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 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI as Trustees for the 1985 Sawridge Trust;
DOCUMENT	**REPLY BRIEF OF THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE ("OPGT")** **JURISDICTION APPLICATION RETURNABLE APRIL 25, 2019**

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Solicitors for Catherine Twinn

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PART I – OVERVIEW

1. In this application the Court is asked to determine whether or not it has jurisdiction to amend the 1985 Sawridge Inter Vivos Trust ("the 1985 Trust") to address discrimination in the beneficiary definition, and the basis and scope of such jurisdiction, if any. Whether or how the Court should exercise any jurisdiction it may have is not before the Court at this time but may be the subject of a future motion if necessary.

2. The Office of the Public Guardian and Trustee ("the OPGT") represents the interests of minors and former minors who are beneficiaries of the 1985 Trust under the existing definition, most of whom might lose their interest in the 1985 Trust under the Trustees' proposed definition.[1] The OPGT also represents the interests of minor children of persons who have, or who are formally seeking, membership in the Sawridge First Nation ("the SFN"), as minors who might become beneficiaries under the Trustees' proposed definition. Given the diverse nature of the interests it represents, the OPGT's submissions on this motion seek to provide the Court with a fair and balanced summary of the applicable legal principles and an overview of the options potentially available to the Court to move forward in this proceeding.[2]

3. The OPGT submits that as a general rule a trust cannot be varied unless expressly provided for in the trust. There are exceptions to this rule but these are restrained in application and call for a principled approach.

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[1] Questioning of Paul Bujold held May 27-28, 2014 Transcript, p.140 [Appendix A, Reply Brief of the OPGT, filed April 12, 2019]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 ("Sawridge #1") at paras. 31-33 [Authorities Tab 1, Reply Brief of the OPGT, filed April 12, 2019]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 ("*Sawridge #2*") at paras. 12-13, 18-19 and 27 [Authorities Tab 2, Reply Brief of the OPGT, filed April 12, 2019]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*") [Authorities Tab 3, Reply Brief of the OPGT, filed April 12, 2019]

[2] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 ("Sawridge #1") at paras. 31-33 [Authorities Tab 1, Reply Brief of the OPGT, filed April 12, 2019]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 ("*Sawridge #2*") at paras. 12-13, 18-19 and 27 [Authorities Tab 2, Reply Brief of the OPGT, filed April 12, 2019]; *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*") at paras. 37, 48, 52-53 and 56-57 [Authorities Tab 3, Reply Brief of the OPGT, filed April 12, 2019]

4. With respect to possible sources of jurisdiction to amend the 1985 Trust the OPGT submits:

a. As presently constituted, the 1985 Trust permits amendments to its terms by resolution of the Trustees approved in writing by at least eighty percent (80%) of the beneficiaries then alive and over the age of twenty-one (21). However, no amendment is permitted by the Trustees to alter the definition of the beneficiaries or their beneficial ownership of the trust property.[3] Accordingly, no amendment of the definition can be made pursuant to the existing terms of the 1985 Trust.

b. The Court has jurisdiction to approve an arrangement varying the 1985 Trust pursuant to s. 42 of the *Trustee Act*.[4] To date the Trustees have not submitted a proposed arrangement under s. 42 to the Court;

c. The Court may have jurisdiction to amend the 1985 Trust to address discriminatory provisions based on considerations of public policy. The presence of discrimination does not automatically trigger such jurisdiction. Whether such jurisdiction exists in any given case is fact specific and closely related to Court's assessment of whether a remedy is required. Jurisdiction ought to be exercised in such a way as to preserve the interests of existing beneficiaries. Jurisdiction is not restricted to deleting language.

5. Given the potential sources of jurisdiction, the Court's options to move this proceeding forward include:

a. Giving directions to the Trustees respecting steps to be taken in pursuit of an application under s. 42 of the *Trustee Act* to address discrimination in the beneficiary definition of the 1985 Trust by:

i. deleting the restriction prohibiting the use of the amending power contained in the 1985 Trust to amend the beneficiary definition, so as to allow the Trustees to pursue an amendment pursuant to that power; or

ii. directly amending the beneficiary definition contained in the 1985 Trust in some fashion.

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[3] 1985 Trust Deed, para.11 [Tab 6, Brief of the Sawridge Trustees, filed March 29, 2019]
[4] *Trustee Act*, RSA 2000, c. T-8, s. 42 [Tab 4, Brief of the Sawridge Trustees, filed March 29, 2019]

b. Directing a further hearing to address whether the Court can and should exercise any common law jurisdiction it may have to address such discrimination in the manner set out in paragraph 5(a) (i) or (ii), above.

6. The OPGT does not suggest the foregoing overview of available options is exhaustive and also notes it is open to the Court to consider a combination of options.

7. With respect to the specific options noted above, the OPGT submits that an application under s.42 of the *Trustee Act* is the least intrusive to the 1985 Trust, the most respectful of the interests of the current beneficiaries, and relies on indisputable statutory jurisdiction. Obtaining the necessary consent of all competent beneficiaries is required, which to date has not been pursued in a meaningful and co-operative way.

8. Exercising common law jurisdiction, if any, to vary the beneficiary definition directly is more intrusive as it does not involve the consent of the current beneficiaries. Relying on common law jurisdiction to vary the amending provision in the 1985 Trust so that it might be used by the Trustees to change the beneficiary definition may be considered a middle ground.

9. Whatever approach the Court may ultimately determine, the OPGT submits that as the Alberta Court of Appeal held at an earlier stage of these proceedings, "it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the 1985 Trust, require protection."[5]

PART II - FACTS

A. The 1985 Trust

10. The 1985 Trust was established by a Declaration of Trust and Deed of Settlement between then SFN Chief Walter Patrick Twinn as Settlor and three named Trustees dated April 15, 1985. The 1985 Trust was ratified and approved at a general meeting of SFN

[5] *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2013 ABCA 226 ("*Sawridge #2*") at para. 27 [Authorities Tab 2, Reply Brief of the OPGT, filed April 12, 2019]

members on April 15, 1985, as reflected in a further Declaration of Trust dated April 16, 1985 affirming the terms on which the trust property was held.[6]

11. The opening paragraph of the Trust Deed states that the Settlor desires to create an *inter vivos* settlement for the benefit of all individuals who:

> ...at the date of 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.

12. The beneficiary definition at paragraph 2 of the Trust Deed then states that the beneficiaries of the 1985 Trust at any particular time are all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the April 15, 1982 provisions of the *Indian Act*. The definition then goes on to say that if the *Indian Act* were to be amended after the execution of the Trust Deed, as in fact occurred with the passage of the legislation commonly referred to as Bill C-31, the beneficiaries would be:

> ...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...(*emphasis added*)[7]

13. For greater certainty, the definition goes on to exclude anyone who would not qualify under the 1982 *Indian Act* provisions even if they become or are considered to be members of the SFN by virtue of future legislation.[8]

14. The 1985 Trust, and the beneficiary definition it contains, was established in anticipation of amendments to the *Indian Act* that were to come into force on April 17, 1985,

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[6] Declaration of Trust and Deed of Settlement dated April 15, 1985 [Tab 6, Brief of the Sawridge Trustees, filed March 29, 2019]; Evidence of Walter Patrick Twinn, Trial Transcript page 3896 line 13 to page 3898 line 13, Affidavit of Records of Paul Bujold, filed April 30, 2018, Document #SAW001772-#SAW001773 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]; Declaration of Trust dated April 16, 1985, Affidavit of Records of Paul Bujold, filed April 30, 2018, Document #SAW000123-#SAW000134[Appendix F, Reply Brief of the OPGT, filed April 12, 2019]

[7] Declaration of Trust and Deed of Settlement dated April 15, 1985, para.2 [Tab 6, Brief of the Sawridge Trustees, filed March 29, 2019]

[8] Declaration of Trust and Deed of Settlement dated April 15, 1985, para.2 [Tab 6, Brief of the Sawridge Trustees, filed March 29, 2019]

which amendments were opposed by SFN. The amendments in question, contained in Bill C-31, sought to eliminate provisions in the *Indian Act* respecting Indian status and band membership which discriminated on the basis of gender. Among its terms, Bill C-31 restored to band membership certain persons who had lost that membership under the former discriminatory provisions. Bill C-31 also empowered First Nations to establish their own membership codes governing entitlement to membership, with the proviso that such codes could not exclude those whose membership had been restored.[9]

15. The Trust Deed defines beneficiaries by reference to entitlement to band membership as established by statute at a particular point in time – April 15, 1982. The definition relies on the provisions of the former *Indian Act*, some of which have since been recognized to discriminate on the basis of gender, including the following:[10]

a. A woman of Indian status who married a non-Indian man lost her Indian status and membership in her band. (s. 12(1)(b)) while a non-Indian woman who married a man of Indian status gained Indian status and membership in her husband's band.(s.11(1)(f)).

b. The child whose mother and whose father's mother were not originally of Indian status, but who had both acquired Indian status and band membership pursuant to s. 11(1)(f), ceased to be of Indian status or be a band member upon reaching the age of 21 (s. 12(1)(a)(iv))

c. The band membership of an illegitimate child of a female band member could be protested on the grounds the child's father was not Indian, but the reverse was not the case. (s. 12(2))

16. The SFN established its own Membership Rules in July 1985. Those Rules vested significant discretion in the Band Council to determine whether applications for membership should be approved[11] and the form for such applications,[12] as well as whether a member

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[9] The terms "Indian" and "band" are used herein as those terms are utilized in the *Indian Act*.
[10] *Indian Act*, R.S.C. 1970, c.I-6, s.12 [Authorities Tab 8, Reply Brief of the OPGT, filed April 12, 2019]; for example see: *McIvor* v. *Canada* [2007] B.C.J. No. 1259 (B.C.S.C.); varied [2009] B.C.J. No. 669 (B.C.C.A.); lve r'fd [2009] S.C.C.A. No, 234 (S.C.C.) and *Descheneaux* v. *Canada (Attorney General)*, 2015 QCCS 3555
[11] Sawridge Membership Rules, Applicants Materials, at para. 3(a)(ii), 3(c), 3(d) [Tab 23, Brief of the Sawridge Trustees, filed March 29, 2019]
[12] Sawridge Membership Rules, Applicants Materials, at para. 10 [Tab 23, Brief of the Sawridge Trustees, filed March 29, 2019]

should be removed from membership.[13] Membership in the SFN has been governed by the provisions of these Rules since notice of them was given to the Minister in 1985.

17. On their face the Membership Rules determine membership in the SFN in a substantially different manner than was provided in the *Indian Act* as it read on April 15, 1982, which governs beneficiary status under the 1985 Trust. As a result, it is common ground there are currently beneficiaries of the 1985 Trust who are no longer recognized as members of the SFN pursuant to the Band's Membership Rules, and members of SFN pursuant to the Membership Rules who are not beneficiaries of the 1985 Trust.

18. An examination of the manner in which the Membership Rules have been applied has been held to be beyond the role of the OPGT in of this proceeding.[14] However, the OPGT notes the suggestion by the Trustees that an application of the Membership Rules as a beneficiary definition will eliminate the issues in the current definition has not been determined by the Court at this time.[15]

19. The parties to this proceeding consented to an Order, filed January 22, 2018, which held that the beneficiary definition contained in the 1985 Trust is 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." The "persons" so discriminated against are the individuals whose band membership in the SFN was directly restored by Bill C-31.[16] However, the divergence between the list of beneficiaries under the 1985 Trust and the membership of the SFN extends beyond such persons.

20. The Trustees point to difficulties in the application of the current beneficiary definition, using as an example differences in opinion as to whether a particular individual

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[13] Sawridge Membership Rules, Applicants Materials, at para. 6 and 7 [Tab 23, Brief of the Sawridge Trustees, filed March 29, 2019]

[14] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*") at para. 54 [Authorities Tab 3, Reply Brief of the OPGT, filed April 12, 2019]

[15] Paragraph 41 of the Brief of the Trustees, filed March 29, 2019

[16] See Application (Statement of Issues and Relief Sought) filed on behalf of the Applicants being the five named Trustees for the 1985 Sawridge Trust. [Tab 1, Brief of the Sawridge Trustees, filed March 29, 2019]

(the Trustee, Justin Twin) is a beneficiary of the 1985 Trust under that definition.[17] The dispute ultimately turns on whether or not Justin Twin would be a member of the SFN pursuant to the *Indian Act* as it read on April 15, 1982. The OPGT notes that disputes of this nature can be resolved by the Court.

B. The Trustees' Application for Advice and Direction respecting the beneficiary definition

21. These proceedings were commenced by way of an application for Advice and Direction. This resulted in a procedural Order issued August 31, 2011 directing that an application shall be brought by the Trustees, *inter alia*:

> 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[18]

22. On January 9, 2018, pursuant to the recommendations of the Alberta Court of Appeal concerning the need "for a formal pleading setting forth the position of the Trustees and the relief being sought" in this proceeding,[19] the Trustees filed their Application (Statement of Issues and Relief Sought).[20]

23. The relief proposed by the Trustees is as follows:

a. First, to amend the beneficiary definition by striking out the language that has discriminatory effect such that the definition is reduced to "members of the Sawridge First Nation";

b. Failing such relief, a determination of whether the 1985 Trust can be amended pursuant to its amending provision or s. 42 of the *Trustee Act*;

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[17] Paragraph 25 of the Brief of the Trustees, filed March 29, 2019
[18] Order of Thomas J, pronounced August 31, 2011, paragraph 1 [Tab 11, Brief of the Sawridge Trustees, filed March 29, 2019]
[19] *Twinn v. Twinn*, 2017 ABCA 419 at para. 22 [Authorities Tab 13, Reply Brief of the OPGT, filed April 12, 2019]
[20] Application (Statement of Issues and Relief Sought) [Tab 1, Brief of the Sawridge Trustees, filed March 29, 2019]

c. In the event the definition beneficiary is amended, direction whether persons who would lose their beneficiary status should be "grandfathered" and if so who and on what terms.[21]

24. As noted above, the evidence of the Trustees is that their preferred amendment would result in most of the current beneficiaries who are minors losing their status as beneficiaries and their interest in the 1985 Trust.[22]

23. In an earlier ruling concerning the role of the OPGT in these proceedings, the Alberta Court of Appeal noted that as an application for advice and direction this proceeding is not adversarial in the usual sense of that term. Nonetheless the Court said the OPGT "will be obliged, as litigation representative, to advocate for the best interests of the children."[23] The OPGT has consistently maintained the interests of current minor beneficiaries in the 1985 Trust must be preserved. The OPGT also seeks to find a fair balance with the interests of minors who would become beneficiaries should the definition change.

C. Trustees' Communications with Beneficiaries prior to these proceedings

25. Between 2009 and the commencement of this proceeding the Trustees engaged in communications with SFN Members and existing or potential beneficiaries of the 1985 Trust, *inter alia,* by way of a newsletter, a letter and newspaper advertising. [24] Some of these communications referred to the Trustees' intention to proceed with a court application concerning the beneficiary definition in the 1985 Trust. However, they did not:

a. state the text of any new beneficiary definition the Trustees were proposing;

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[21] Application (Statement of Issues and Relief Sought) at para. 9 and 10 [Tab 1, Brief of the Sawridge Trustees, filed March 29, 2019]

[22] Questioning of Paul Bujold held May 27-28, 2014 Transcript, p.140 [Appendix A, Reply Brief of the OPGT, filed April 12, 2019]

[23] *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 ("*Sawridge #3*") at para. 19 [Authorities Tab 3, Reply Brief of the OPGT, filed April 12, 2019]

[24] Affidavit of Records of Paul Bujold, filed April 30, 2018, Document #SAW0006 and #SAW00564 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Records of Catherine Twinn, filed April 30, 2018, Document #TWN001691-#TWN001694 and #TWN002584-#TWN002591 [Appendix G, Reply Brief of the OPGT, filed April 12, 2019]

b. explain the Trustees' positions as to why a definition change was necessary and/or the benefits of a definition change; or,

c. explain the impact of any variation in the beneficiary definition would have on the interests of existing beneficiaries.[25]

26. One of the newsletters stated that "the permission of those affected will have to be obtained before amending the 1985 Trust documents."[26] Another stated that all beneficiaries of the 1985 Trust "must be members of the Sawridge First Nation as determined by the Sawridge Band."[27]

27. On August 31, 2011 the Trustees' counsel appeared before Justice Thomas to obtain procedural direction concerning their proposed application for advice and direction with respect to the 1985 Trust. The resulting Order, filed September 6, 2011, required notifications be given, *inter alia*, to all members of the SFN, all known 1985 Trust beneficiaries, all known 1982 Trust beneficiaries, all SFN membership applicants, and all individuals who responded to the Trustees' newspaper advertisements.[28] The directions required that the notice be given by a variety of means including registered letter to the Beneficiaries and potential Beneficiaries, posting on the Sawridge Trusts website and newspaper advertisement.

