable. La théorie de la divisibilité fictive n'est pas applicable aux clauses restrictives figurant dans les

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contrats d'emploi puisqu'il n'existe pas de règle objective de démarcation nette qui puisse être appliquée dans tous les cas pour obtenir une clause raisonnable, et l'application de la théorie incite l'employeur à imposer une clause restrictive déraisonnable à l'employé en risquant, pour unique sanction, que le tribunal, s'il juge la clause déraisonnable, lui donne néanmoins effet dans la mesure de ce qui aurait pu être valablement stipulé par les parties.

Une clause restrictive est à première vue inapplicable, à moins qu'il ne soit démontré qu'elle est raisonnable. Mais si la clause est ambiguë, en ce sens que l'interdiction n'est pas clairement définie quant à sa durée, à sa portée géographique ou à l'activité interdite, il est impossible d'en démontrer le caractère raisonnable. Une clause restrictive ambiguë est donc par définition déraisonnable et inapplicable à première vue. C'est uniquement si l'ambiguïté peut être dissipée qu'il devient possible de déterminer si la clause restrictive non ambiguë est raisonnable. Le juge de première instance a constaté l'absence de définition législative ou jurisprudentielle de l'expression « l'agglomération de la ville de Vancouver » et les termes utilisés dans la clause restrictive n'étaient ni clairs ni précis. La Cour d'appel a convenu que l'expression « l'agglomération de la ville de Vancouver » était ambiguë mais a conclu que le secteur [traduction] « sans doute raisonnablement envisagé par les parties lorsqu'elles ont conclu l'entente » était composé de « la ville de Vancouver, la dotation foncière universitaire de l'Université de la Colombie-Britannique, Richmond et Burnaby ». Dans les faits, la Cour d'appel a interprété la clause selon ce qu'elle jugeait raisonnable et sa perception de l'intention possible des parties; toutefois, la théorie de la divisibilité fictive ne permet pas à un tribunal de récrire une clause restrictive d'un contrat de travail en accord avec sa propre perception du consensus auquel ont pu arriver les parties ou avec ce qu'il juge raisonnable dans les circonstances.

La théorie de la rectification ne s'appliquait pas. Rien n'indiquait ce que les parties avaient en tête en utilisant le mot « agglomération » lors de la conclusion du contrat et rien n'indiquait qu'elles s'étaient entendues sur un secteur géographique, puis avaient écrit le mot « agglomération » par erreur. KRG Western ne pouvait faire valoir aucune entente préalable qui expliquerait l'expression « l'agglomération de la ville de Vancouver ». La rectification a pour objet de rétablir l'entente véritablement conclue par les parties, n'eût été l'erreur commise dans l'entente écrite. Or en l'espèce, rien ne permettait de croire que les parties auraient convenu d'une chose, puis inscrit par erreur quelque chose d'autre dans le contrat écrit. En fait, elles ont plutôt utilisé une expression ambiguë dans le contrat écrit.

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Statutes considered:

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Generally — referred to

s. 347 — referred to

APPEAL by insurance agent from judgment reported at *KRG Insurance Brokers (Western) Inc. v. Shafron* (2007), 45 C.C.L.I. (4th) 163, 2007 C.L.L.C. 210-012, 236 B.C.A.C. 116, 390 W.A.C. 116, 2007 CarswellBC 276, 2007 BCCA 79, 25 B.L.R. (4th) 193, 64 B.C.L.R. (4th) 125, 68 C.C.E.L. (3d) 23 (B.C. C.A.), reversing trial judge's decision and finding restrictive covenant in employment contract to be reasonable and enforceable.

POURVOI d'un agent d'assurance à l'encontre d'un jugement publié à *KRG Insurance Brokers (Western) Inc. v. Shafron* (2007), 45 C.C.L.I. (4th) 163, 2007 C.L.L.C. 210-012, 236 B.C.A.C. 116, 390 W.A.C. 116, 2007 CarswellBC 276, 2007 BCCA 79, 25 B.L.R. (4th) 193, 64 B.C.L.R. (4th) 125, 68 C.C.E.L. (3d) 23 (B.C. C.A.), ayant infirmé la décision du juge de première instance et concluant qu'une clause restrictive prévue dans un contrat d'emploi était raisonnable et applicable.

Rothstein J.:

I. Introduction

1 The central issue in this appeal is whether, in an employment contract, the doctrine of severance may be invoked to resolve an ambiguous term in a restrictive covenant or render an unreasonable restriction in the covenant reasonable. The issue arises because the term "Metropolitan City of Vancouver" in the restrictive covenant contained in the contract between the parties has no legally defined meaning and is therefore ambiguous.

2 Severance, when permitted, appears to take two forms. "Notional" severance involves reading down a contractual provision so as to make it legal and enforceable. "Blue-pencil" severance consists of removing part of a contractual provision. For reasons I set out below, notional severance is not an appropriate mechanism to cure a defective restrictive covenant. As for blue-pencil severance, it may only be resorted to in rare cases where the part being removed is trivial, and not part of the main purport of the restrictive covenant. These circumstances are not present in this case and hence the ambiguity cannot be cured by severing the word "Metropolitan".

3 A secondary issue is whether rectification may be invoked to resolve the ambiguity. In my opinion, it cannot. There is no indication that the parties agreed on something and then mistakenly included something else in the written contract. The doctrine of rectification cannot be invoked to rewrite the bargain between the parties.