D. Trustees' 2018 Mailout to Beneficiaries to "vote" on potential amendment to the beneficiary definition

[25] Affidavit of Records of Paul Bujold, filed April 30, 2018, Document #SAW00005, #SAW00006, #SAW00564 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Records of Catherine Twinn, filed April 30, 2018, Document #TWN001691-#TWN001694 and #TWN002584-#TWN002591 [Appendix G, Reply Brief of the OPGT, filed April 12, 2019]

[26] Sawridge Trust News Volume 2, Number 1, Spring-Summer 2011 Affidavit of Records of Catherine Twinn, filed April 30, 2018, Document #TWN002588 [Appendix G, Reply Brief of the OPGT, filed April 12, 2019]

[27] Affidavit of Angeline Ward, filed February 27, 2019, para.5 [Appendix M, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Records of Paul Bujold, filed April 30, 2018, Document #SAW000661 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]

[28] Procedural Order, filed September 6, 2011 [Tab 11, Brief of the Sawridge Trustees, filed March 29, 2019]

28. There was little or no with prejudice communication with beneficiaries over the next 7 years. In the summer of 2018, the Trustees provided the parties to this proceeding with a "with prejudice" proposed amendment to the beneficiary definition under the 1985 Trust, which would redefine beneficiaries as all persons who at any particular time were members of the SFN under the laws of Canada, including pursuant to the SFN Membership Rules. This definition made no provision for the protection of existing beneficiary rights.[29]

29. The OPGT suggested an alternate beneficiary definition that would preserve existing beneficiaries' rights and expressed the hope there would be further discussion.[30] The Trustees replied they intended to proceed with their mailout which would ask 1985 Trust beneficiaries to "vote" on the two potential definitions.[31] The OPGT suggested the parties work together on plain language explanations of the definitions to accompany the ballot.[32] The Trustees advised they were not seeking approval from other counsel and that they did not intend to include any explanation in the mailout. [33]

30. The mailout proceeded on October 19, 2018 using two different letters, one to "Potential Beneficiaries" and one to "Interested Persons".[34] The wording of the respective letters suggested "Interested Persons" had less obvious interests in the 1985 Trust and it was unclear how "Interested Persons" votes would be counted.[35]

31. The mailout contained no commentary or explanation about the two beneficiary definitions on the ballot or how each proposed beneficiary definition might affect the rights

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[29] Letter from Dentons to Hutchison Law and McLennan Ross, dated June 22, 2018, Application by the Sawridge Trustees for Advice and Direction, Schedule "G", filed August 10, 2018 [Appendix D, Reply Brief of the OPGT, filed April 12, 2019]

[30] Letter from Hutchison Law to Dentons, dated July 27, 2018, Questioning of Paul Bujold, held February 11, 2019, Exhibit A for Identification [Appendix I, Reply Brief of the OPGT, filed April 12, 2019]

[31] Application by the Sawridge Trustees for Advice and Direction, Schedule "A" and "B", filed August 10, 2018 [Appendix D, Reply Brief of the OPGT, filed April 12, 2019]

[32] Email from McLennan Ross, dated September 25, 2018, Questioning of Paul Bujold, held February 11, 2019, Exhibit C for Identification [Tab 13, Brief of the Sawridge Trustees, filed March 29, 2019]

[33] Email from Dentons, dated October 5, 2018, Questioning of Paul Bujold, held February 11, 2019, Exhibit B for Identification [Tab 13, Brief of the Sawridge Trustees, filed March 29, 2019]

[34] Affidavit of Paul Bujold, filed January 10, 2019, para. 3 [Tab 10, Brief of the Sawridge Trustees, filed March 29, 2019]

[35] Questioning of Paul Bujold, held February 11, 2019, page 28-34 [Appendix H, Reply Brief of the OPGT, filed April 12, 2019]

of existing beneficiaries or SFN Members. Recipients of the mailout have confirmed they did not receive any other information about the vote.[36]

32. Despite being of the opinion that beneficiaries rarely responded to written communications, the Trustees did not attempt to hold consultation or information sessions with beneficiaries or potential beneficiaries of the 1985 Trust in relation to the 2018 mailout or at any previous time.[37]

PART III – ISSUES

33. The OPGT sees the thrust of the Jurisdictional Questions as being (and as appropriately/conveniently ordered for the purpose of these submissions) as follows:

a. Do the Trustees have, under the existing terms of the 1985 Trust, a power to amend the beneficiary definition? (*Para. (d) of the Order*)

b. What jurisdiction exists under s. 42 of the *Trustee Act* ("s. 42") to amend the beneficiary definition in the 1985 Trust? (*Para. (c) of the Order*).

c. What evidence is required for the exercise of the Court's jurisdiction under s. 42 of the *Trustee Act*? (*Para. (c) of the Order*).

d. If the Trustees are able to effect an amendment of the beneficiary definition by the exercise of a power under the 1985 Trust, or were they to effect such an amendment by resort to s. 42 of the *Trustee Act*, would the *Minors' Property Act 2004 c.M-18.1* "require evidence of consent from minor beneficiaries who are over the age of 14". (*para. (c) of the Order*)

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[36] Affidavit of Paul Bujold, filed January 10, 2019, Exhibit A [Tab 10, Brief of the Sawridge Trustees, filed March 29, 2019]; Affidavit of Shelby Twinn, filed February 26, 2019 [Appendix K, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Patrick Twinn, filed February 26, 2019 2019 [Appendix L, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Angeline Ward, filed February 27, 2019 [Appendix M, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Roland Ward, filed February 27, 2019 [Appendix N, Reply Brief of the OPGT, filed April 12, 2019]

[37] September 1, 2011 Letter to Beneficiaries, Affidavit of Records of Paul Bujold, filed April 30, 2018, Document # SAW00005 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]; Questioning of Paul Bujold, held February 11, 2019, page 41-44 and 63 [Appendix H, Reply Brief of the OPGT, filed April 12, 2019]

e. Does the Court have other or additional jurisdiction to amend the beneficiary definition of a trust such as the 1985 Trust on the basis of "public policy, inherent jurisdiction, or any other common law plenary power" (*Para. (a) of the Order*)?

f. What is the scope of any such jurisdiction to amend? For instance, can the Court delete words in a subject trust, add words, or engage in a combination of both? (*Para. (b) of the Order*).

PART IV – ANALYSIS

A. The Scope of the Jurisdictional Questions

34. As acknowledged by the Trustees, the within application "merely seeks clarification of the Court's jurisdiction to amend and to provide guidance to the Justice who will finally determine this matter"[38]. Specifically, the Jurisdictional Questions do not call for following issues to be addressed:

i) The merits of any application brought forward to amend the 1985 Trust under s. 42 of the *Trustee Act*;

ii) Whether the 1985 Trust in fact offends public policy;

iii) What remedy would be appropriate in the event an offence to public policy were found.

B. Do the Trustees have, under the existing terms of the 1985 Trust, a power to amend the beneficiary definition (Para. (d) of the Order

35. This Jurisdictional Question calls for consideration of paragraph 11 of the Trust Deed. The OPGT agrees with the Trustees that no power exists under the existing terms of the 1985 Trust to amend the beneficiary definition and provide for a different class of beneficiaries[39].

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[38] Paragraph 4 of the Brief of the Trustees, filed March 29, 2019
[39] See paras. 19-21 of the Brief of the Trustees, filed March 29, 2019

36. While paragraph 11 of the 1985 Trust sets forth an amending formula for other terms of the trust, the beneficiary definition and the beneficial interests established thereunder, are expressly excluded from the variance power that the formula provides.[40] As previously noted, in the event the Court concludes it has jurisdiction to vary the terms of the 1985 Trust one possible exercise of such jurisdiction would be to amend paragraph 11 to remove this restriction, allowing the Trustees to pursue a change to the beneficiary definition under the amending power contained in the 1985 Trust.

C. What jurisdiction exists under s. 42 of the *Trustee Act* to amend the beneficiary definition in the 1985 Trust? (Para. (c) of the Order)?

i) Section 42- General Principles

37. *Saunders* v *Vautier* gave rise to the common law for the variation of trusts. It established that with the agreement of all of the beneficiaries of a trust of adult age and under no disability a trust could be modified or extinguished without reference to the wishes of the settlor or trustee.[41]

38. Section 42 of the *Trustee Act* replaced the common law rules on the variation of trusts as reflected in *Saunders* v. *Vautier*, and added the requirement that a variation under the section must be approved by the Court[42].

39. In the absence of a power to amend being provided in a trust, resort to s. 42 of the *Trustee Act* is the mechanism made available under Alberta law to vary, amend, or re-write trust terms. Section 42 provides a wide suite of powers. The Court may vary the terms of a trust, resettle any interest under a trust, and terminate or revoke a trust.

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[40] 1985 Trust Deed, para.11 [Tab 6, Brief of the Sawridge Trustees, filed March 29, 2019]
[41] *Saunders* v *Vautier* [1841] EWHC J82, (1841) 4 Beav 115 [Authorities Tab 11, Reply Brief of the OPGT, filed April 12, 2019]
[42] *Saunders* v *Vautier* [1841] EWHC J82, (1841) 4 Beav 115 [Authorities Tab 11, Reply Brief of the OPGT, filed April 12, 2019]; *Trustee Act*, RSA 2000, c. T-8, s. 42(2) [Tab 4, Brief of the Sawridge Trustees, filed March 29, 2019]

40. Section 42 also provides:

a. Specific protection of existing beneficial interests by also requiring, under s. 42(6), the consent (in writing) of all vested beneficiaries capable of consenting (i.e. adult beneficiaries). Court approval of a proposal is only available if all existing beneficiaries who are capable of giving consent agree.

b. The Court, under s. 42(5) can consent on behalf on behalf of minors; on behalf of contingent interests; and on behalf of those who, after reasonable inquiry, cannot be located.

c. The Court must be satisfied that the variation appears to be for the benefit of each person for whom the Court provides consent.

41. Decisions around s.42 focus on the Court's obligation to protect the interests of the beneficiaries.[43] In *Zeidler*[44], the Alberta Court of Appeal upheld a strict application of s. 42(6) as follows (at paragraph 13):

> "...Section 42(6) of the Trustee Act expressly requires 'all other persons who are beneficially interested under the trust' to consent. It does not say persons beneficially interested in property originally settled by the settlor. *Courts of equity are careful to protect beneficiaries.* Construing narrowly what is a beneficial interest under a trust would subvert the purposes of trusts. Allowing other beneficiaries to cancel the trust against the will of a beneficiary because his trust interest is not in the identical property settled would emasculate the trust. The same would be true even if his interest were in property to which the original property is not traceable...." [*Emphasis added*]

ii) Availability of Section 42 in this Proceeding

42. The Brief of the Trustees seeks a declaration from the Court that s. 42 of the *Trustee Act* "irrelevant" in this proceeding. The Trustees also submit a s.42 application is

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[43] *Samoil* v. *Samoil*, 1999 ABQB 526 (Q.B) [Authorities Tab 10, Reply Brief of the OPGT, filed April 12, 2019]

[44] *Zeidler* v. *Campbell*, 1988 CarswellAlta 195 (C.A.) [Authorities Tab 14, Reply Brief of the OPGT, filed April 12, 2019]

"unworkable", citing an inability to arrive at a consensus on the amendment to the definition[45].

43. As discussed, above, the beneficiary definition currently proposed by the Trustees results in many existing beneficiaries losing their interest in the 1985 Trust. The OPGT concedes the lack of protection for existing interests in the Trustees' proposal has been a real impediment to reaching a consensus on a definition change that would protect, and balance, the interests of existing and contingent beneficiaries with the interests of SFN Members who would become beneficiaries.

44. The OPGT respectfully submits the evidence available suggests that a lack of discussion, education and attempts at consensus building by the Trustees may have been an additional impediment to existing beneficiaries achieving a consensus to date.

45. The Trustees acknowledge that the 2018 mailout was not perfect. [46] Indeed, none of the limited beneficiary communications the Trustees have engaged in since 2009 have provided fulsome information to existing beneficiaries about the nature of their existing interests, the reasons a variation of the definition may be needed from a legal perspective, the impacts on the rights of existing beneficiaries or the overall benefits a variation may have for the Sawridge community.[47]

46. Further, existing 1985 Trust beneficiaries that have received some of the mailouts, may have been left with the impression that if they were not currently members of SFN, they have no existing rights or voice in relation to what happens with the 1985 Trust. This could clearly impact the level of response to any mailout or "vote" unless or until such perceptions are corrected.[48]

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[45] See paras. 23 and 27 of the Brief of the Trustees, filed March 29, 2019
[46] See paragraph 15, Brief of the Trustees, filed March 29, 2019
[47] Affidavit of Records of Paul Bujold, filed April 30, 2018, Documents #SAW00005, #SAW00006 and #SAW00564 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]; Affidavit of Records of Catherine Twinn, filed April 30, 2018, Document #TWN001691-#TWN001694 and #TWN002584-#TWN002591 [Appendix G, Reply Brief of the OPGT, filed April 12, 2019]
[48] September 1, 2011 Letter to Beneficiaries, Affidavit of Records of Paul Bujold, filed April 30, 2018, Document # SAW00005 [Appendix F, Reply Brief of the OPGT, filed April 12, 2019]

47. Based on available evidence, the OPGT respectfully submits a "declaration" that s.42 of the *Trustee Act* is "irrelevant" in this proceeding, or even a finding that it is unworkable, is premature.

48. The Court may be able to assist the Trustees in relation to the s.42 process way of directions, or suggestions, on the evidence of education, consultation, advice and information to existing 1985 Trust beneficiaries that might permit the Court to arrive at the findings the Trustees currently seek regarding the relevance of s.42.

49. In summary, and in response to paragraph C of the Jurisdictional Order, the OPGT submits:

    a. The Court's jurisdiction under s.42 of the *Trustee Act* remains intact;

    b. The importance of a s.42 should not be underestimated as it leaves the decisions more squarely in the hands of the beneficiaries;

    c. It would be premature to find that a s.42 process is irrelevant or unworkable;

    d. The Trustees may benefit from this Court directions or suggestions on how better to approach seeking consensus for a s.42 proposal; and

    e. A question existing beneficiaries have never been asked is whether they would agree to an amendment of the provision in the 1985 Trust that prevents the beneficiaries and Trustees from using the Trust's existing amendment clause to address the discrimination in the Trust.

iii) Evidence relevant to a s. 42 Trustee Act Application (para. (c) of the Order)

50. The Trustees do not specifically address in their Brief this additional Jurisdictional Question[49].

51. The OPGT submits that the evidence that would be required under s.42 would include:

[49] Presumably having regard to their position that an application under s. 42 is unworkable.

i) Evidence regarding the currently known beneficiaries of the 1985 Trust;

ii) Evidence as to which beneficiaries are capable of consenting to a proposal;

iii) Evidence of actual, written consent, from such beneficiaries;

iv) Failing actual consent from such beneficiaries, evidence of reasonable inquiries having been made for any person capable of giving consent who cannot be located;

v) For those beneficiaries for whom the consent of the Court is required, evidence pertaining to why the Court should be satisfied that the variation is for the benefit of those for whom the consent of the Court is necessary[50]; and,

vi) evidence pertaining to why the Court should find the variation to otherwise be of justifiable character.