II. Facts

4 On December 31, 1987, Morley Shafron sold the shares he owned in his own insurance agency business, Morley Shafron Agencies Ltd. ("MSA"), to KRG Insurance Brokers Inc. for a total consideration of $700,000. The name of his business was changed from MSA to KRG Insurance Brokers (Western) Inc. ("KRG Western") following the sale. Shafron continued to be employed in the business.

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case is the ambiguity of the geographical restriction contained in the covenant. However, before turning to the case at hand, I will discuss the doctrine of severance as it applies to restrictive covenants in employment contracts.

28 As we see in this case, the limits on geographic scope often give rise to questions of severance. Can a restrictive covenant that is unreasonably wide in its geographic scope be severed in some manner so as to leave in place what the court regards as reasonable?

C. Severance

29 Where severance is permitted, there appears to be two types: "blue-pencil" severance and "notional" severance. Both types of severance have been applied in limited circumstances to remove illegal features of a contract so as to render the contract in conformity with the law. Blue-pencil severance was described in *Attwood v. Lamont*, [1920] 3 K.B. 571 (Eng. C.A.), by Lord Sterndale as "effected when the part severed can be removed by running a blue pencil through it" (p. 578). In *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249 (S.C.C.), Bastarache J., in dissent, described this form of severance at para. 57:

> Under the blue-pencil test, severance is only possible if the judge can strike out, by drawing a line through, the portion of the contract they want to remove, leaving the portions that are not tainted by illegality, without affecting the meaning of the part remaining.

30 Notional severance involves reading down an illegal provision in a contract that would be unenforceable in order to make it legal and enforceable (see *Transport*, at para. 2). In *Transport*, the contract provided that interest was to be charged at a rate exceeding 60 percent contrary to s. 347 of the *Criminal Code*. There was no evidence of an intention to contravene this provision, and this was not a case of loan sharking. Arbour J. applied the doctrine of notional severance to effectively read down the interest rate to the legal statutory maximum of 60 percent.

31 In *Transport*, a condition for application of the doctrine of notional severance appears to have been that what was illegal was easily determined by a bright-line provision in the *Criminal Code*. At para. 34, Arbour J. stated:

> This legislatively mandated bright line [of 60 percent] distinguishes s. 347 cases from those involving provisions, for example, in restraint of trade, where there is no bright line.

It is apparent that Arbour J. would not have applied the doctrine of notional severance where there was no bright-line test for illegality. (See also *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 262 D.L.R. (4th) 752 (Alta. C.A.), at para. 46.)

32 It must be recognized, however, that the court is altering the terms of the original contract between the parties by applying the doctrine of severance, whether blue-pencil or notional. In *Transport*, Arbour J. observed at para. 30, that "[i]ndeed, all forms of severance alter the terms of the original agreement". Where severance is applied, whether blue-pencil or notional, the purpose is to give effect to the intention of the parties when they entered into the contract. However, courts will be restrained in their application of severance because of the right of parties to freely contract and to choose the words that determine their obligations and rights.

D. Blue-Pencil and Notional Severance Applied to Restrictive Covenants

33 Where the provision in question is a restrictive covenant in an employment contract, severance poses an additional concern. While the courts wish to uphold contractual rights and obligations between the parties, applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the court will only sever the unreasonable parts or read down the covenant to what the courts consider reasonable. In *Mason*, Lord Moulton made the well-known statement to this effect at p. 745:

> It would in my opinion be pessimi exempli if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and, by applying their ingenuity and knowledge

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Tab 28

2019 ONSC 328
Ontario Superior Court of Justice

Taylor et al. v. Ginoogaming First Nation

2019 CarswellOnt 659, 2019 ONSC 328, 301 A.C.W.S. (3d) 681

MARTHA TAYLOR, JASON RASEVYCH, CALVIN TAYLOR, GEORGETTE O'NABIGON, MARIANNE ECHUM, CINDY WESLEY and THEODORE SCOLLIE in their capacity as Trustees of the GINOOGAMING FIRST NATION TIMBER CLAIM SETTLEMENT TRUST (Applicants) and GINOOGAMING FIRST NATION (Respondents)

T.J. Nieckarz J.

Heard: July 13, 2018
Judgment: January 11, 2019
Docket: Thunder Bay CV-18-230-00

Counsel: E. Esquega, Molly MacDonald, for Applicants
No one for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts; Natural Resources; Public

Related Abridgment Classifications

Aboriginal and Indigenous law
III Status
III.2 Miscellaneous

Headnote

Aboriginal and indigenous law --- Status — Miscellaneous

For purposes of trust agreement — First Nation (FN) established Timber Claim Settlement Trust allowing for distribution of settlement proceeds received from federal government — Both settlement agreement (SA) and trust agreement (TA) had been approved by members of FN in ratification vote on December 15, 2001 — TA provided for one-time payment to be made to members whose names were on band list pursuant to provisions of Indian Act on day of vote and were alive on that day — Many current members of FN had not been entitled to register for Indian status and membership with FN by day of vote solely because of provisions in Act that had since been struck down as unconstitutional — Trustees brought application for opinion, advice, and direction of court concerning interpretation of trust agreement, particularly whether those current members were entitled to one-time payment — Application granted — One-time payment was not extended to any individual who became member of FN after December 15, 2001, even if they should have otherwise been member on that date but for discriminatory provisions of Act — This finding did not preclude possible amendment to terms of trust agreement as permitted under agreement or variation as otherwise permitted by law — TA and SA, read together, clearly limited one-time payment to members "whose name appears on the First Nation's Band List on the Voting Day" — Nothing in amendments to Act provided for retroactivity of rights upon gaining or re-gaining Indian status and FN membership rights — While one-time payment provision incorporated words "without discrimination", they were in specific reference to ensuring there was no discrimination between those who fell within definition of term "Member" on day of vote — It had not been anticipated that provisions of Act would be struck down, nothing suggested FN had breached fiduciary duty by not treating band members fairly and equally, and TA was not discriminatory on its face.

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Generally — referred to

s. 2(1) "band" — referred to

s. 2(1) "Indian" — referred to

s. 6(1) — considered

s. 6(2) — considered

Trustee Act, R.S.O. 1990, c. T.23

s. 60 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 14.05(3)(a) — considered

R. 14.05(3)(b) — considered

R. 14.05(3)(f) — considered

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R. 14.05(3)(h) — considered

APPLICATION by trustees of First Nation's Timber Claim Settlement Trust for opinion, advice, and direction of court concerning interpretation of trust agreement.

T.J. Nieckarz J.:

Overview:

1 This is an Application brought by the Trustees of the Ginoogaming First Nation Timber Claim Settlement Trust (the "Trust") for the opinion, advice, and direction of the court concerning the interpretation of the Timber Claim Trust Agreement (the "Trust Agreement").

2 Specifically, the opinion, advice, and direction sought pertain to the following two questions:

1. Does Article 12.5 of the Trust Agreement require the Trustees to make *per capita* payments to members who would have been entitled to be placed on the Band List of the Ginoogaming First Nation at the time of the ratification vote but for the discriminatory registration provisions in the *Indian Act*, R.S.C., 1985 c.I-5 that were in effect at the time?

2. If the answer to question #1 is "yes" then do the Trustees also have an obligation to hold funds in the Trust for the purpose of the *per capita* payments beyond the 20-year period specified in Article 12.5? If so, then for how long?

3 The Trustees rely on Rules 14.05(3)(a), (b), (f), and (h) of the *Rules of Civil Procedure* along with s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23 in support of their Application.

4 The Trustees have taken a neutral position regarding the outcome of this matter.

5 No one appeared on behalf of the Respondent First Nation. I note that the Office of the Children's Lawyer was served with the Application Record but takes no position on the Application. Counsel for the Applicants advise, that notice of this proceeding was posted in various locations including at the Ginoogaming band office, at Confederation College, at Lakehead University, in the Thunder Bay newspaper, and in various locations in the Geraldton area. As a result of these notices, a number of requests for the Application materials were received by counsel for the Applicants and satisfied, but no one appeared at the hearing of the Application other than the Applicants.

The Facts:

The Trust:

6 The Ginoogaming First Nation ("Ginoogaming") is a Band pursuant to the terms and provisions of the *Indian Act*. Ginoogaming is the settlor of the Trust.

7 On or about March 27, 2002, Ginoogaming and the Government of Canada entered into the Ginoogaming Timber Claim Settlement Agreement (the "Settlement Agreement"). The Settlement Agreement provided the terms for a resolution of a historical claim made by Ginoogaming with respect to the mismanagement of Ginoogaming's timber assets on reserve. The total value of the settlement was approximately $14 million.

8 Attached as a schedule to the Settlement Agreement was the Trust Agreement dated January 17, 2002, that created the Trust. The funds from the timber claim settlement were to form the property of the Trust.

9 Prior to the Settlement Agreement being entered into, the terms and conditions of the Settlement Agreement and the Trust Agreement were put to the members of Ginoogaming and approved in a ratification vote that was held on December 15, 2001. The ratification vote authorized Ginoogaming to enter into the terms of the Settlement Agreement and also to settle the Trust on the terms set out in the Trust Agreement.

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10 At the time of the vote, Ginoogaming had 507 registered adult members and 230 minor members. Ginoogaming has never assumed control of its band membership list, which is maintained by the director of Indigenous and Northern Affairs Canada. The right to become a member is regulated pursuant to the terms of the *Indian Act*. To be placed on a Band List, a person must be entitled to be registered as an "Indian" pursuant to the registration provisions in the *Indian Act*.

11 In June of 2002, the Ginoogaming Chief and Council passed a Band Council Resolution ("BCR") directing that the remaining funds from another settlement, of approximately $2 million, also be transferred to the Trust and be administered accordingly. These funds represented the remaining settlement proceeds from a settlement in 1998 with Ontario Hydro (as it was then called) to settle a claim for historical flooding on Ginoogaming lands caused by Ontario Hydro activities.

12 The Ontario Hydro settlement funds formerly formed the trust property of the Keemeshominishmanak Fund. Ginoogaming's decisions regarding this fund became the subject of a judicial review proceeding before the Federal Court of Canada in *Medeiros v. Ginoogaming First Nation*, 2001 FCT 1318, 213 F.T.R. 221 (Fed. T.D.) ("*Medeiros*"). In that case, the court considered the differential treatment between band members living on reserve and those living off reserve arising out of two Band Council Resolutions ("BCRs") that directed the use of the funds. The BCRs directed the Ontario Hydro settlement funds into the Keemeshominishmanak Fund to finance on-reserve projects, and they authorized payments to certain Elders living on-reserve. The Federal Court agreed with the applicants that the BCRs were discriminatory to off-reserve members and were therefore ultra vires. The assets of the fund were ordered to be remitted to the Chief and Council of Ginoogaming, who subsequently passed the June 2002 BCR directing that the funds be placed into the Trust.