D. If the Trustees are able to effect an amendment of the beneficiary definition by the exercise of a power under the 1985 Trust, or were they to effect an amendment by resort to s. 42, would the Minors' Property Act 2004 c.M-18.1 "require evidence of consent from minor beneficiaries who are over the age of 14". (para. (e) of the Order)

52. Section 14 of the *Minors' Property Act* provides that applications under the Act relating to a minor who is 14 years of age or older may be made only with the minor's consent, unless the Court otherwise allows.[51]

53. The possible impacts of this section were not addressed in the terms of the OPGT's original appointment as litigation representative. Also, the case is somewhat unique in that the OPGT represents adults who were minors at the time this proceeding commenced.[52] As such, this question was included in the Jurisdictional Questions to obtain guidance from the Court.

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[50] In the proceedings before the Court, this is an evidentiary matter the OPGT, through its representative role, has been seized with speaking to.

[51] *Minors' Property Act*, 2007 c.M-18.1 [Authorities Tab 9, Reply Brief of the OPGT, filed April 12, 2019]

[52] Letter from Court to Hutchison Law, dated June 22, 2017 [Appendix C, Reply Brief of the OPGT, filed April 12, 2019]

54. The OPGT submits the *Minors' Property Act* does not extend to and would not come into play were a power to vary the beneficiary definition be found in the 1985 Trust and were the Trustees to resort to such a power. No application under the *Minors' Property Act* would be called for as the exercise of such a power would not entail:

a. "a sale, lease or other disposition of or action respecting property of a minor" (s.2);
b. confirmation of a contract (s.3); or
c. settlement of a minor's claim (i.e. "a claim that, if proved in a court of competent jurisdiction, would result in a money judgment as defined in the *Civil Enforcement Act*". (s. 4).

55. Nor would the *Minors' Property Act* come into play in circumstances where the Court made a determination to rely on its jurisdiction under s. 42(5) of the *Trustee Act* to consent to a variation of trust on behalf of a minor beneficiary. The OPGT submits that the provisions of the more specific *Trustee Act* would govern, whereby the Court has an express statutory power to give consent on the Minor's behalf.

56. However, as past settlement offers from the Trustees have referenced the *Minors Property Act*[53], and to avoid uncertainty in relation to future offers or applications within this proceeding, the OPGT seeks confirmation from the Court that if a variation to the 1985 Trust proceeds under the terms of the 1985 Trust Deed or under s.42 of the *Trustee Act*, the OPGT need not provide the Court with proof of the consent of minors over the age of 14 or from minors the OPGT represents who are now adults.

E. The Court's Common Law and Plenary Jurisdiction

i) Nature of the 1985 Trust

57. The nature of the trust in question is integral to the assessment of the Court's jurisdiction to vary its terms on a common law basis.

[53] Brief of the Trustees for Special Chambers Case Management Meeting on June 30, 2015, filed June 12, 2015

58. The Trustees have submitted the 1985 Trust has been constituted as a valid discretionary private trust[54] as distinguished from a charitable purpose trust. Private trusts have ascertained or ascertainable beneficiaries while, with charitable purpose trusts the "beneficiary" is instead considered to be the object or purpose of the trust, such as the advancement of education or the relief of poverty.

ii) Common Law – Cy Pres Doctrine

59. The doctrine of *cy-pres* applies where it is impracticable or impossible to carry out the object or purpose of a charitable purpose trust. It allows the Court to fashion a revised object or purpose resembling that of the original settlor as closely as possible. [55]

60. *Cy-pres* has typically been invoked to address circumstances that outright prevent the administration of the trust. Examples cited by Waters in his treatise *The Law of Trusts* include where a settlor has incorrectly recorded the name of a charitable institution, or, where details have been omitted in the setting out of the administrative machinery of the trust. [56] The power of the Court to devise an appropriate scheme is robust. The OPGT knows of no authority that confines the exercise of the power to the deletion of words in the original trust deed.

61. As the Trustees do not suggest the 1985 Trust is a charitable purpose trust, and given that it has beneficiaries who are ascertainable and objects and purposes capable of being carried out, the 1985 Trust does not appear to be a candidate for the application of *cy-pres* doctrine, at least not in its typical, traditional sense.

62. *Cy-pres*, has been engaged as a means of addressing charitable purpose trusts that have been found to contain discriminatory terms that offend public policy. In *Leonard*

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[54] By virtue of a *nunc pro tunc* Order previously obtained from the Court, this includes in terms of the settling of property into the Trust. Consent Order re: Transfer of Assets filed August 25, 2016 [Appendix B, Reply Brief of the OPGT, filed April 12, 2019]

[55] Essentials of Canadian Law, Eileen Gillese, Irwin Law, Toronto 2014 3rd edition [Authorities Tab 6, Reply Brief of the OPGT, filed April 12, 2019]

[56] Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, Carswell: Toronto, 4th ed. (2012) [Waters, Law of Trusts in Canada] at 14.VI.A. [Authorities Tab 5, Reply Brief of the OPGT, filed April 12, 2019]

Foundation[57] a trust was created to provide scholarships. The scholarship eligibility criteria were openly racist.[58] *Cy-pres* doctrine was applied to bring the trust into accord with public policy by providing that scholarship eligibility was opened to others without restriction.

63. In *Dominion Students Hall Trust* v. *A.G.* the Court invoked *cy-pres* to address a discriminatory scholarship eligibility requirement in a charitable purpose trust on the basis it was "impossible" to advance the intent of the trust with the discriminatory limit.[59]

iii) Common Law -- Discrimination in Trusts

64. By prior Consent Order in the within proceedings, the parties have agreed and the Court has confirmed that the existing beneficiary definition in the 1985 Trust is "discriminatory". The thrust of the Trustees' submission in this Application is that given this finding, a "remedy" or "solution" must be available. They ascribe a ready jurisdiction on the part of the Court to intervene with the existing beneficiary definition on a public policy basis, and conversely take a narrow view of the remedies and means available to a Court upon any such intervention.

65. While the OPGT agrees the discrimination in the 1985 Trust is undesirable, discrimination in a trust does not automatically call for or require the intervention of the Court, or establish jurisdiction. Trusts by their very nature commonly "discriminate", as is true of charitable purpose trusts, and which can be particularly so for private trusts.

66. In the charitable purpose trust context, the discrimination in the trust must "offend" public policy in order to give rise to the potential intervention of the Court on a common law basis. This does not necessarily correlate with what may constitute impermissible "discrimination" on a constitutional or human rights (equality) analysis given that with charitable purpose trusts one is generally considering private action, not "government or

[57] *Leonard Foundation* case [Tab 16, Brief of the Sawridge Trustees, filed March 29, 2019]
[58] *Leonard Foundation* case [Tab 16, Brief of the Sawridge Trustees, filed March 29, 2019]
[59] *Dominion Students' Hall Trust* v. *A-G*, 1947 Ch 183 [Authorities Tab 4, Reply Brief of the OPGT, filed April 12, 2019]

state action". For example, *Re McConnell Estate* dealt with a private charitable trust was found to be beyond the scope of the B.C. Human Rights Code. [60]

67. While the Trustees suggest there is "strong authority" to support the Court's jurisdiction to address discrimination, the OPGT notes that, in fact, the Trustees' submissions rely on an invitation that the Court make new law to establish a new category of trust, namely "community or quasi-public trusts" to provide the basis for jurisdiction.[61]

68. The question of whether discriminatory provisions of a trust has predominantly private trust characteristics can be reviewed on a public policy basis, in the same manner as with charitable purpose trusts or otherwise, is a question considered in two decisions cited in the Brief of the Trustees, *Spence*[62] and *Taylor* [63] Each decision bears consideration in detail.

iv) *Spence v. BMO*

69. *Spence* concerned testamentary dispositions by the deceased which excluded his daughter. The will gave no reason for the disowning; however, the daughter brought forward evidence it was because the father of her child was "white". The daughter claimed a racist intent on the part of the father and sought to impugn his will as discriminatory.

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[60] For other, recent "discriminatory scholarship" cases where offence to public policy not found, see: *Estate of F.G. McConnell* 2000 BCSC 0445 [Authorities Tab 7, Reply Brief of the OPGT, filed April 12, 2019] (*Cy-pres* scheme unnecessary as scholarship based on religious affiliation found not to offend public policy, nor was human rights legislation applicable) and *Re Castanera Scholarship* 2015 MBQB 28 [Authorities Tab 12, Reply Brief of the OPGT, filed April 12, 2019] (Respecting a variation application to have scholarship made available only to underrepresented women -- as opposed to all women as provided for – because University concerned availability to all women may be discriminatory under University policy adopting application of human rights legislation. No discriminatory intent found and variation refused).

[61] The Trustees themselves seem to acknowledge this when they later, at paragraphs 49-51 of their Brief, refer to the Court extending the jurisdiction the Court has to review charitable purpose trusts on a public policy basis, to the review of trusts such as the 1985 Trust.

[62] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]

[63] *Taylor et.al.* v. *Ginoogaming First Nation,* 2019 ONSC 0328 [Tab 28, Brief of the Sawridge Trustees, filed March 29, 2019]

70. In rejecting this claim, Cronk J.A, writing for the majority of the Court acknowledged the ability of the Court to scrutinize testamentary dispositions alleged to offend public policy but found no such offence on the face of the will.[64]

71. In the course of her decision Cronk J.A.:

i) Noted that testamentary freedom was not an absolute right. Apart from limits imposed by legislation, it may also be constrained by public policy considerations in some circumstances.[65]

ii) Noted the will imposed "no conditions or stipulations" of the type where public policy has been invoked by courts, such as conditions that:[66]

a) act in restraint of marriage;
b) result in a disinheritance if a certain choice is made; or,
c) incite a crime or act prohibited by law.

iii) identified as pivotal considerations whether:

a) a personal representative would be obligated to act in a manner contrary to law or public policy in order to implement the testators intentions; or,
b) the beneficiary would be required to act in a manner contrary to law or public policy in order to inherit under the will. [67]

72. Cronk J.A. also relied on the distinction described in *Leonard Foundation* between private trusts and "public" charitable trusts to distinguish the result in *Leonard* from the case before her, as follows:[68]

> "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*

[64] Concurred in by Justice Lauwers and with concurring reasons by Justice van Rensburg.
[65] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.38 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]
[66] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.55 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]
[67] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.56 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]
[68] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.45 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]

> *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.* (at p. 515)" [*Emphasis added* by Cronk J.A.]

She went on to note that unlike the case before her, the trust at issue in *Leonard* required the administrators to themselves act in a discriminatory manner in their selection of scholarship candidates.[69]

73. Finally, Cronk J.A. held that even if the will had displayed a discriminatory intent on its face the Court would not intervene on public policy grounds with the deceased's intentional and private disposition of his property. [70] Such private dispositions, even if discriminatory, were beyond the scope of provincial human rights legislation or the *Charter,* and were not prohibited by any other enactment.

v) Taylor v. Ginnogaming First Nation

74. Like the case at bar, *Taylor* concerned an application by the trustees of a band member trust for Advice and Direction. The trust defined the beneficiary class as band members as of a fixed date. After that date, some persons who had been excluded from band membership became band members as a result of certain provisions of the *Indian Act* being struck down as discriminatory. [71] The trustees sought a determination of whether those who have since become band members due to changes in the *Indian Act*, but who did not meet the existing beneficiary definition, should receive distributions under the trust. The trustees were not seeking to amend the trust.

75. The Ontario Superior Court found that on a plain reading of the trust agreement the new band members did not meet the fixed date criteria for band membership and were not

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[69] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.68 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]
[70] *Spence* v. *BMO Trust Co.* 2016 ONCA 196 at para.73-75 [Tab 14, Brief of the Sawridge Trustees, filed March 29, 2019]
[71] *Taylor et.al.* v. *Ginoogaming First Nation,* 2019 ONSC 0328 at para.16 [Tab 28, Brief of the Sawridge Trustees, filed March 29, 2019]

part of the beneficiary class. The Court noted that it was not "the role of an interpreting Court to change the plain meaning of a trust document".[72]

76. The Court also commented on the application of public policy, referring to *Leonard Foundation* as an instance where "a public charitable trust was discriminatory on its face" and referencing *Spence* as having "clarified that a settlor has a common law right to limit the scope of beneficiaries as long as the document is not discriminatory on its face".[73] While noting that "the applicants neither sought to vary the trust, nor did they seek to have certain provisions declared void" the Court also stated "It cannot be said that the Trust Agreement is discriminatory on its face."

vi) Application of Case Law

77. The OPGT submits that the Trustees' argument for extending public policy based jurisdiction to a non-charitable purpose trusts such as the 1985 Trust should be considered in light of the following principles:

i) Judicial restraint is to be exercised. (*Spence*). In the present case, the amendment to the beneficiary definition sought by the Trustees directly contradicts the express intention of the Settlor in establishing the Trust and it would extinguish the rights of some vested and some contingent beneficiaries.

ii) Non-charitable purpose trusts call for distinct considerations from charitable purpose trusts. (*Leonard Foundation, Spence*).

iii) Overt discrimination on the face of the trust that requires a trustee or a beneficiary to act in a way that "collides with public policy" is an important consideration in finding public policy jurisdiction (*Spence, Taylor*). Here, the existence of such overt discrimination would have to be the subject of a further determination by the Court.

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[72] *Taylor et.al.* v. *Ginoogaming First Nation*, 2019 ONSC 0328 at para.52 [Tab 28, Brief of the Sawridge Trustees, filed March 29, 2019]

[73] *Taylor et.al.* v. *Ginoogaming First Nation*, 2019 ONSC 0328 at para.50 [Tab 28, Brief of the Sawridge Trustees, filed March 29, 2019]

iv) Overt discrimination warranting judicial intervention on public policy grounds, at least in the testamentary context, can also stem from discriminatory conditions or restraints that serve to dictate whether or not a person retains or achieves beneficiary status. (*Spence*) Whether such restraints or conditions exist here, either expressly or implicitly, and if so whether the jurisdiction that applies in the testamentary context should be extended to a trust such as the 1985 Trust, would have to be the subject of a further determination by the Court.

v) A definition that restricts beneficiaries to band members who meet the definition of band member under the *Indian Act* as of a specific date does not necessarily require the trustees to act in a discriminatory manner (*Taylor*).

78. The Trustees also invite the Court to find a new category of trusts: "community or quasi-public trusts". They suggest such trusts should be recognized as laying closer on a spectrum to charitable trusts than private family trusts, and thus more readily subject to public policy review.[74]

79. The OPGT notes that in *Leonard Foundation* Robins J.A. emphasized that though the subject trust in that case (again, a charitable purpose trust) may have been privately created it had a "public or, at the least, a quasi-public character".[75] A final determination of the Trustees' argument that such a character exists with the 1985 Trust, and should be accepted as a reason for the Court to extend its public policy jurisdiction with respect to charitable purpose trusts to the 1985 Trust, is a matter to be decided in a future application.

80. The OPGT does note that important distinctions remain between the 1985 Trust and charitable purpose trusts. One distinction is that with charitable purpose trusts the beneficiary of the trust is some qualifying charitable purpose or object rather than specific individuals with a vested beneficial interests as is the case with the 1985 Trust. Intervention by the Court in a charitable purpose trust does not involve impact on vested individual interests as it would with the 1985 Trust, where the interests impacted include those

[74] See paragraph 35, Brief of the Trustees, filed March 29, 2019
[75] *Leonard Foundation* case at para. 30 and 33 [Tab 16, Brief of the Sawridge Trustees, filed March 29, 2019]

represented by the OPGT.[76] Should the Court at some point decide intervention is merited, protection of vested interests in the 1985 Trust would continue to be a priority for the OPGT.

81. With respect to the "no-amendment" clause at paragraph 11 of the 1985 Trust, the OPGT does not see this as a bar to the Trustees' argument in favor of public policy review, nor for that matter to the Court's jurisdiction under s. 42 of the *Trustee Act*. On the other hand, the existence of such a clause may be pertinent to the Court's ultimate assessment of whether or how to exercise the jurisdiction it is found to have.