13 The recitals to the Trust Agreement provide that the Trust is to enure to the benefit of the present and future generations of the Members of Ginoogaming. Article 11 of the Trust provides that trust property may be used for various initiatives for the benefit of Ginoogaming, including promoting the health of members, construction of infrastructure on Reserve lands, and education. In addition, Article 12.5 of the Trust Agreement, which is the subject matter of this Application, provides for a one-time payment to be made to a specified category of persons as follows:

> 12.5 Within six months of the first deposit of the Compensation, as set out in Article 2.1 of the Settlement Agreement, the Trustees shall effect a payment from the Trust Property of ONE THOUSAND DOLLARS ($1,000.00) **to each and every Member, without discrimination, alive on the day of the vote.** Any Member who is EIGHTEEN (18) years or older on the day of the vote and who fails to identify herself or himself to the Trustees and provide a valid mailing address for the payment within TWENTY (20) years of the date of the vote shall forever be disqualified from receiving the payment; all such delayed payments shall be WITHOUT accrued interest. The Trustees shall hold all payments to Members who are not Voters until they attain the age of EIGHTEEN (18), at which time they shall be paid $1,000.00 PLUS accrued interest from the date of the vote to the date of their eighteenth birthday.
>
> [Emphasis added].

Article 2(c) of the Trust Agreement defines the term "Band Member" as follows:

> 2(c) "Band Member" has the same meaning as "Member", and means a person whose name appears on the Ginoogaming Band List, pursuant to the provisions of the *Indian Act*.

14 The term "Member" is not defined in the Trust Agreement, but it is defined in the Settlement Agreement. Article 2 of the Trust Agreement provides that, if a term is not specifically defined in the Trust Agreement, but is defined in the Settlement Agreement, it shall have the same meaning as in the Settlement Agreement. Article 1.1(o) of the Settlement Agreement defines "Member" as follows:

> 1.1(o)"Member" means a person whose name appears on the First Nation's Band List on the Voting Day.

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15 "Voting Day" is defined in Article 1.1(x) of the Settlement Agreement to mean the day set for holding the Ratification Vote, which was December 15, 2001.

16 As of February 16, 2018, at least 118 individuals who were alive on the Voting Day have since become members of the Ginoogaming Band List. Some of those members, although at the time of the hearing of the Application it was not known how many, were not entitled to register for Indian Status and membership with Ginoogaming on the Voting Day solely because of provisions in the *Indian Act* that have since been struck down as discriminatory and an unjustifiable infringement of *Charter* rights. But for the discriminatory registration provisions in the *Indian Act*, these individuals could have been "Members" as defined in the Settlement Agreement.

The Legislative Background:

17 The *Indian Act* has been and remains the primary legislation governing Aboriginal peoples and their lands. The Act sets out criteria defining "Indian" status for purposes of determining entitlement to a range of legislated rights, federal programs and services. Status under the Act is also tied to an individual's eligibility to become a member of a First Nation, unless that First Nation maintains its own membership list.

18 Prior to 1985, the *Indian Act* provisions regarding status explicitly favoured paternal lineage and discriminated against aboriginal women and their descendants. Specifically, from 1869 onwards the marriage of an Aboriginal woman to a non-Aboriginal man meant loss of status for the woman and her children. Aboriginal men who "married out" did not lose their status, and neither did their children. Additionally, a non-Aboriginal woman who married an Aboriginal man gained status and the right to be registered as a member of a particular band.

19 The *Indian Act* was amended in 1951 in several ways. Significantly, children of a married Aboriginal man who married a non-Aboriginal woman would be entitled to Indian status unless the child's paternal grandmother was also non-Aboriginal. In those cases, the child would lose his or her Indian status once they reached the age of twenty-one years. This was referred to as the "double-mother" rule.

20 Leading up to the implementation of the *Charter of Rights and Freedoms*' equality rights provisions in April of 1985, there was significant advocacy by Aboriginal women's groups, human rights organizations, and other bodies, along with court challenges seeking to eliminate the gender discrimination in the *Indian Act*. Bill C-31, An Act to Amend the *Indian Act*, S.C. 1985, c.27, s.4 ("Bill C-31") came into effect on April 17, 1985, and attempted to remove the differential discriminatory treatment between men and women.

21 The Bill C-31 amendments removed the "marrying out" provisions and the "double mother" rule, and entitlement to registration was restored to those who had lost their status under those provisions. Those entitled to register for Indian status would now either be entitled to register under ss. 6(1) or 6(2) of the *Indian Act*. Unfortunately the Bill C-31 amendments resulted in a complicated array of categories of individuals entitled to status and failed to fully rectify the discriminatory effects of prior registration provisions.

22 The Bill C-31 amendments continued to draw a distinction between those individuals with two Aboriginal parents and those with only one Aboriginal parent, although it eliminated the distinction between paternal and maternal lineage for children born after 1985.