F. What is the scope of any jurisdiction to amend the 1985 Trust? (Para. (b) of the Order).

82. While taking an expansive approach to the existence of public policy jurisdiction, the Trustees propose a very narrow approach to its scope, suggesting that it be limited to striking out language that gives rise to the discrimination in the 1985 Trust.

83. The OPGT feels obliged to point out this is a singularly result-oriented approach calculated to yield the Trustees' preferred amendment -- redefining the beneficiary class as "band members". The effect of this would be to extinguish the vested (and contingent) beneficial interests of many current beneficiaries including many of those represented by the OPGT. The OPGT is troubled that the Trustees should advocate an amendment with such adverse impact on the existing beneficiaries, to whom the Trustees fiduciary obligations are owed.

84. The OPGT sees no principled basis for this approach. If the Court were to extend public policy jurisdiction to allow review of the 1985 Trust, it follows that the remedies available on such review should also be extended.

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[76] Note, the OPGT submits the unworkability that the Trustee contends to exist with the current beneficiary definition (e.g. at paras. 25 and 26 of the Brief of the Trustees) to be an irrelevant consideration to any question of whether the beneficiary definition offends public policy. Moreover, it is a contention the OPGT would dispute were the matter at issue in the within application.

85. The OPGT submits that were the Court to decide to interfere with an existing beneficiary definition of the 1985 Trust on public policy grounds, the proper objective should be to ameliorate the discriminatory aspects of the existing definition found to be against public policy by preserving and protecting existing beneficial interests, while allowing, through the exercise of *cy-pres* scheme-making power, for those who had previously been discriminated against to be added. This was the net result in each of *Leonard Foundation* and *Dominion Students*[77] in the charitable purpose trust context.

86. In this regard, the OPGT also sees *Re Sprott Estate*, cited but sought to be distinguished by the Trustees, as an illustrative and informative canvassing of approaches taken to the amendment of trusts terms.[78]

87. In sum, the OPGT submits the Court is not, and cannot be, restricted in the means available to it to address discrimination which it finds warrants judicial intervention, but rather has available to it the full suite of *cy-pres* remedies. A remedy that would re-write the existing trust terms to address the discrimination, but result in a loss of beneficiary status for current or prospective beneficiaries under the existing trust terms, is clearly not the only remedy available to the Court.

PART V – SUMMARY

88. In summary, the OPGT submits:

a. No amendment to the beneficiary definition of the 1985 Trust is available under the terms of the Trust itself by virtue of the restriction in paragraph 11 thereof, provided that:

i. An amendment to eliminate that restriction could be pursued under s. 42 of the *Trustee Act* if the preconditions under s. 42 were satisfied; and

ii. If the restriction were considered to be discriminatory or offensive to public policy the Court might also be asked to exercise public policy review

[77] *Leonard Foundation* case [Tab 16, Brief of the Sawridge Trustees, filed March 29, 2019]
[78] See paragraph 53, Brief of the Trustees, filed March 29, 2019

jurisdiction to remove it, although the extension of such jurisdiction specifically to the 1985 Trust is as yet undecided and its exercise discretionary.

b. An amendment to directly vary the beneficiary definition might also be sought pursuant to s. 42 of the *Trustee Act* or on a public policy basis, subject to the same qualifications.

c. The Court always has jurisdiction to vary a trust pursuant to s. 42 of the *Trustee Act* provided the statutory preconditions are satisfied. The OPGT invites the Court to provide direction to the Trustees that might assist in the pursuit of a s. 42 application.

d. The Court's amendment power under s. 42 of the *Trustee Act*, and on a public policy basis if available, is fulsome and is not limited to deletions.

e. In the exercise of any type of jurisdiction the Court may find available, the rights of existing beneficiaries are paramount and must be protected.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the Hamlet of Sherwood Park, in the Province of Alberta, this 12th day of April, 2019.

HUTCHISON LAW

Per: _____

JANET L. HUTCHISON

Solicitors for the Office of the Public Guardian and Trustee of Alberta

FIELD LAW

Per: _____

P. JONATHAN FAULDS, Q.C.

Solicitors for the Office of the Public Guardian and Trustee of Alberta

Estimation of time for Oral Argument: 45 minutes

LIST OF APPENDICIES

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A.	Transcript from Questioning of Paul Bujold, held May 27-28, 2014
B.	Consent Order re: Transfer of Assets filed August 25, 2016
C.	Letter from the Court to Hutchison Law, dated June 22, 2017
D.	Application by the Sawridge Trustees for Advice and Direction, filed August 10, 2018
E.	Letter from Shelby Twinn to Court, filed September 21, 2018
F.	Affidavit of Records of Paul Bujold, filed April 30, 2018, Documents #SAW00005, #SAW00006, #SAW000123-#SAW000134, #SAW00564, #SAW000661, #SAW001772-#SAW001773, #SAW001777-#SAW001780
G.	Affidavit of Records of Catherine Twinn, filed February 1, 2019, Documents #TWN001691-#TWN001694 and #TWN002584-#TWN002591
H.	Transcript from Questioning of Paul Bujold, held February 11, 2019
I.	Questioning of Paul Bujold, held February 11, 2019, Exhibit A for Identification
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K.	Affidavit of Shelby Twinn, filed February 26, 2019
L.	Affidavit of Patrick Twinn, filed February 26, 2019
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N.	Affidavit of Roland Ward, filed February 27, 2019

LIST OF AUTHORITIES

Tab	Authorities
1.	*1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2012 ABQB 365 (Q.B.)
2.	*1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2013 ABCA 226 (C.A.)
3.	*1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2015 ABQB 799 (Q.B.)
4.	*Dominion Students' Hall Trust* v. *A-G*, 1947 Ch 183
5.	Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, Carswell: Toronto, 4th ed. (2012) [Waters, Law of Trusts in Canada]
6.	Essentials of Canadian Law, Eileen Gillese, Irwin Law, Toronto 2014 3rd edition
7.	*Estate of F.G. McConnell*, 2000 BCSC 0445 (S.C.B.C.)
8.	*Indian Act*, R.S.C. 1970, c.I-6
9.	*Minors' Property Act*, 2007 c.M-18.1
10.	*Samoil* v. *Samoil*, 1999 ABQB 526 (Q.B)
11.	*Saunders* v *Vautier* [1841] EWHC J82, (1841) 4 Beav 115
12.	*Re Castanera Scholarship*, 2015 MBQB 28 (Q.B.)
13.	*Twinn v. Twinn*, 2017 ABCA 419 (C.A.)
14.	*Zeidler* v. *Campbell*, 1988 CarswellAlta 195 (C.A.)

TAB A

COPY

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

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

QUESTIONING ON AFFIDAVIT

OF

PAUL BUJOLD

Ms. D.C.E. Bonora — For the Applicants

Ms. J.L. Hutchison — For the Public Trustee

Susan Stelter — Court Reporter

Edmonton, Alberta

27 & 28 May, 2014

Q So the three lists that we were talking about previously, have you updated those lists since 2011, since the application was filed?
A Yes, this -- well, parts of it. So the people who applied hasn't changed because we stopped the application process when we launched the application.
Q Okay.
A So I am confusing you. So when we launched the application for advice and direction we stopped anybody who had felt that they had an interest as a beneficiary to the 1985 Trust, we stopped them filling out forms.
Q You didn't ask them to keep working on forms?
A We actually refused forms after that point.
Q Okay.
A Because we felt that the court would, at the end of the application for advice and direction process, that the court will settle this issue. So it was no longer necessary for the trustees to get a bunch of people to state their claim.
Q Okay. How were forms refused? Was it in writing? Was it verbal?
A Well, they had sort of petered off by then anyway. People weren't applying very much. Those who did, I still get calls every once in a while saying I would like an application form and I just tell them we don't do that anymore. And we are in this process and the court is going to, we hope --

Q Decide?
A -- give us a new definition and then we will have to figure out how we decide then.
Q Is there a form letter that you send out to explain that?
A No.
Q It is just verbal?
A Verbal. Most of the people are phoning and asking. So that list hasn't changed. The affiliates list, we don't -- Indian Affairs won't tell us who is on the list. We would only have the 2001 pay list, that is it. So that is the end of that list. And the only list that changes is the Sawridge First Nation membership list and who has been born and died since then. So I do not modify that list.
Q Okay.
A So that is a list of beneficiaries.
Q So to the extent that that list has changed, particularly in relation to minor children of members, if you could give us both the list that existed when you swore the Affidavit and the updated list?
A Yeah, it is actually one list because it changes as of their birthday. So all you need to do is look at their birthday and if the birthday is the date of the application, then they were on the other list.
Q Okay.
MS. BONORA: We will just amend Undertaking 24

never get seniors benefits obviously if they don't apply and become members.

Q Okay. And then the 21, and I just want to be sure I understood --

A The 23? There is 31.

Q There is 31.

A So there is 23 minors under the '85 Trust who now qualify.

Q Who will cease to qualify under the new definition?

A Who would cease to qualify under a new definition unless they or their parents applied for membership.

Q And succeeded in getting membership?

A Obviously.

Q So 23, not 21?

A There is 23. There is 31 total so 23 plus 8.

Q Got you. So those 23 minors, unless they were successful in their application to become members of the Sawridge First Nation, would cease to receive any benefit through the 1985 Trust if the new definition is approved, once they cease to be minor dependents of their parents? Is that your understanding?

A Once they cease to qualify as minor dependents under the policies of the benefits. So it is 18 for most benefits, 25 for educational benefits.

Q Understood, thank you.

A Or if they are handicapped then they continue until they are 25.

TAB B

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
DOCUMENT	**CONSENT ORDER**

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

DATE ON WHICH ORDER WAS PRONOUNCED: August 24, 2016

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, AB

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

CONSENT ORDER

UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not

seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that assets from the 1982 Trust were transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;

IT IS HEREBY ORDERED THAT:

1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.

2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.

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

CONSENTED TO BY:

Dentons Canada LLP

Doris Bonora
Counsel for Sawridge Trustees

Reynolds Mirth Richards & Farmer LLP

Marco S. Poretti
Counsel for Sawridge Trustees

McLennan Ross LLP

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

Hutchison Law

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

TAB C

THE HONOURABLE MR. JUSTICE
DENNIS R. THOMAS

THE LAW COURTS
EDMONTON, ALBERTA
T5J 0R2
TEL: (780) 422-2200
FAX: (780) 427-0334

COURT OF QUEEN'S BENCH OF ALBERTA

June 22, 2017

SENT VIA E-MAIL

Ms. Janet Hutchison
Hutchison Law
130 Broadway Boulevard
Sherwood Park, AB T8H 2A3
Phone: 780-417-7871
Fax: 780-417-7872
Email: jhutchison@jlhlaw.ca

Dear Ms. Hutchison:

Re: Sawridge Band Inter Vivos Settlement (1985 Sawridge Trust)
Action No. 1103 14112 (the "Action")

In the course of preparing my decision on the Application by Patrick Twinn et al. to be added as parties and be indemnified for costs, a further request for clarification has occurred to me.

In the Trustees Response Brief filed October 31, 2016, counsel had raised an interesting question in para 26, p 5 of that brief, namely whether the OPTG continues to represent child beneficiaries who have become adults since the commencement of the Action on June 12, 2011.

I am aware from my involvement in other legal proceedings that the OPTG often terminates representation of a child upon that person becoming an adult. I understand that position is driven by cost considerations. However, that sort of consideration does not apply here, because the Trustees must indemnify the OPTG for all reasonable costs of representing an individual who may be affected in this Action.

I request that you confirm on behalf of the OPTG that the OPTG will continue to represent beneficiaries of the 1985 Sawridge Trust who have become adults since the commencement of the Action.

A timely response would be appreciated as that point is something I have under consideration in deciding the outstanding Application by Patrick Twinn et al.

Yours truly

D.R.G. Thomas

/ds

cc Ms. D. Bonora, (Dentons) (via email: doris.bonora@dentons.com)
Ms. A. Loparco, QC (Dentons) (via email: anna.loparco@dentons.com)
Ms. N. Golding (Borden Ladner Gervais LLP) (via email: ngolding@blg.com)
Karen A. Platten, QC (McLennan Ross LLP) via email: kplatten@mross.com

TAB D

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, MARGARET WARD, BERTHA L'HIRONDELLE, EVERETT JUSTIN TWIN, and DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**Application by the Sawridge Trustees for Advice and Direction (returnable September 25, 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 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. and Crista Osualdini

Counsel for Catherine Twinn

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	September 25, 2018
Time	10:00 am
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:

A. ***Privilege Order***

1. The Sawridge Trustees request that this Court grant an order in the form attached as **Schedule "A"** to deem that lawyer-client privilege has not been waived in respect of the subject matter raised in a number of documents filed in these proceedings, the related Action 1403 04885 (the "1403 Action"); and the questionings on those documents (both in respect of oral responses to questionings, and in respect of written responses such as undertakings, interrogatories, and associated productions/filings).

2. The proposed order would allow the documents to be used in the form they are in and permit the litigation to proceed without delay. The only restriction sought is to protect privilege on documents that have not been released to date. The solution proposed by the Sawridge Trustees will permit any other privileged documents that a party may seek to rely on to be dealt with on a case-by-case basis.

3. The Sawridge Trustees believe that the proposal is efficient and an effective means of proceeding to reach a resolution. It is the quickest means of resolving this claim at the least expense.

4. If the proposed order is not granted, the Sawridge Trustees request that a timetable in respect of an application to determine how the issue of privilege should be dealt with be set according to **Schedule "B"**, attached.

B. ***Directed Issue Hearing and Litigation Plan***

5. 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) Given that the definition of "Beneficiary" in the 1985 Trust ("**Definition**") has been determined to be discriminatory, is it appropriate to change the Definition on the basis of public policy?

   (b) If the answer to the above question is "yes", in what manner should it be changed and what should the Definition be?

   (c) If the answer to the above question is "no", should the Definition be varied pursuant to s. 42 of the *Trustee Act*?

   (d) If the Definition is not varied on the basis of public policy or s. 42 of the *Trustee Act*, does the definition remain the same?

6. The Sawridge Trustees request a direction that any party that is proposing a variation of the Definition pursuant to s. 42 of the *Trustee Act* must secure approval from the known beneficiaries prior to the Directed Issue Hearing. If 100% approval from known beneficiaries cannot be obtained, that will immediately address the question of whether that provision can be invoked.

7. 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 "C"**, attached.

C. ***Non party participation***

8. The Trustees seek direction on non party participation as was suggested in Sawridge #5 and as was sought but not dealt with in the January 2018 case management meeting.

Grounds for making this application:

A. Privilege Order

9. Catherine Twinn has sworn an Affidavit of Records on which she intends to rely. Included in that Affidavit of Records are documents that disclose the contents of solicitor-client communications between the Sawridge Trustees (of which Catherine Twinn formerly was one), and their lawyers.

10. A number of those documents were filed simultaneously in this proceeding and in the 1403 Action. Some of them were discussed during questioning, and some documents produced in response to undertakings and/or interrogatories contain such communications as well.

11. The Sawridge Trustees did not intend to broadly waive privilege over the subject matter of those communications. At the time those documents were filed, they were relevant to the issues in dispute

between Catherine Twinn and the Sawridge Trustees. Those issues included the conduct of the Trustees and their possible removal based on conduct and also an indemnity application for costs by Catherine Twinn. The issues of conduct and indemnification were mostly unrelated to the issues in this 1103 Action.

12. The Sawridge Trustees seek an order clarifying and declaring that there is no broad waiver of solicitor-client privilege in respect of any subject matter that is raised in any of the documents filed in these proceedings, the 1403 Action, or the questionings and responses. Attached as **Schedule "D"** hereto is the proposed form of order.

13. This proposed order would permit the use of the documents filed to date, as well as the transcripts of the questionings of Catherine Twinn and Paul Bujold held to date and answers to Undertakings and Interrogatories. It would permit virtually all documents in Catherine Twinn's sworn Affidavit of Records, with the exception of four new documents she seeks to introduce. For any new documents such as those four new documents in Catherine Twinn's Affidavit of Records, the order permits them to be dealt with on a case-by-case basis on the agreement of the parties or the direction of the Court.