23 The amendments also implemented the "second generation cut-off" rule. The second generation cut-off rule signified the loss of status after two successive generations of mixed Aboriginal and non-Aboriginal parentage. The amendments were criticized for creating a disadvantage for the descendants of aboriginal women who had married out and regained status under Bill C-31 because their children, who were born before 1985 and registered under the new Act, were unable to transmit status onward if they married a non-Aboriginal person. In contrast, the children of Aboriginal men who had married non-Aboriginal women prior to 1985 did not suffer the same fate.

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24 These were the provisions pertaining to eligibility for status and registration for membership with a First Nation that were in effect on the Voting Day when the Trust was settled and ratified by Ginoogaming members. Since then, there have been two further significant legislative changes to these provisions that have arisen from two significant court decisions.

25 The first of those decisions was the 2009 British Columbia Court of Appeal decision *McIvor v. Canada (Registrar of Indian & Northern Affairs)*, 2009 BCCA 153, 269 B.C.A.C. 129 (B.C. C.A.) leave to appeal to the S.C.C. refused, 33201 [2009 CarswellBC 2987 (S.C.C.)] (November 5, 2009) ("*McIvor*"). In *McIvor*, the court found that, despite the corrective purpose of the Bill C-31 amendments, the registration provisions of the *Indian Act* (and specifically the second generation rule) continued to provide differential treatment to individuals born prior to April 1985 based on whether the child's sole Aboriginal grandparent was a male or female. The court found that, while the amendments gave individuals affected by the double mother rule additional rights, it also created new inequalities. As such, the offending provisions were deemed to be unconstitutional and were declared to be of no force and effect. This declaration was suspended for a period of one year to give the federal government time to make the necessary amendments to the legislation.

26 In response to *McIvor*, Bill C-3, the *Gender Equity in Indian Registration Act* (short title) ("Bill C-3"), was introduced and received royal Assent in 2010. Pursuant to the Bill C-3 amendments, the grandchildren of eligible Aboriginal women who had lost status as a result of marriage became entitled to register for status, but the legislation did not address all issues related to gender discrimination in the *Indian Act*. Bill C-3 focused exclusively on the specific circumstances outlined in *McIvor* and the remedies required to only address these issues. Inequities persisted, with some individuals and their descendants continuing to have fewer rights than others by virtue of having an Aboriginal grandmother as opposed to grandfather.

27 A further challenge to the status and registration provisions of the *Indian Act* came with the 2015 the Superior Court of Quebec case, *Descheneaux c. Canada (Procureur général)*, 2015 QCCS 3555, 259 A.C.W.S. (3d) 601 (C.S. Que.). In this case, the Plaintiffs argued that Bill C-3 had not gone far enough to remedy the inequities perpetuated by the *Indian Act*. Specifically, the Plaintiffs alleged that the Act continued to perpetuate differential treatment between:

a. First cousins, depending on the sex of their Indian grandparent, where the grandparent was married to a non-Indian before 1985; and

b. Siblings, where a male and female child were born out of wedlock between the 1951 and 1985 amendments to the Act.

28 The Plaintiffs argued that the differential treatment resulted in an unequal ability to pass on Indian status, depending on whether a person was descended from a male or female Indian grandparent or parent. The Quebec Superior Court agreed and held that the registration provisions of the *Indian Act* that continued to unfairly discriminate against Aboriginal women and their descendants and limit their ability to pass on Indian status were declared of no force and effect. The court's decision was suspended for 18 months (with subsequent extensions of this timeframe) to give Canada time to enact new legislation.

29 The federal government's response to *Descheneaux* was Bill S-3, an Act to amend the *Indian Act* (elimination of sex-based inequities in registration) (short title) ("Bill S-3"), which received royal assent on December 12, 2017. Part of the legislation came into force on December 22, 2017. This includes an extension of entitlement to Indian status to individuals affected by inequities relating to the different treatment of cousins, siblings, or minors who were omitted from historic lists. Further amendments will come into force at a later date that will further extend the categories of those eligible for registration under the Act.

The Issues:

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30 The primary issue to be determined on this Application is whether members of Ginoogaming, who would have been entitled to membership on the Voting Day but for the discriminatory provisions of the *Indian Act* and have since become members by virtue of the two amendments to that Act, are entitled to the payment contemplated by Article 12.5 of the Trust Agreement. If they are, does the 20 year time limit provided for in Article 12.5 still apply for these individuals to identify themselves and claim their payment or should the time limit be extended?

The Law:

31 Section 60 of the *Trustee Act*, and Rule 14.05(3)(a) of the *Rules of Civil Procedure* provide a trustee the ability to apply to this court for the opinion, advice, or direction on any question respecting the management or administration of the trust property. Specifically, s. 60 of the *Trustee Act* grants to the court the jurisdiction to provide advice and direction to a trustee as to what they can and cannot do within the confines of the trust agreement: *Roseau River Anishinabe First Nation v. RRFNT AKI Property Holdings Ltd.*, 2014 MBQB 215, 311 Man. R. (2d) 155 (Man. Q.B.), at para. 108.

32 Both trust principles and contractual interpretation principles factor into how a court is to interpret a trust document: *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2012 ONCA 862, 115 O.R. (3d) 287 (Ont. C.A.), at para. 64. In doing so, a court must take into account the trust agreement as a whole and should consider the factual matrix surrounding the trust agreement: The *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, at para. 64; *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (Ont. C.A.), at para. 32.

33 In The *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, at paras. 67 and 70 the Ontario Court of Appeal considered the importance of the factual matrix

> [67] It is well established that in interpreting a contract, the court may consider the "factual matrix" surrounding the contract, even where there is no ambiguity. "Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case": *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CanLII 24049 (ON CA), 52 O.R. (3d) 97 (C.A.), at para. 23.
>
> . . . . .
>
> [70] In *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 49 B.C.L.R. (3d) 317, at para. 18, the British Columbia Court of Appeal described the factual matrix as the "background" of the contract:
>
> > The factual matrix is the background of relevant facts, that the parties must clearly have been taken to have known and to have had in mind when they composed the written text of their agreement. It can throw light on what the parties must have meant by the words they chose to express their intention....
> >
> > The factual matrix is the background which may deepen an understanding of what the parties meant by the language they used, but the Court cannot make a new agreement.

34 While the factual matrix may be used to clarify the parties' intentions as expressed in a written agreement, it cannot be used to contradict that intention or have the effect of making a new agreement. Ultimately, the words of the agreement are paramount: *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, at para. 71.

Analysis:

35 The Applicants do not seek to vary the terms of the Trust. This court has been asked solely the question of whether Article 12.5 of the Trust Agreement requires the Trustees to make *per capita* payments to members who would have been entitled to be placed on the Band List for Ginoogaming on the Voting Day but for the discriminatory registration of the *Indian Act*. Based on a plain reading of the Trust Agreement, the conclusion I am forced to reach is that it does not.

36 Article 12.5 of the Trust Agreement is clear that the *per capita* payments are to be made "to each and every Member, without discrimination, alive on the day of the vote." Member is not defined in the Trust Agreement, but is defined in

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s. 1.1(o) of the Settlement Agreement. Section 2 of the Trust Agreement incorporates the definitions contained in the Settlement Agreement. "Member" is clearly defined in the Settlement Agreement as "a person whose name appears on the First Nation's Band List *on the Voting Day*" (emphasis added). The Voting Day was December 15, 2001. The new Members of Ginoogaming, who have become members by virtue of the amendments to the *Indian Act*, were not members on the Voting Day.

37 The amendments to the registration provisions of the *Indian Act* did not take place until 2010, and then 2017, and are ongoing. There is nothing in either Bill C-3 or Bill S-3 that indicates that those individuals who have either gained or re-gained "Indian" status and rights of membership in a First Nation as a result of the amendments will have those rights accrue to them retroactive to a date prior to the amendments coming into effect. In other words, the rights afforded to those individuals by "Indian" status, including membership, did not accrue prior to the 2010 and 2017 amendments. Even though it is fully recognized that but for the discriminatory provisions of the *Indian Act* those individuals *should have* been members on the Voting Day, the reality is that they were not and are therefore excluded from the benefit of the payment provided for in Article 12.5.

38 The Applicant Trustees, while they took no position on this Application, did point out that the *per capita* payments made pursuant to Article 12.5 are to be made to members "without discrimination." The Trustees argue that part of the factual matrix is the *Medeiros* decision that was issued shortly before the Trust was ratified. They state that the settlors of the Trust, being clearly aware of the perils of having a discriminatory provision in a Trust Agreement, were mindful in the drafting of the Trust Agreement not to discriminate between members. The Trustees argue that the settlors intended an inclusive interpretation of "Member" in the Trust Agreement.

39 I agree with the position of the Trustees that the settlors were careful in the drafting of the Trust Agreement not to have discriminatory provisions in the Trust Agreement such as those found in the offending BCR's in *Medeiros*. But I do not find that this changes the result. This Trust Agreement does not discriminate between members on-reserve or off-reserve and it does not discriminate between any other class of members. Keeping in mind the context of the *Medeiros* case that caused the settlors to be mindful of discriminating as between existing members, this would appear to have been the intention of the settlors in incorporating the words "without discrimination." The Trustees have acknowledged in argument that there is no evidence that the Settlors turned their minds to the particular type of discrimination found in the registration provisions of the *Indian Act*. In fact, the Trustees argued that the settlors could not have anticipated that portions of the *Indian Act* would be found unconstitutional at a much later date. This supports the conclusion that the words "without discrimination" are in specific reference to ensuring there is no discrimination between those who fell within the definition of the term "Member" on the Voting Day.

40 The general recitals to the Trust Agreement express a clear intention to benefit all present and future generations of Members. The Trustees in their argument suggested this too may support an inclusive interpretation of "Member" in the Trust Agreement. A reading of the Trust Agreement does not support this interpretation. The provisions of Article 11.4 allow for the use of Trust Property for the benefit of the First Nation as a whole in order to accomplish this goal of benefitting present and future generations. However, when it comes to Article 12.5, the settlors of the Trust expressed an intention to limit the payment to those individuals who were members of Ginoogaming on the Voting Day. Based on a clear reading of the Trust Agreement, any individual who became or becomes a member after that date has no entitlement to enjoy the benefit of the Article 12.5 payment.