14. What the order does is declare that there is no broader waiver of privilege by the use of those documents, or responses, in these proceedings. As such, the Sawridge Trustees cannot be compelled, by anyone, to disclose any further documents or information regarding legal advice in respect of any subject matter raised in the documents and/or questionings.

15. The Sawridge Trustees believe that this declaration is critical to protect the 1985 Trust from arguments of broad waiver by anyone, including strangers to the 1985 Trust.

16. There is also an express provision in the proposed order to clarify that nothing in the order is meant to expand or limit the rights that any beneficiary of the 1985 Trust may have at law to request to see a trust document. Such requests will continue to be governed by the law respecting the rights of a beneficiary to request trust documents, including limits on those rights at law.

17. The Sawridge Trustees believe that this is a practical solution that will permit the parties to this Application to use documents that have been filed to date and use the questioning done to date, while providing critical protection to the 1985 Trust. Since the questionings of the Sawridge Trustees have been held, and all proposed documents have been listed in the parties' Affidavits of Records, the Sawridge Trustees do not see any prejudice to any party that may be caused by an order confirming that privilege is not broadly waived, particularly in contrast to the important role of protecting privilege of the 1985 Trust.

18. In keeping with Rule 1.2 of the Rules of Court, the order will facilitate the quickest means of resolving a claim at the least expense and will provide an effective, efficient system of enforcing the rules with respect to disclosure.

19. If this Honourable Court declines to grant the proposed order in **Schedule "D"**, the Sawridge Trustees request that a timeline be set for an application to determine how the documents that Catherine Twinn proposes to include in her Affidavit of Records should be dealt with in accordance with **Schedule "C"**.

B. Directed Issue Hearing on Definition of Beneficiary

20. The Definition has been deemed discriminatory, pursuant to the Order of this Court issued on January 19, 2018. A copy of that Order is attached for ease of reference as **Schedule "E"**.

21. The next issue, then, is whether the Definition will be changed, and by what procedure. The Sawridge Trustees raised this in their Application filed on January 9, 2018 (Application: Statement of Issues and Relief Sought). The application is attached as **Schedule "F"**.

22. The Sawridge Trustees sent a letter to the parties on June 22, 2018, proposing an Order for dealing with this issue. A copy of that letter is attached as **Schedule "G"**. In terms of the procedure to amend the Definition, the Sawridge Trustees requested that the OPGT and Catherine Twinn advise if they took the position that an application to vary the Trust pursuant to s. 42 of the *Trustee Act* was required, or whether an amendment pursuant to the Trust Deed was required..

23. The Sawridge Trustees propose that there be a Directed Issue Hearing because this question of procedure is essential in determining the course of remaining issues in the Application. The resolution of the Directed Issue Hearing meets the objectives in Subrule 7.1(1):

    (a) Determining whether the Definition may be amended or modified may dispose of the rest of the claim. If it is found that the Definition should not or cannot be modified, the discriminatory nature of the Definition notwithstanding, then that will dispose of the rest of the Application in respect of grandfathering.

    (b) The determination of whether the Definition may be amended or modified is a necessary precursor to any findings on what grandfathering, if any, is appropriate. Until it is known whether the Definition will change, and if so, then how it may change, there cannot be any determinations or meaningful discussions about whose rights may be affected by any such change.

    (c) Having this early determination will save expense and court resources, as it will focus the hearing on the issue of grandfathering. Since it will be known in advance what the new Definition will be, then the parties will be in a better position to ascertain whose interests will be affected, and therefore what evidence may need to be led in respect of those individuals. In contrast, if it is not known what the Definition will be before any hearing on grandfathering, then there is likely to be evidence led in respect of individuals who will remain beneficiaries and do not need to be grandfathered. The trial on that issue will almost certainly be longer than necessary as a result, and the parties will be put to additional expense.

    (d) The question of whether the Definition may be amended or modified is an issue of law. Little evidence will be required. It can proceed quickly in contrast, the remaining issue of grandfathering will require a significant amount of evidence on the issues of individual genealogies and the interpretation of the *Indian Act* as of April 15, 1982. It will require a longer hearing, which, for reasons above, may be entirely unnecessary, depending on how the DIH is determined.

    The Sawridge Trustees are proposing that any change would be made pursuant to common law powers of the courts in respect of the administration of trusts and dealing with

public policy, and as such would not require 100% approval of beneficiaries. In contrast, s. 42 requires that 100% beneficiary approval be obtained in respect of any proposed change to the definition. The parties should take such steps prior to the Directed Issue Hearing as may be necessary to seek approval of any proposed definition. If there is even one beneficiary response opposing a proposed change, and the Court determines that it cannot proceed under the common law, then it will be quickly and readily apparent that such an application would not succeed and grandfathering will not be a question.

24. There is little to no overlap between the issue of whether and how the Definition is to be modified, and the issue of who may be grandfathered. The determination of the issue respecting the change to the Definition is a legal question

25. If the Directed Issue Hearing is granted, the Sawridge Trustees propose that a litigation plan in the form attached as **Schedule "A"** be approved by this Court. If this Honourable Court declines to grant the proposed order in **Schedule "D"**, the Sawridge Trustees propose that a litigation plan in the form attached as **Schedule "B"** be granted to accommodate the determination of the privilege issue.

C. Litigation Plan

26. The Order of this Honourable Court issued January 19, 2018 attached and incorporated, as Schedule "A" thereto, a Litigation Plan. Step 15 of that Litigation Plan provided:

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

27. The Sawridge Trustees and the Respondents did not reach such a Consent Order by July 15, 2018.

28. The Sawridge Trustees therefore bring the within application to seek assistance of this Court in setting a Litigation Plan for the remainder of the application as provided in Step 15 of the previous Litigation Plan.

D.Method of Non-Party Beneficiary Participation

29. The Sawridge Trustees submitted at the Case Management Conference held on January 19, and their submission remains, 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 and that this be incorporated into the Litigation Plan. (If this Court agrees to the Directed Issue Hearing, one submission could be made at that time, and one at the time of any subsequent hearing in respect of grandfathering.)

30. 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.

31. The Sawridge Trustees submit that, for the Directed Issue Hearing, beneficiary evidence from beneficiaries, or potential beneficiaries, would not be required, as it is a question of law. However, if this Court disagrees, the Sawridge Trustees propose that any beneficiary or potential beneficiary who wishes to file an affidavit can only do so to raise evidence that is unique and distinct from 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 submissions.

32. 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"** (or, in the alternative, **Schedule "B"**). The Sawridge Trustees propose that notice 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:

D. Affidavits of Paul Bujold filed to date.

E. The attached Schedules.

F. Concise Bench Brief to be filed by the Applicants by August 24, 2018.

G. Such further evidence as may be filed by the Applicant prior to the return date of the Application.

Applicable Rules:

H. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 1.2, 4.14, 7.1, 6.44-46

How the Application is proposed to be heard or considered:

I. The Sawridge Trustees propose that this application proceed by way of an oral hearing on the date set out above.

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

Schedule "A" – Litigation Plan for Directed Issue Hearing
if Privilege Issue Determined September 25, 2018

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 Trustees' Application for Advice and Direction	September 25, 2018
2.	Questioning by OPGT of Catherine Twinn on Affidavit of Records filed, if required, and further questioning of Paul Bujold (Sawridge Trustees) by OPGT on Affidavits of Records filed, if required.	By October 19, 2018
3.	Notice posted to the website of the Directed Issue Hearing. Letters sent to SFN members of the nature of the application and letters sent to identified potential beneficiaries of the application.	By October 19, 2018
4.	Parties to send any proposal(s) for a varied definition that might be relied on for dealing with s. 42 at the Directed Issue Hearing, with a request that responses to the proposal be returned by November 1, 2018	By October 19, 2018
5.	Brief of the Sawridge Trustees for Directed Issue Hearing filed	By November 9, 2018
6.	Briefs of the OPGT and Catherine Twinn for Directed Issue Hearing filed	By November 23, 2018
7.	Written submissions by any non-party beneficiaries/potential beneficiaries, including any submission by the SFN (maximum of 5 pages, including attachments)	By December 5, 2018
8.	Directed Issue Hearing (one half day)	Dependent on availability of Court (by December 21 if possible)
9.	A new litigation plan will be developed for the steps for grandfathering, if necessary: need witness lists; will-say statements; briefs; hearing date	

SCHEDULE B

Schedule "B" – Litigation Plan for Directed Issue Hearing
if Privilege Issue Not Determined September 25, 2018

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 Trustees' Application for Advice and Direction	September 25, 2018
2.	Notice posted to the website of the Directed Issue Hearing. Letters sent to SFN members of the nature of the application and letters sent to identified potential beneficiaries of the application.	By November 19, 2018
3.	Parties to send any proposal(s) for a varied definition that might be relied on for dealing with s. 42 at the Directed Issue Hearing, with a request that responses to the proposal be returned by November 1, 2018	By November 19, 2018
4.	Questioning by OPGT of Catherine Twinn on Affidavit of Records filed, if required, and further questioning of Paul Bujold (Sawridge Trustees) by OPGT on Affidavits of Records filed, if required.	By December 14, 2018
5.	Brief of the Sawridge Trustees for Directed Issue Hearing filed	By December 21, 2018
6.	Briefs of the OPGT and Catherine Twinn for Directed Issue Hearing filed	By January 4, 2019
7.	Written submissions by any non-party beneficiaries/potential beneficiaries, including any submission by the SFN (maximum of 5 pages, including attachments)	By January 18, 2019
8.	Directed Issue Hearing (one half day)	Dependent on availability of Court (by February 1, 2019 if possible)
9.	A new litigation plan will be developed for the steps for grandfathering, if necessary: need witness lists; will-say statements; briefs; hearing date	

SCHEDULE C

Schedule "C" –Litigation Plan for Privilege Hearing

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 Privilege Issue. If proposed order granted, issue is complete.	September 25, 2018
2.	If order not granted September 25, Trustees to put together all documents that contain privileged information and provide to Catherine Twinn to see if agreement can be reached on the exclusion of the whole document or on the exclusion of a redacted portion of the document	By September 28, 2018
3.	All non-contested documents from the Affidavit of Records of Catherine Twinn (i.e., documents over which no issues regarding privilege are raised) delivered to OPGT	By September 28, 2018
4.	If no agreement is reached on exclusions/redactions from contested documents by October 12, 2018, then the parties will agree on a referee to review the documents to determine what documents raise privilege issues. Referee to be appointed by agreement of the parties.	By October 19, 2018
5.	If no agreement is reached on a referee, the parties may apply in regular morning chambers to have a referee appointed.	By October 26, 2018
6.	Referee to make decision and provide report to the Court.	By November 2, 2018
7.	Trustees to file a brief outlining position on privilege.	By November 9, 2018
8.	Any responding briefs to be filed by Catherine Twinn and the OPGT on privilege.	By November 16, 2018
9.	Hearing in respect of the privilege issues	By November 30, 2018 (court time permitting)

SCHEDULE D

Schedule "D" – Proposed Privilege Order

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 TWIN AND DAVID MAJESKI, as Trustees for the 1985 Trust ("Sawridge Trustees")
DOCUMENT	**ORDER (PRIVILEGE)**
DATE ORDER PRONOUNCED LOCATION WHERE ORDER PRONOUNCED	**Edmonton, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER	**Honourable Justice D.R.G. Thomas**
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 certain documents have been filed in these proceedings prior to the date of this Order that refer to legal advice provided to the Sawridge Trustees, including to Catherine Twinn while she was a Sawridge Trustee (the "**Filed Documents**");

AND WHEREAS certain of the Filed Documents have also been filed in Court File No. 1403 04885 (the "**1403 Filed Documents**");

AND WHEREAS the Sawridge Trustees, The Office of the Public Trustee and Guardian of Alberta ("**OPGT**") and Catherine Twinn agree that there is no intention to waive solicitor-client privilege over the subject matter of the communications contained in the Filed Documents and the 1403 Filed Documents;

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

IT IS HEREBY ORDERED AND DECLARED;

1. Any waiver of solicitor-client privilege that may be implied from the contents of the Filed Documents, and/or the 1403 Filed Documents, is expressly limited to the contents of those documents.

2. No response in a questioning, whether by way of oral or written response including any answer recorded by transcript or answer to undertaking or interrogatories, that addresses the contents of the Filed Documents, and/or the 1403 Filed Documents (collectively "Questioning Responses"), can be construed as a general waiver of solicitor-client privilege over the subject matter of any communications contained therein.

3. The Sawridge Trustees are expressly declared not to have waived solicitor-client privilege over the subject matter of any matters discussed in the Filed Documents, the 1403 Filed Documents, and/or the Questioning Responses. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or any Questioning Responses given in these proceedings, can be used to compel the Sawridge Trustees to produce further documents or answer questions in respect of legal advice received by the Sawridge Trustees.

4. Nothing in the contents of the Filed Documents, the 1403 Filed Documents, or the Questioning Responses, can be used to compel the Sawridge Trustees to produce

further documents or answer questions in respect of legal advice received by the Sawridge Trustees.

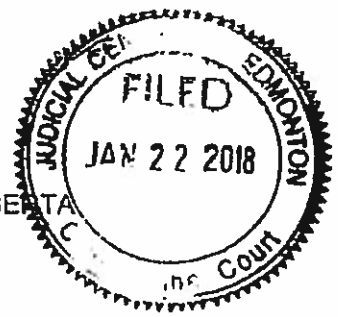
5. While this is a binding declaratory order, including on the parties to the Application and the beneficiaries of the 1985 Trust, nothing in this Order is intended to expand or limit the disclosure or production to which a beneficiary of the 1985 Trust may otherwise be entitled to at law to request as a beneficiary of the 1985 Trust.

6. If the Sawridge Trustees, the OPGT, Catherine Twinn, or any beneficiary of the 1985 Trust who may choose to participate in the manner permitted by this Court, seek to use any other document or record in this Application, other than those covered by this Order (being the Filed Documents, the 1403 Filed Documents, and the Questioning Responses) to which a claim of solicitor-client privilege may be made, the admissibility of such document and/or the terms for protecting the privilege of such document may be determined on a case-by-case basis, either by agreement of the Sawridge Trustees, the OPGT and Catherine Twinn, or by the direction of this Court.

The Honourable Justice D. R. G. Thomas

SCHEDULE E

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

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

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"), 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

SCHEDULE F

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 (Statement of Issues and Relief Sought)**
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

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	To Be Determined
Time	To Be Determined
Where	Law Courts, 1 A Sir Winston Churchill Square, **Edmonton**
Before Whom	To Be Determined

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

Basis for this claim:

1. The Applicants, the Sawridge Trustees, are the Trustees of the Sawridge Band Inter Vivos Settlement ("1985 Trust"). The Applicants seek determination of an issue and advice and directions from this Court. Pursuant to the comments of the Court of Appeal in *Twinn v Twinn*, 2017 ABCA 419, the Applicants file this document to set out and clarify the advice and directions sought in this Application.

2. The 1985 Trust was settled on April 15, 1985. Thereafter, section 15 of the *Canadian Charter of Rights and Freedoms* came into force, following the signing of the *Charter* into law.

3. After the 1985 Trust was settled, Bill C-31 was passed into law, making significant amendments to the *Indian Act*, R.S.C. 1970, Chapter I-6. Those amendments included the reinstatement of status and membership to women who had married non-Indigenous men and therefore lost their status and membership under the *Indian Act* prior to the amendments.

4. The definition of "Beneficiary" in the Trust Deed of the 1985 Trust makes specific reference to determining members of the Sawridge First Nation ("SFN") by reference to the *Indian Act* as it read as at April 15, 1982, before Bill C-31 was passed. The Trust Deed specifically prohibits amendment of the definition of "Beneficiary".

5. The 1985 Trust was funded from assets that had belonged to the SFN. Currently, there are members of SFN who are not beneficiaries of the 1985 Trust, such as the Bill C-31 women. There are beneficiaries of the 1985 Trust who are not members of SFN.