Other Cases:

41 The Trustees point to *Barry v. Garden River Ojibway Nation No. 14* (1997), 71 A.C.W.S. (3d) 800 (Ont. C.A.) [1997 CarswellOnt 1812 (Ont. C.A.)] ("*Garden River*"), as an example of litigation in which discrimination in the distribution of settlement trusts has been at issue. In *Garden River*, female members of the Band brought an action for an accounting and payment of their *per capita* distributive share of a trust fund received by the Band in settlement of a claim with the Government of Canada. The appellants claimed a share for themselves and on behalf of all other women who were reinstated to membership in the Band as a result of Bill C-31 amendments to the *Indian Act*. The concern was that the

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share had been reduced for enfranchised women in the amount they had received when they left the band, while no deductions were made from the share of other members who owed debts to the Band for other reasons. Minor appellants also claimed a share on behalf of themselves and all other children of reinstated women who are or should be known to the trustees.

42 In *Garden River*, the court quoted at para. 35 the following from Waters, *Law of Trusts in Canada*:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share...*It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.*
>
> [Emphasis added].

43 As noted by the court, at para. 43, a trustee's first duty is to follow the terms of the trust instrument. In the*Garden River* case, the terms of the trust were set by BCR on September 28, 1987, to make a *per capita* distribution of the settlement funds to *all* members of the Band. It was only after the trust was created, when, on December 3, 1987, the Band further resolved to determine membership and make the disbursement on December 17 and 18, 1987. The court noted that the distribution date for the settlement funds was arbitrary in that it was not chosen for any particular reason. The court also noted that payments had been made to other individuals after the cut-off date pursuant to the terms of a subsequent BCR. The court found that, in knowing there was an issue with respect to the qualification of the minor appellants for membership but making a decision to distribute the funds before it could definitely ascertain the identity of all beneficiaries, this was a breach of the Band's duty to act fairly and impartially and was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and identify and locate the members of that class.

44 The Trustees in the case at hand acknowledge that *Garden River* is distinguishable on its facts. In this case, the date for determining membership is provided for in the Trust Agreement and was not arbitrarily determined after the date of the settlement of the Trust. As stated by the Court of Appeal, a trustee's duty is to follow the terms of the trust instrument. In the case at hand, the trust instrument is clear that membership is determined on the Voting Day, namely December 15, 2001.

45 The Trustees also point to *Blueberry Interim Trust, Re*, 2011 BCSC 769, 203 A.C.W.S. (3d) 683 (B.C. S.C.) ("*Blueberry*"), and suggest that arguably the same fiduciary duties apply to the Applicants in this case to treat all beneficiaries fairly and equally as was found in *Blueberry*. I agree with that general statement. However, this argument still does not overcome the clear and plain definition of "Members" as provided for in Article 1.1(o) of the Settlement Agreement and the obligation of the trustees to carry out the terms of the Trust Agreement.

46 The facts before the court in *Blueberry* concerned the *per capita* payment to minor members and the duties which arose at the time the Band undertook to distribute settlement funds. Similar to the case at hand, the Band settled a claim, and then created a trust to hold and manage the proceeds. The trust provision in *Blueberry* provided that the minor beneficiaries were to receive their payments upon turning 19, but were not entitled to accrued interest. The Public Guardian and Trustee took the position that minor members were entitled to the accrued interest as the time value of the money needed to be considered. Otherwise, the minor members would be treated differently than the adult members who received their payments much earlier. The Public Guardian and Trustee sought a declaration that payment of interest to the minor beneficiaries was required. The court agreed with the Public Guardian and Trustee and held that even though there was no breach of fiduciary duty by failing to provide for the payment of interest in the terms of the Trust, the act of distributing the funds to minor members without paying interest would result in a breach of that duty and the duty to treat all beneficiaries fairly and equally.

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47 In *Blueberry*, the court noted that a Band Council is impressed with a fiduciary obligation to ensure a fair distribution of settlement proceeds upon receipt of those proceeds, and even before the terms of a trust are settled. At para. 54, the court noted that several cases have held that, when a Band undertakes to make a *per capita* distribution, it must treat band members equally.

48 In the case at hand, there is nothing to indicate or suggest that the Band breached its fiduciary duty by not treating band members fairly and equally. All band member as at the Voting Day were treated equally and the Trust Agreement was clearly drafted to avoid issues such as that in *Blueberry* where arbitrary deductions were made from some beneficiary's payments and interest was not paid to minors. There is no breach of the duty of loyalty and honesty to future members of the Band necessary to establish a breach of fiduciary duty. The Applicants did not present any case law or make any argument that suggests that this duty extends to future members and therefore the limitation on distribution to members that were registered on the Voting Day is a breach.

Public Policy:

49 In confirming that this court has jurisdiction pursuant to s. 60 of the *Trustee Act* to hear this application, the applicants make reference to *Canada Trust Co. v. Ontario (Human Rights Commission)*, and specifically para. 40, where the court states:

> 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 be conducive to public interests.

50 *Canada Trust Co.* dealt with a public charitable trust that was discriminatory on its face. The Trust Document stated that the Trustees were only to provide scholarships to white Christians. The Applicants in that case sought a declaration that the trust, to the extent that it was discriminatory, was void on the grounds of public policy. The Court of Appeal agreed. More recently, in *Spence v. BMO Trust Co.*, 2016 ONCA 196, 129 O.R. (3d) 561 (Ont. C.A.), the Court of Appeal has clarified that a settlor has the common law right to limit the scope of beneficiaries as long as the document is not discriminatory on its face. It cannot be said that the Trust Agreement is discriminatory on its face. In any event, the applicants neither sought to vary the terms of the Trust, nor did they seek to have certain provisions declared void.