6. There may be other forms of discrimination in the definition of "Beneficiary".

7. The Applicants seek a determination of the following issue:

   Is the definition of "Beneficiary" in the Trust Deed of the 1985 Trust discriminatory, insofar as the

definition refers to provisions of the *Indian Act*, RSC 1970, c I-6, which have since been amended, and 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;

Remedy sought:

8. If the definition of "Beneficiaries" is found not to be discriminatory, then the Applicants do not expect to seek any other relief.

9. If the definition of "Beneficiary" is discriminatory, the Applicants seek direction from this Court as to the appropriate remedy, and particularly whether the appropriate remedy is:

   (a) To modify the definition by striking out language that has a discriminatory effect such that the definition of "Beneficiary" in the 1985 Trust will be reduced to members of the Sawridge First Nation?

   (b) If the remedy in paragraph 9(a) is not granted to determine if the 1985 Trust can be amended pursuant to,

      (i) the amending provisions of the Trust Deed, or

      (ii) Section 42 of the *Trustee Act*?

10. If the definition of "Beneficiary" is modified, by striking out language or otherwise, then:

   (a) Should there be "grandfathering" such that any of the individuals who met the definition of "Beneficiary" before this relief is granted will remain Beneficiaries?

(b) If the answer to 10(a) is "yes", what should the terms of such "grandfathering" be and who will be grandfathered?

11. Such further and other relief as this Court may deem appropriate.

Affidavit or other evidence to be used in support of this application:

12. Such material as has been filed to date and has been posted on the applicable court ordered website at www.sawridgetrusts.ca

13. Such further material as counsel may further advise and this Honourable Court may admit.

How the Application is to be heard:

14. The application is to be heard in Special Chambers before the presiding Justice at a date to be determined.

Applicable Acts and regulations and Orders:

15. *Alberta Rules of Court*, Alta Reg 124/2010;

16. *Trustee Act*, RSA 2000, c T-8;

17. Order of the Court of Queen's Bench of Alberta dated January 5, 2018 in case management.

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 G

大成 DENTONS

Doris C.E. Bonora

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D +1 780 423 7188

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

dentons.com

June 22, 2018

File No.: 551660-1

SENT VIA E-MAIL:

Janet Hutchison
Unit #190 Broadway Business Square,
130 Broadway Boulevard,
Sherwood Park, Alberta, T8H 2A3

Karen Platten, Q.C. and Crista Osualdini
McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton AB T5N 3Y4

Dear Sir/Madam:

RE: **Beneficiary Definition in 1985 Sawridge Trust**
Court File No. 1103 14112

We write further to our letter dated March 21, 2018, to which we have not received a response. A copy of our letter is attached for your ease of reference.

One of the issues in our Application (Statement of Issues and Relief Sought) filed on January 9, 2018 ("Application") has been resolved by way of consent order dated January 19, 2018, with the definition of "Beneficiary" in the Trust Deed having been declared discriminatory.

As you are aware, the current litigation plan has no scheduled steps beyond July 15, 2018. In terms of the next steps, we write to propose that the issue of remedying the definition also be resolved by an order which can either be by consent or by having the parties signify that they do not oppose the order.

Law on amending the trust

Our view is that there is sound legal basis upon which the Court may strike language in the definition of "beneficiary" on the basis that such language has a discriminatory effect.

Two other possible methods of proceeding have been raised during the course of discussions: seeking variation pursuant to s. 42 of the *Trustee Act*, or amending pursuant to the terms of the Trust Deed

If we were to proceed by way of s. 42 of the *Trustee Act*, which requires 100% consent, the views of even one beneficiary would prevent a remedy even if the substantial majority of other beneficiaries approve. Given the contentious nature of the litigation to date, we doubt that 100% approval of a definition is possible. In addition, there are substantial issues with ascertaining the identities of all of the beneficiaries of the Trust

thus it will not be certain that we have 100% approval. It also perpetuates the discrimination because the very women who are impacted by the discrimination do not have a vote, as they are not beneficiaries.

Our view is that amending pursuant to the Trust Deed is not possible, insofar as paragraph 10 specifies that no change can be made to the definition of "beneficiary" by way of the variation clause in the Trust Deed.

Amendment must precede Grandfathering

We believe that we cannot proceed with discussions about "grandfathering" individuals who may be impacted by a change to the definition until we know how the definition will be amended, as we cannot know if someone needs to be grandfathered until we know what the definition will be and whether they will be excluded. The change of definition must precede the grandfathering issue. Otherwise, we will be spending a great deal time and expense to discuss what amounts to hypotheticals, and in our view, there is no time or expense to be wasted.

Proposal to Proceed

We therefore are of the view that it is advisable to proceed by seeking the direction of the Court to amend the definition by striking language as follows:

> "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 1-6 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 1-6 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 1-6, 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;~~

We have enclosed a draft Order to this effect. If agreed to by the parties, we can present that Order to the Court, together with a brief that sets out the law respecting the Court's authority to strike discriminatory language in a trust such as this one, and seek the Court's approval.

If you do not agree with our analysis, or with the terms this Order, we ask that you outline your position for our consideration. If either of your clients oppose this approach, it is important that we be advised of that position.

We look forward to your response, which we request be provided before July 15, 2018.

Yours truly,
Dentons Canada LLP

Per

Doris C.E. Bonora

Encl.

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	**ORDER (DEFINITION OF BENEFICIARY)**
DATE ORDER PRONOUNCED	
LOCATION WHERE ORDER PRONOUNCED	**Edmonton, Alberta**
NAME OF JUSTICE WHO MADE THIS ORDER	**Honourable Justice D.R.G. Thomas**

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 one issue in the Application by the Sawridge Trustees on which direction was sought was whether the definition of "Beneficiary" in the 1985 Trust is discriminatory;

AND WHEREAS the definition was declared discriminatory by way of Consent Order issued January 19, 2018;

AND WHEREAS another question in the Application on which direction is sought is what remedy is appropriate in respect of changing the definition that has been declared discriminatory;

AND UPON being advised that the parties ask the Court to consider resolving the definition of Beneficiary 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 there being one remaining substantive issue in the Application to be resolved, being whether there should be ay grandfathering of individuals whose status as beneficiaries would be affected by this change of definition, and upon being advised that the parties wish to reserve and adjourn the determination of this issue;

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 the Court being satisfied that it has the authority to amend a Trust Deed by striking discriminatory language;

AND UPON the form of this Order having been approved by the Sawridge Trustees, The Office of the Public Trustee and Guardian of Alberta ("OPGT") and Catherine Twinn;

IT IS HEREBY ORDERED AND DECLARED;

1. The definition of "Beneficiary" in the 1985 Trust be amended by striking out portions of the language in the Trust Deed, as follows:

> "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;~~

2. The definition of Beneficiary for the 1985 Trust will be:

> "Beneficiary" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band.

3. The remaining substantive issue in the Application, being the determination of whether any individual whose status as a Beneficiary is affected by this amendment to the definition should be grandfathered as a Beneficiary, is adjourned *sine die*. The timeline for advancing that issue will be agreed by the parties or may be further determined at a future Case Management Meeting.

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

The Honourable Justice D. R. G. Thomas

APPROVED BY:

MCLENNAN ROSS LLP

Karen Platten, Q.C.
Counsel for Catherine Twinn

DENTONS CANADA LLP

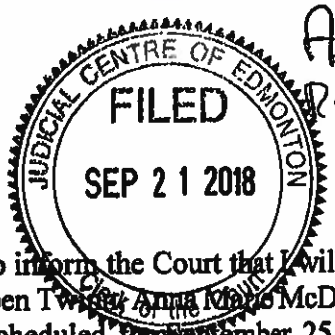
Doris Bonora
Counsel for the Sawridge Trustees

HUTCHISON LAW

Janet Hutchison
Counsel for the OPGT

TAB E

Action No 1103 14112
Roland Twinn et al



September 21, 2018

My name is Shelby Twinn. I am writing to inform the Court that I will be appearing, along with Deborah Serafinchon, Melissa Megley, Aspen Twinn, Anna Marie McDonald, Cameron Shirt, and others at the case management meeting scheduled for September 25, 2018 for the purpose of speaking to how non-party beneficiaries and potential beneficiaries should be able to participate in the future steps in the litigation. Patrick Twinn, Isaac Twinn, Julie Rudkowski, Sam Twinn, Kiki Twinn and Wesley Twin and others cannot attend but agree on what is required to assure our meaningful and just participation in our Trust. I am aware that the Sawridge Trustees have made beneficiary participation an agenda item for the case management meeting. (See paragraphs 24-29 of the written submissions of the Sawridge Trustees filed August 24, 2018).

You will recall that myself, along with Patrick Twinn and Deborah Serafinchon were represented by Nancy Golding of Borden Ladner Gervais at an application where we were seeking party status in the litigation. The decision that your Honour issued as a result of that application declared that myself and Patrick Twinn are current beneficiaries of the 1985 Trust. You also stated that you could not foresee a circumstance where my status as a beneficiary of the 1985 Trust would be eliminated.

The legal fees that myself, Patrick and Deborah incurred as a result of our attempts to gain party status were significant. Unfortunately, the costs of these prior applications have left us in a position where we can no longer afford legal representation. This is why I, rather than Ms. Golding, am writing to you today. Late afternoon, September 20, 2018 Dentons' emailed Ms. Golding the Trustees' brief, but Ms. Golding is not acting for us.

I understand that the Court of Appeal in their December 12, 2017 decision suggested that class counsel for current and potential adult beneficiaries may be appropriate and that this issue should be dealt with in case management. The purpose of my letter is that at the September 25, 2018 case management meeting, we are seeking the appointment of class counsel for the current and potential adult beneficiaries of the 1985 Trust and that such lawyer be paid for by the 1985 Trust. Our free, prior and informed consent requires we have access to independent class counsel.

Briefly put, the reasons we believe class counsel is needed are:

- Myself, Patrick and Deborah have not been able to establish a dialogue with the Trustees for the purpose of ensuring our status is respected or to provide comments in respect of the "beneficiary" definition. See paragraphs 39 and 43 of your decision on party status that directed this to occur. We understand that settlement meetings have been occurring between the Trustees' lawyers and the other parties' lawyers, but we have not been invited by the Trustees to attend these meetings or our input sought. It is very difficult to protect our interests when we are not privy to how the parties are trying to resolve the litigation.

- I understand that the Trustees are seeking to schedule an application for the purpose of changing the current beneficiary definition to only include members of the SFN without concurrently considering how existing beneficiaries, like myself, will be protected. If the trustees are successful, then my status as a beneficiary could be eliminated. It is very

concerning to me that the Trustees are doing this given your comments that my beneficiary status would be respected. I note that I did apply for membership in the SFN on April 23, 2018, but have yet to hear anything from the SFN, not even an acknowledgment of receipt of my application. It is very unclear whether I will ever be a member of the SFN, despite being the late Chief Walter Twinn's granddaughter, and therefore entitled to beneficiary status on this basis;

- I have come to learn from Patrick Twinn that the Trustees are holding a meeting "only with approved beneficiaries of the Sawridge Trust (1986 Trust) ...that includes only members of the Sawridge First Nation" the weekend of October 13-14, 2018. It is my understanding that the "approved beneficiaries" would only be band members of the SFN. See attached letter. It is disappointing that given the significant legal issues facing the current beneficiaries of the 1985 Trust, that the trustees are not reaching out to the adult beneficiaries and potential beneficiaries, including those who applied to the Trust in 2009/10 to keep us informed given the significant threat to our legal interests;

- We do not believe the Trustees are trying to meaningfully consult with the affected beneficiaries and are instead solely focused on changing the definition to band membership. Myself and those in my circumstances cannot rely on the trustees to represent our interest as my perception is that they favour the interest of the SFN over ours. This perception is also informed by my understanding that the Trustees have been paying the SFN's legal fees to participate in this litigation, despite their vigorous opposition to the payment of mine. In June 2015 the Trustees filed then later withdrew a Settlement Proposal with the Court. Had it been accepted, my beneficiary status would have ended, and the irrevocable status of other beneficiaries, like Patrick Twinn, would be revocable;

- I have reviewed the written submissions provided by the Trustees for this case management meeting and in particular their proposal on how non party beneficiaries like myself, can participate. I am very afraid of their proposals regarding cost consequences for failure to comply with their process. I am not a lawyer. I genuinely wish to comply with the process that is ultimately set out by the Court, however, my lack of legal training may result in me, and others like me, making mistakes. In order to properly represent my interests, I very much need a lawyer, which is why I am asking for class counsel to be appointed.

- I understand that the trustees are seeking to set timelines to have the issue of the beneficiary definition change heard. Their application could result in me being disentitled as a beneficiary. I believe that appointing counsel for me and the other adult beneficiaries would not result in unnecessary expense as the ultimate issue is on the verge of being decided and justice requires we be heard about our Trust.

With Respect,

Shelby Twinn

SAWRIDGE TRUSTS

NOTICE OF BENEFICIARY ANNUAL GENERAL MEETING 2018

The Trustees of the Sawridge Trust (1986 Trust) have recently passed a policy to hold an annual meeting with the beneficiaries of the Trusts. The first such meetings will be held on:

Saturday, 13 October 2018
10:00 AM to 4:00 PM
Sawridge First Nation Office, Slave Lake, AB

AND

Sunday, 14 October 2018
10:00 Am to 4:00 PM
Jasper Room, Sawridge Inn-Edmonton South, Edmonton, AB

At this meeting, Trustees will present:

- An explanation of the Trusts,
- An explanation of the current actions being undertaken by the Trusts,
- An explanation of the benefits, and
- The audited financial statements for 2017.

In addition, the Trustees will consult with the beneficiaries about future directions for the Trusts and the benefits programs.

Only approved beneficiaries of the Sawridge Trust (1986 Trust) may attend this meeting. That includes only members of the Sawridge First Nation. If you are receiving this notice, you may attend but are not permitted to bring any guests or non-approved beneficiaries. You may attend either one of these meetings as the same information will be presented at each meeting.

PLEASE LET ME KNOW WHICH MEETING YOU WILL BE ATTENDING SO THAT WE CAN PLAN THE MEALS AND REFRESHMENTS.

214, 10310-124 Street NW
Edmonton, AB T5N 1R2
Office: 780-988-7723
Fax: 780-988-7724
Toll Free: 888-988-7723
Email: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca

TAB F

SAWRIDGE
TRUSTS

1 September 2011

Jonathon B. Potskin
P. O. Box 390
Smith, AB T0G 2B0

SENT BY REGISTERED MAIL

Dear Jonathon B.,

The Trustees (the "Trustees") of the Sawridge Band Inter Vivos Settlement created on April 15, 1985 (the "1985 Trust") will be bringing an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust (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 Trust, and if necessary to vary the 1985 Trust to clarify the definition of "Beneficiaries".
b. To seek direction with respect to the transfer of assets to the 1985 Trust.

A website (the "Website") has been created which will contain information in respect of the Advice and Direction Application. The Website is located at http://www.sawridgetrusts.ca/courtdoc. You will have access to this Website and the documents contained thereon, including all documents filed with the Court in relation to the Advice and Direction Application, which documents are located under the "Court Documents" tab of the home page of the Website.

On 1 September 2011 an Order was issued by the Court of Queen's Bench of Alberta in relation to the Advise and Direction Application. The Order directs that the Trustees provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries of the 1985 Trust by way of this letter. The Order also includes deadlines for filing affidavits and written legal argument with the Court in respect of the Advice and Direction Application. This Order can be accessed on the Website, under the "Court Documents" tab.

Cordially,

Paul Bujold,
Trusts' Administrator

801, 4445 Calgary Trail N.W.
Edmonton, AB T6H 5R7
Office: 780-988-7723
Fax: 780-988-7724
Toll Free: 888-988-7723
Email: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca

SAWRIDGE TRUSTS

21 December 2009

Dear Potential Beneficiary of the Sawridge Inter-Vivos Settlement,

The Sawridge Trusts, operating under the terms of the Trust Deeds for the Sawridge Band Inter-Vivos Settlement (1985) and the Sawridge trust (1986) and reporting to the five Trustees of the Trusts: Clara Midbo, Bertha Twin-L'Hirondelle, Walter Felix Twin, Catherine Twinn and Chief Roland Twinn, is in he process of trying to identify the beneficiaries of the Sawridge Band Inter-Vivos Settlement (1985). The attached notice was recently published in newspapers in Saskatchewan, Alberta and British Columbia.

As part of this process, the Trustees have hired a legal team to determine the rules governing the determination of who is eligible to be a beneficiary of this trust. The enclosed form requests information that is necessary to make this determination. We ask that you fill out the form and return it to our office as soon as possible. You may copy to form for others who feel that they may also qualify.

The Sawridge Trusts recently decided to issue an initial "Good Faith Disbursement" of $2,500 to the beneficiaries of the Sawridge Trust (1986) since they can clearly be identified as those on the Sawridge Band membership list. For those who do not fall into this category, no disbursement is being issued at this time because the beneficiaries cannot yet be clearly identified. If you become eligible as a beneficiary through this process, the "Good Faith Disbursement" will also be made available to you at that time.

The eligibility process is expected to take some months. Information concerning progress on this issue will be available on the website, through regular mail-outs to potential applicants and through this office.

Cordially,

Paul Bujold,
Trusts Administrator

Attachments

801, 4445 Calgary Trail NW, Edmonton, Alberta T6H 2R7 Canada | P: (780) 988-7723 | F: (780) 988-7724 | general @sawridgetrusts.ca

DECLARATION OF TRUST MADE THIS 16TH DAY OF APRIL, 1985.

This is Exhibit "J" referred to in the Affidavit of Paul Bujold
Sworn before me this 12 day of September A.D., 2011
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

BETWEEN:

WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWIN
(hereinafter referred to collectively as the "Old Trustees")

OF THE FIRST PART

AND:

WALTER PATRICK TWINN, SAM TWIN AND GEORGE TWIN
(hereinafter referred to collectively as the "New Trustees")
OF THE SAWRIDGE INTER VIVOS SETTLEMENT

OF THE SECOND PART

WHEREAS the "Old Trustees" of the Sawridge Band Trust (hereinafter referred to as the "trust") hold legal title to the assets described in Schedule "A" and settlor Walter P. Twinn by Deed in writing dated the 15th day of April, 1985 created the Sawridge Inter Vivos Settlement (hereinafter referred to as the "settlement").

AND WHEREAS the settlement was ratified and approved at a general meeting of the Sawridge Indian Band held in the Band Office at Slave Lake, Alberta on April 15th, A.D. 1985.

NOW THEREFORE this Deed witnesseth as follows:

The undersigned hereby declare that as new trustees they now hold and will continue to hold legal title to the assets described in Schedule "A" for the benefit of the settlement, in accordance with the terms thereof.

Further, each old trustee does hereby assign and release to the new trustees any and all interest in one or more of the promissory notes attached hereto as Schedule "B".

WITNESS:

OLD TRUSTEES

NEW TRUSTEES

SCHEDULE "A"

SAWRIDGE HOLDINGS LTD. --- SHARES

WALTER PATRICK TWINN	30 CLASS "A" COMMON
GEORGE TWIN	4 CLASS "A" COMMON
SAM TWIN	12 CLASS "A" COMMON

SAWRIDGE ENERGY LTD. --- SHARES

WALTER PATRICK TWINN	100 CLASS "A" COMMON

SCHEDULE 'B'

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED AND NINETY-THREE THOUSAND, ONE HUNDRED AND SEVENTY-EIGHT ($293,178.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate than in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives dispute of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19th day of December , A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 14 day of December , A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWENTY FOUR THOUSAND, SIX HUNDRED AND TWO ($24,602.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

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DATED at the City of Edmonton, in the Province of Alberta, this 19 day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

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Per: _____

Per: _____

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DATED at the City of Edmonton, in the Province of Alberta, this 19 day of December, A.D. 1983.

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Per: _____

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PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of EIGHT THOUSAND, ONE HUNDRED AND THIRTY EIGHT ($8,138.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate then in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives dispute of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19 day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of FORTY FOUR THOUSAND, ($44,000.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate then in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives dispute of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this 19 day of December, A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

PROMISSORY NOTE

FOR VALUE RECEIVED SAWRIDGE HOLDINGS LTD. a Federally incorporated company maintaining its head office on the Sawridge Indian Band Reserve near Slave Lake, in the Province of Alberta, hereby promises to pay to WALTER PATRICK TWINN, SAM TWINN AND GEORGE TWINN (together being the Trustees of the Sawridge Band Trust, hereinafter referred to as the "Trustees"), the sum of TWO HUNDRED FIFTY ONE THOUSAND THREE HUNDRED ($251,300.00) DOLLARS in lawful money of Canada at Edmonton, in the Province of Alberta, ON DEMAND, together with interest thereon, calculated and compounded semi-annually (not in advance) at a rate per annum equal to Three (3%) per cent in excess of the prime commercial lending rate published and charged by the Bank of Nova Scotia on substantial Canadian Dollar loans to its prime risk commercial customers, both before as well as after maturity until all sums of interest and principal are paid.

Interest to be determined at a rate per annum equal to Three (3%) Percent in excess of the prime commercial lending rate published and charged by The Bank of Nova Scotia (a Chartered Bank of Canada with Corporate Head Offices in the City of Toronto, in the Province of Ontario) on a substantial Canadian Dollar loans to its prime risk commercial customers (hereinafter referred to at "prime rate"), until all amounts secured hereunder are paid. It being further understood and agreed that if and whenever the prime rate is a variable rate published and charged by the Bank of Nova Scotia from time to time. It being further understood and agreed that if and whenever the prime rate is varied by The Bank of Nova Scotia the interest rate hereunder shall also be varied, so that at all times the interest rate hereunder, computed on the daily minimum balance, shall be the percentage stipulated for the periods aforesaid plus the prime rate then in effect (hereinafter referred to as the "current mortgage rate"). The Mortgagor, by these presents, hereby waives dispute of and contest with the prime rate, and of the effective date of any change thereto, whether or not the Mortgagor shall have received notice in respect of any change. It being provided and agreed that interest at the current mortgage rate then in effect from time to time on the principal sum, or on such part thereof as has been from time to time advanced and is then outstanding, computed from (and including) the date the principal sum or any such part is advanced.

WE HEREBY waive presentment for payment, notice of protest, demand for payment and notice of non-payment.

DATED at the City of Edmonton, in the Province of Alberta, this [illegible] day of [illegible], A.D. 1983.

SAWRIDGE HOLDINGS LTD.

Per: _____

Per: _____

NOTICE

TO PERSONS WHO ARE OR MAY BE BENEFICIARIES OF THE SAWRIDGE BAND INTER-VIVOS SETTLEMENT (1985) OR BENEFICIARIES OF THE SAWRIDGE TRUST (1986).

The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to 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 April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions at they existed on April 15, 1985.

The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of The Sawridge Indian Band as they 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.

All person who believe that they qualify or may qualify as beneficiaries of either or both of The Sawridge Band Inter-Vivos Settlement or The Sawridge Trust are asked to contact Paul Bujold, Trust Administrator by mail at 801, 4445 Calgary Trail NW, Edmonton, AB T6H 2R7 or by email at paul@sawridgetrusts.ca or by telephone at (780) 988-7723 or by fax at (780) 988 7724 listing the particulars supporting their claim to be a beneficiary of The Sawridge Band Inter-vivos Settlement or The Sawridge Trust.

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SAWRIDGE
TRUSTS

7 January 2011

Applicants
Sawridge Trusts

Dear Applicant,

Based on extensive legal advice and negotiations with the Sawridge First Nation, the Sawridge Trusts Trustees have come to the conclusion that the provisions of the two trust documents envision that all beneficiaries of the Trusts must be Band members and that the only body able to make a determination as to who qualifies as a Band member is the Sawridge First Nation through its Chief and Council, Membership Committee and Legislative Assembly using the Membership Code established by the Sawridge First Nation.

As such, the Sawridge Trusts have decided to abandon their previous decision to appoint a tribunal to review the applications you and other persons submitted to the Trusts to be considered as beneficiaries in favour of having the Membership Committee of the Sawridge First Nation make a determination of who qualifies to be a member of the First Nation.

The definition of beneficiaries for the Sawridge Trust of 15 August 1986 is quite clear:

> "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.

Since the Sawridge First Nation has a Membership Code in force, the Trust definition of a beneficiary to the Sawridge Trust can be taken to mean "anyone who has been accepted as a member of the Sawridge First Nation according to the Membership Code".

The definition of beneficiaries for the Sawridge Intervivos Settlement of 15 April 1985, which reads:

> "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 1-6 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

801, 4445 Calgary Trail N.W.
Edmonton, AB T6H 5R7
Office: 780-988-7723
Fax: 780-988-7724
Toll Free: 888-988-7723
Email: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca

> 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 1-6 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 1-6, 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

is also quite clear that "beneficiaries" are clearly meant to be persons who are members of the Sawridge First Nation except for a select few who qualified as Band members under the 1982 provisions of the Indian Act but may no longer qualify under the current Act. The definition, though, refers to a section of the Indian Act that has since been repealed.

As a result of this reference to a section of the Indian Act that is no longer in force, the Trustees have decided to ask the Alberta Court to provide its advice as to whether or not this definition is still valid. All parties having an interest in this application to the Court will be notified when the application is submitted. The application is not likely to affect the requirement that, for the most part, beneficiaries must also be members of the Sawridge First Nation.

We are contacting you because you applied to be considered as a beneficiary to one or both of the Sawridge Trusts. We are now informing you that you should do the following:

1. **If you have not already done so, you should apply to Indian and Northern Affairs Canada to register for Indian status** which you can access at http://www.ainc-inac.com/ai/scr/bc/proser/fnp/regscd/regapp/index-eng.asp if you have access to the Internet or by contacting one of the offices listed below:

   Ontario Region
   Indian and Northern Affairs Canada
   8th Floor 25 St. Clair Avenue East
   Toronto, Ontario
   M4T 1M2
   (416) 973-6234
   fax: (416) 954-6329

Saskatchewan Region
Indian and Northern Affairs Canada
Room 200, 1 First Nations Way
Regina, Saskatchewan
S4S 7K5
(306) 780-5945 or 780-5392
fax: (306) 780-5733

Alberta Region
Indian and Northern Affairs Canada
630 Canada Place
9700 Jasper Avenue
Edmonton, Alberta
T5J 4G2
(780) 495-2773
fax: (780) 495-4088

British Columbia Region
Indian and Northern Affairs Canada
Suite 600
1138 Melville Street
Vancouver, B.C.
V6E 4S3
(604) 775-7114
(604) 775-5100
fax: (604) 775-7149.

2. **If you have not already done so, you should apply for membership in the Sawridge First Nation** by contacting the Sawridge First Nation office to request a copy of the Membership Code and Membership Application Form. **If you have already applied, you should check into the current status of your application.** The address is listed below:

   Sawridge First Nation
   P.O. Box 326
   806 Caribou Trail NE
   Slave Lake, AB T0G 2A0
   (780) 849-4331
   fax: (780) 849-3446
   email: Sawridge@sawridgefirstnation.com

The Sawridge Trusts have offered to assist the Sawridge First Nation in any way that they can in order to help the First Nation deal with the volume of applications in an efficient and effective manner. If there is anything that we can do to assist you in this process, please contact us at the address listed below:

Sawridge Trusts
801, 4445 Calgary Trail
Edmonton, AB T6H 5R7
(780) 988-7723

(888) 988-7723
fax: (780) 988-7724
email: paul@sawridgetrusts.ca

We hope that this will help to resolve the issue of beneficiaries to the Sawridge Trusts and that it will help you resolve whether or not you are one of the beneficiaries.

Cordially,

Paul Bujold,
Trusts Administrator

Q Okay. We've had the assistance of your counsel in tracking down all of the relevant documents, and this is what has been located.
MR. HENDERSON: My Lord, I tracked the documents down, and the Senator wasn't involved in the process at all, and I've not discussed the contents of the documents with him because I was worried about -- because the subject has already gone into. So it was me that did it, not the Senator, just so it's clear.
MR. FAULDS: Quite properly so.
Q MR. FAULDS: The search has been carried out by legal counsel on your behalf?
A That's right.
Q Now, I'd like to refer you, Chief Twinn, if I could, to Document 92(E), Exhibit 92(E).
THE COURT: B as in "baker"?
MR. FAULDS: E as in "Edward," My Lord. I'm sorry.
THE COURT: Oh. Thank you.
MR. HENDERSON: I might say that the Senator hasn't read these before they were produced, at least not in the
03906 last couple days, so . . .
THE COURT: Yes.
MR. FAULDS: Well, then we'll see how we do.
Q MR. FAULDS: This is a declaration of trust that is dated the 15th of April, 1985. Correct?
A That's right.
Q And, as I think you're aware, that would be two days before the effective date of Bill C-31. Bill C-31 became effective as of April the 17th, 1985.
A That's right.
Q Do you recall that this declaration of trust document was created in anticipation of the passage of Bill C-31 and its coming into effect?
A That's right.
Q And the parties to this document are yourself -- you are called the settlor, if you look at the top of the first page. Correct?
A Right.
Q And you are the settlor as an individual, not as a trustee on anybody's behalf, according to that description?
A That's right.
Q And the beneficiaries of the trust are described on page 2 of that document, and I'd ask you to look at the definition there.

A Page . . .
Q I'm sorry. Page 2, and it's paragraph 2(a) at the bottom. And maybe what I could ask you to do, Chief Twinn, is just read through that definition of "beneficiaries." And it actually goes on to page 4.
A How far do you want me to go?
Q If you could finish where the definition of "trust fund" starts. That would be the top of page 4.
Have you had a chance to look that over?
A Yeah.
Q As I understand it, the people who are beneficiaries under this settlement are people who would be considered members of the Sawridge Band under the Indian Act as it was in April of 1982.
Is that your understanding, too?
A That's right. '82?
Q I think they say -- the date is April -- I don't know what the significance of it is, but if you look at the top of page 3 --
A I just don't know why it wouldn't be '85. That's all. That's fine. It's a legal document, so . . .
Q Sure. But, in any event, what it meant was that the people who would be beneficiaries would be people who would be considered members of the band before the passage of Bill C-31?
A That's right.
Q The object of that was to exclude people who might become members of the Sawridge Band under Bill C-31 as beneficiaries?
A Yes, to a certain extent, yeah.
Q Was it the intention that all of the assets of the band would be covered by that agreement or only some?
A I believe all assets that are -- not including -- I'm going to repeat -- I believe not including the capital -- the funds that are held in Ottawa.
Q So all assets other than that capital fund in Ottawa was to be covered by this trust agreement?
A Mm-hmm, or whatever the documents are in there. I can't . . .
Q But I just want to know, when this agreement was being prepared, what your objective was. And your first objective was that people who might become band members under Bill C-31 wouldn't be beneficiaries?
A Mm-hmm.
Q That's correct? That was Objective Number 1?

A Right.
Q And Objective Number 2 was that the trust would cover all of the assets of the Sawridge Band that were under the Sawridge Band's control?
A Yes. What's on there, I believe. I don't want to be saying something that --
Q I'm not trying to trick you. I'm wondering if that's what your objective was.
A That's the objective of those.
Q Sure. So that even if people under the bill became members of the band, they would be excluded from sharing in the assets of the band?
A For -- especially a short purpose, right, for a short while there.
Q Until you changed the trust agreement?
A We didn't know what the Bill C-31 was going to bring about.
Q So you tried to create a trust arrangement that would prevent Bill C-31 members from having any share in the band's assets?
A That's right, on this one, yeah.
Q Okay. Now, as far as whether or not -- it's a legal question, I suppose, whether or not you succeed in doing what you're trying to do. You hire lawyers to try and do things for you, and sometimes they do it, and sometimes they don't. You recognize that?
A I'm not saying the lawyers -- what they try to do or not. But the document, you know -- I need professional help for documents.
MR. HENDERSON: My Lord, just so it's clear on the record -- I want to make sure it is. Because the Senator has not had a chance to read through all of these documents, I've been giving history to my friend. There's an '86 version of the same trust where the definition of "beneficiary" would include anyone, from time to time, becoming a member under the Indian Act or otherwise. And that deals with the circumstance where the bill is now law, and you have to deal with people on that basis.
So just so it's not misleading, there's a time period for each of these things.
THE COURT: Thank you, Mr. Henderson.
Q MR. FAULDS: Now, Chief Twinn, I notice that the people who are named as trustees on Document 92(A) are yourself, George, and Samuel.
MR. HENDERSON: 92(A)?