Order:

51 In light of the foregoing, I find that the payments provided for in Article 12.5 are not extended to any individuals who became a member of Ginoogaming after December 15, 2001, even if they should have otherwise been a member on that date but for the discriminatory provisions of the *Indian Act*. In light of my findings as to the interpretation of Article 12.5 there is no need to answer the second question posed by the applicants with respect to the 20-year time limit.

52 As indicated at the outset of this decision, I was asked only to interpret the Trust Agreement and not to amend or vary it. It is not the role of an interpreting court to change the plain meaning of a trust document. I do, however, note that Article 16 of the Trust Agreement specifically provides for changes or amendments to the terms of the Trust Agreement if approved by a vote of the Members. It is also open to the Trustees to bring an application for a variation of the terms of the Trust if otherwise permitted by law.

53 The Applicants are entitled to their costs from the Trust to be fixed. The Applicants are asked to provide a Bill of Costs within 30 days of the date of this decision.

Application granted.

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Tab 29



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

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

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

APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**AFFIDAVIT OF PAUL BUJOLD**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

I hereby certify this to be a true copy of the original.
for Clerk of the Court

I, Paul Bujold, of Edmonton, Alberta, make oath and say that:

1. I am the Chief Executive Officer of the 1985 Sawridge Trust and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I have reviewed the affidavit of Catherine Twinn ("Catherine") filed September 30, 2015 (the "September 30 Affidavit") and wish to provide by this affidavit my response to the

Trusts to Merge

153. At an October 18, 2011 meeting, Catherine referenced a part of the transcript from Chief Walter Twinn's testimony in the constitutional challenge litigation involving SFN suggesting that the two Trusts were not to co-exist; the 1985 Trust was not going to be effective and the 1986 Trust would survive. Catherine is now challenging that concept and suggesting that the Chief Walter Twinn always wanted two Trusts with two sets of beneficiaries.

154. In addition, in 2009, the Companies were lobbying the Trustees to merge the Trusts since the two-trust-situation was impeding business. Donovan Waters even drew up a Trust Deed in 2010 envisioning this merger of the Trusts if the beneficiary definition was changed to be the same in both Trusts. Catherine was involved in this process and approved it.

155. It is clear from the transcript of Chief Walter Twinn that the Trusts were to be merged. I also learned that from a phone call with Maurice Cullity. The relevant portion of the transcript is attached hereto as Exhibit "AA"

December 16, 2015 affidavit of Catherine Twinn

156. Catherine also deposed a further affidavit and filed such affidavit on December 16, 2015 ("December Affidavit"). Much of the evidence in the December Affidavit is a repetition of the evidence in the September 30 Affidavit and thus I will only address my concerns, and contrary evidence, about those matters which are not a repetition.

157. In several of the paragraphs of the December Affidavit, Catherine addresses the need for the Trustees to become involved in the SFN membership process. I believe that the decision of Justice Thomas in December 2015 has determined that it is not appropriate to address membership in the 1103 action. Further, membership is not relevant to the 1403 action. Thus, while I have contrary evidence to the issues as Catherine has raised them in the December Affidavit, I will not set out that evidence in detail as I believe it has now become irrelevant. Specifically, references to SFN membership in paragraphs 4, 6, 7, 10, 11 and 12 of the December Affidavit will not be specifically addressed.

158. Catherine suggests that the Trusts need independent representation so that the management of the assets is not affected by "improper motivations". The Trusts' assets

This is Exhibit "aa" referred to in the Affidavit of

Paul Bujold

Sworn before me this 15th day

of February A.D., 2017

A Notary Public, A Commissioner for Oaths
in and for the Province of Alberta

TAYLOR J. WATTS
Student-at-Law

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION
Court File No. T-66-86

BETWEEN:

WALTER PATRICK TWINN, suing on his own behalf and on behalf of all other members of the Sawridge Band, WAYNE ROAN, suing on his own behalf and on behalf of all other members of the Ermineskin Band, BRUCE STARLIGHT, suing on his own behalf and on behalf of all other members of the Sarcee Band

Plaintiffs

-and-

HER MAJESTY THE QUEEN

Defendant

-and-

NATIVE COUNCIL OF CANADA, NATIVE COUNCIL OF CANADA (ALBERTA), AND NON-STATUS INDIAN ASSOCIATION OF ALBERTA

Interveners

P R O C E E D I N G S

Held at the Federal Court of Canada
Edmonton, Alberta
October 29, 1993
Volume 25
Pages 3945 to 4047

Taken Before:

The Honourable Mr. Justice F. Muldoon

APPEARANCES

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P. Healey, Esq.	
D. D. Akman, Esq.	For the Defendant
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P. J. Faulds, Esq.	Intervener for the Native Council of Canada (Alberta)
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T. P. Glancy, Esq.	Intervener for the Non-Status Indian Association of Alberta

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(PROCEEDINGS RESUMED AT 9:05 A.M.)

MR. HENDERSON: My Lord, I'm going to ask for your consent to excuse my friends. I've got them chugging through the documents again today.

THE COURT: That's reasonable, Mr. Henderson. Yes. Thank you.

MR. FAULDS: And with respect to Mr. Glancy, My Lord, I believe Mr. Meehan is going to . . .

MR. MEEHAN: With your permission, My Lord, may I act as agent for Mr. Glancy?

THE COURT: Of course. With his consent, of course.

MR. MEEHAN: With his consent.

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