MR. FAULDS: 92(E) as in "Edward." I'm sorry.
A That's right.
Q MR. FAULDS: My recollection was that on the corporate documents that we looked at, the directors of the corporations were yourself, George, and Chester.
A That's right.
Q Is Samuel your brother?
A Yeah, was my brother. He's not -- he's deceased.
Q Was he the director of the corporations, and then Chester took his place when he died?
A No. I can't recall whether he died when it came about, but I think -- I'm trying to remember. I think Sam was reluctant a bit at this case because of all the -- a lot
03911:01 of paper or whatever. Yeah, I think he preferred not to if we get someone else, let's say.
Q Okay. Now, if I could ask you to look at page 6, paragraph 6 and read that.
A Okay. Did you want me to read it first, or do you want to ask?
Q If you would read it over yourself first so that --
A Well, if you could ask; then I can read it.
Q Okay. As I read paragraph 6, it says that the trustees will hold the trust, then, for the beneficiaries until the end of 21 years after the death of the last --
A Survivor?
Q -- survivor of a descendent of a Treaty 8 Indian who was alive on the date of April 15, 1982.
A Right.
Q We, as lawyers, recognize that formula as relating to something called "the rule against perpetuities."
A That's right.
Q You've heard that phrase, too?
A That's right.
Q The rule against perpetuities is a rule which says you can only tie up money in a trust for so long.
A Yes, unlike the Sawridge Band account.
Q What you attempted to do in paragraph 6 was to tie up the assets of the Sawridge Band in the trust fund for the longest time that was legally permissible?
03912:01 A That's right.
Q Do you remember, Chief Twinn, if you made any submissions to the government of the Province of Alberta asking them to allow you to tie it up even longer than that?
A I think we did; I think we did; I'm sure we did. We've had good lawyers. We don't overlook too much.
Q Sure. So you went to the government to see if you could

TAB G

Exhibit: 1
Date: March 8, 2017
Witness: PAUL BUJOLD
Katie McLeod, Court Reporter

SAWRIDGE

Sawridge Trusts News

VOLUME 1, NUMBER 1 SPRING 2010

SPECIAL POINTS OF INTEREST:

- [illegible]
- [illegible]
- [illegible]
- [illegible]

INSIDE THIS ISSUE:

Trusts Office Opened

The Sawridge Trusts now have an office. It isn't exactly new—we've been here since November 2009. The Trustees hired a Trusts Administrator in September 2009. Prior to setting up the office, the Administrator was working from his home.

Beneficiaries of the Sawridge Band Intervivos Settlement and the Sawridge Trust now have a place to go to get information about the Trusts or potential benefits.

Since November, the office has been collecting the records of the Trusts, setting up the office (desks, computers, telephones), working on a web page, recruiting a chairperson for the Board of Trustees and clerical help, tracking down eligible beneficiaries (see **Tracking Beneficiaries** later in this newsletter) and reviewing the performance of the Trusts since their creation in 1985.

Setting up the office was part of a plan approved in July 2009 by the Trustees. Some beneficiaries were involved in the Four Worlds study on the Trusts in January 2009. Part of the plan that came from that study was to set up an office and begin working on developing benefits (see **Defining Benefits** later in this newsletter).

Terrace Plaza Office Building from Calgary Trail, Edmonton

The office is now open to assist Trustees with their work and to assist beneficiaries get answers to their questions or help on various issues.

You can call us or visit the office anytime from 8:30 AM to 4:30 PM Monday through Friday. Our address is 801, 4445 Calgary Trail, Edmonton (North of the Delta Hotel and West of the Radisson Hotel just off the Whitemud Freeway). You can call us toll-free at 1-888-988-7723.

Tracking Beneficiaries

Since the Trusts were initially set up, 25 years ago, a lot of people have come and gone. The world has also changed a great deal.

Tracking the beneficiaries of the Trusts is more complicated than one would think. The Trusts were set up for members of the Sawridge First Nation but changes to the Indian Act and decisions by the courts have made even that question a complicated process.

For the Sawridge Trust, the beneficiary list is clearer—if you are on the Band list, you are probably a beneficiary. For the Sawridge Band Intervivos Settlement, the rules are a bit more complicated. The Trusts have to get people to apply so that the Trustees can match the applicants to the rules.

If you or someone you know hasn't applied yet, application forms are available from the Trusts office. We will mail, fax or email them to you. The review will likely begin in late May or early June 2010.

New Chair of
usts Board of
es

The Trustees

The Trustees recently hired Mr. Brian Heidecker as the new Chair of the Board of Trustees. Brian will begin a three-year term as Chair on 10 May 2010.

Brian is a retired farmer from Castor, AB who now lives in Edmonton. He is presently also Chair of the University of Alberta Board of Governors and has served on many Boards, including the Board of the Bank of Canada.

In addidon to the Chair, there are five Trustees serving the Sawridge Trusts: Clara Midbo, Catherine Twinn, Bertha L'Hirondelle, Roland Twinn and Walter Felix Twin.

The Trustees meet monthly, sometimes in Slave Lake and sometimes in Edmonton at the Trusts offices. They supervise the assets and business of the Trusts and decide upon the benefits and on eligible beneficiaries.

Trust Assets

"Providing benefits through dividends from the assets."

Trust assets consist of two holding companies, Sawridge Holdings Ltd and 352736 Alberta Ltd. These two holding companies are invested in a number of businesses.

The most visible of these assets are the Sawridge Inns located in Slave Lake, Peace River, Fort McMurray, Jasper and Edmonton, Alberta. In addition to these, the holding companies own the Sawridge Truck Stop in Slave Lake, the Slave Lake Plaza and a number of properties and other small businesses.

The assets are managed for the Trusts by Sawridge Management which is run by a Board of Directors selected by the Trustees. The Board of Directors reports to the Board of Trustees and directs the management of the business investments of the Trusts through its management team led by CEO John McNutt and CFO Susan Berggren. Company head offices are located in Edmonton.

Through these investments, the Trusts provide economic development, jobs and, through dividends from the companies, will eventually provide benefits to the beneficiaries into the future.

Defining Benefits

"For our children and our children's children"

Some First Nations receiving large land claims settlements or large profits from resource development have chosen to use some of the revenue to develop infrastructure and have distributed the rest to the membership. Sawridge First Nations chose a difference approach by investing the income to provide future benefits to its members.

During the Four World consultations, many of the beneficiaries thought that "benefits should provide incentives for people to live in health and balance, rather than 'rewarding' people for making poor choices". People also felt that: benefits needed to balance the needs of present and future generations; needed to recognize the unique needs and circumstances of each person; needed to respect unique life paths by provid-

Defining Benefits (cont'd)

ing choices; needed to provide for individuals as well as for the community as a whole; and needed to balance the need for limits with flexibility.

Beneficiaries wanted benefits to provide insurance, support related to death and illness, support related to educational needs, support related to employment and entrepreneurship, support related to financial planning and management, support for housing, support for child and youth development, support for seniors, support for community unity, support for personal development and cash disbursement.

Developing benefits that fit within the resources available from the Trusts' investments that meet the needs of the beneficiaries is a complicated balancing process.

Trustees have begun by defining four benefits packages: The Compassionate Care and Death Benefit, the Seniors' Support Benefit, the Health and Life Insurance Benefit and the Personal Development Benefit.

Plans for 2010 include work on a Child and Youth Development Benefit, an Educational Benefit, and a Housing Support Benefit.

Since benefits provided to the beneficiaries need to fit in to the resources available through the Trusts' investments, the Trustees have to be careful to develop benefits within the limits that the investments will permit.

Information about the benefits will be provided to the beneficiaries as it becomes available.

"...benefits should provide incentives for people to live in health and balance, rather than 'rewarding' people for making poor choices".

Meet The Trusts' Administrator

In September 2009, the Trustees hired a Trusts Administrator. Paul Bujold brings a broad range of experience to the job. Paul grew up in Cold Lake. He has a bachelor's degree in psychology and a master's degree in community development from the University of Alberta.

Paul Bujold, Trusts Administrator

His work experience includes serving as Director of family and community services in Killam and Cold Lake, Alberta; as Executive Director of health services at Hobbema; as Director of Operations for the Bahá'í Community of Canada in Toronto; as a financial planner with London Life in Vancouver; as CEO for child and family services authority in Eastern Alberta, as Principal of a high school in Swaziland, Africa; and as a management consultant in Ontario, BC, Alberta and Swaziland.

Paul's family is grown—he has three daughters, one working in molecular genetics at the U of A, one working in cell biotechnology at the U of A and one studying political science-development at Grant MacEwan. He also has one grand daughter.

The Trustees plan to establish a branch office in Slave Lake as well as the main office in Edmonton. Paul will be visiting the Slave Lake area on a regular basis and will be available to assist beneficiaries with accessing the benefits they need.

The office staff is there to answer your questions and hear your concerns. If there is anything that we can do or any information we can provide, we will try to do that immediately. If your problem requires a decision from the Trustees regarding benefits, the matter will be brought to the trustees attention and you will be informed as soon as there is a decision.

Please let us know what you need and we will try to develop the resources to meet these needs.

Slave Lake, Home of Sawridge First Nation

Sawridge Trusts

801, 4445 Calgary Trail
Edmonton, AB T6H 5R7
Phone: (780) 988-7723
Fax: (780) 988-7724
E-mail: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca (in development)

Established in 1985 and 1986 by the Chief and Council of the Sawridge First Nation under Chief Walter P. Twinn, Sawridge Trusts were set up to provide economic development, potential for employment, create an avenue for self sufficiency, self assurance, confidence and financial independence for the members of the Sawridge First Nation.

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Making the Trusts Work for You

One of the ways in which you can make the Trusts work for you is to do some planning and include the Trusts in your planning. Most of the benefits that were recommended by the beneficiaries who participated in the Four Worlds study are small, focused benefits designed to help people develop their capacities and skills. There are no large distributions of cash planned in the immediate future.

The cash distribution of $2,500 to the each member of the Sawridge Trust last December was an initial benefit to signal that the Trustees were actively involved in getting the benefits part of the Trusts implemented. Future benefits will likely be focused more on the areas identified by the beneficiaries in the study.

These areas, as previously pointed out, include help with education and training, help for child development, help for the elders, help with family illness and crises, help with financial planning and management, and help with housing development. Benefits will be designed to first take advantage of existing government and agency programs, make the best use of personal resources and finally provide top-up support where needed.

The Late Chief and Senator Walter P. Twinn,

Using the Trusts' resources in this careful and measured way will help to ensure that these benefits are available for you and your children and your grandchildren.

If you are planning to go to school, the Trust office can assist you in finding and applying for resources to cover the cost of your education and, possibly, to supplement the financial support to ensure that you can take full advantage of your educational opportunity. The Trusts cannot pass the tests or get good grades. That is up to you.

If you are planning to save money for future needs and your retirement, the Trusts can help you with planning and may be able to even help out financially but the saving has to come from you.

There are many ways we can work together to make life better for you and your family.

PB013.02-Vol 1 No 2, Summer 2010.pdf

SAWRIDGE TRUSTS

Sawridge Trusts News

VOLUME 1, NUMBER 2 SUMMER 2010

SPECIAL POINTS OF INTEREST:

- SAWRIDGE FIRST NATION CONSTITUTION DAY
- 24 AUGUST

INSIDE THIS ISSUE:

Young Man Honoured

Congratulations to Isaac Twinn who not only graduated from High School with top marks—he got 86% in Math and 80% in Biology—but who was also selected to receive a special hockey award from the St. Francis Xavier Hockey Academy. The Michael Fogolin Memorial Award is given to student-players who demonstrate solid academics, solid skills as a hockey player and, most notably, dedication and perseverance. Bryan Keller, Director of St. Francis, said about this award: "Isaac was an easy choice and [the award] is well deserved."

Isaac Twinn receiving the Michael Fogolin Memorial Award from Bryan Keller. Isaac's brother, Sam, accompanied him.

Isaac will be attending the University of Alberta this Fall.

Compassionate Care and Death Benefit

In February 2010, the Sawridge Trusts established its first benefit—the Compassionate Care and Death Benefit. As the name suggests the Compassionate Care Benefit portion provides assistance to a family when one of its members is severely ill and is placed in a care facility that is distant from where the family normally lives. In this case, the Trusts will help with travel, accommodation and meal costs while the ill family member is being cared for in the facility. Once the ill family member returns home, the Trusts will also assist with special equipment or care that may be needed to assist in the complete recovery of the person if no other programs, like the Federal Non-Insured Health Benefit or private health insurance, will cover these costs.

The Death Benefit will supplement costs associated with the death of a family member including the funeral costs, plot and headstone costs and cost of the wake and reception up to a maximum of $12,000. If the Canada Pension Plan benefit, which has a maximum of $2,500, is due, this benefit must be used first before the $12,000 can be used to cover the funeral costs.

More information on this benefit is available from the Trusts Administrator.

Seniors' Support Benefit

The second benefit set up was the Seniors' Support benefit. In April 2010, the first payments were made to beneficiaries who were 65 years of age and older. The Seniors' Support benefit pays $1,500 per month to the elder beneficiary and will reimburse up to $500 per month for transportation and home maintenance expenses.

The Seniors' Support benefit is meant to supplement the small pension income being received by most elders through the Old Age Pension. The reimbursable expenses help these people remain mobile by paying for vehicle operating costs or public transportation. It also helps people maintain their homes by paying for minor repairs and home or yard maintenance.

More information on this benefit is available from the Trusts Administrator.

Health Support Benefit

The Trusts are presently setting up a health support benefit which is expected to be in place by September 2010. This benefit involves three parts: health insurance, life insurance and a Member Assistance Plan.

The health insurance will cover the difference between what is paid through Alberta Health Care and Non-Insured Health Benefits and health care, prescriptions and dental care actual costs for both the beneficiary and her/his dependents.

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

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

Call the Trusts Administrator for more information.

Personal Development Benefit

The Personal Development benefit was set up in May 2010. It is meant to provide financial assistance in covering the costs of services like counselling and personal development courses (not educational development courses). The Trusts will reimburse 2/3 of expenses incurred by beneficiaries for tuition, professional fees, and travel costs to obtain a personal development service.

The maximum annual benefit available per beneficiary is $6,000 per year although for 2010 the maximum amount is only $4,500 since the program has not been available for the whole year.

The type of services that are covered under this benefit include: personal or family counselling provided by a recognized professional, elder or healer; fitness or nutrition counselling and self-esteem building programs.

If other programs provide these benefits, they must be used first before this benefit will be paid.

More information is available from the Trusts Administrator on this program and what it will cover.

Cash Disbursement Benefit

All eligible beneficiaries received a "good faith" cash disbursement of $2,500 in November 2009. This benefit was paid out to indicate that the Trusts were in the process of developing benefits for the beneficiaries.

In order to receive this benefit, a beneficiary has to be an identified beneficiary who is 18 years of age or older.

Those beneficiaries who reach 18 after the first pay out will receive their disbursement when they reach their 18th birthday.

Only beneficiaries of the 1986 Trust have been identified so only those beneficiaries have received this benefit. As the beneficiaries for the 1985 Trust are identified, they will also receive this benefit.

The benefit is only paid out once, regardless of whether a beneficiary belongs to both Trusts so only one payment is made.

Economic Development Based on Reconciliation

Addressing Lateral Violence in Indigenous Country

"Bosnia is like a reserve across the ocean!" exclaimed Algonquin Verna McGregor at a consultation on Economic Development Based on Reconciliation in Bosnia. She noted that the economic development challenges there after civil war mirrored those in First Nations communities.

Echoing those sentiments, lawyer Catherine Twinn of Sawridge Reserve invited Vern Neufeld Redekop to adapt his research proposal for Bosnia for indigenous peoples in Canada. At the heart of Redekop's approach is the realization that it is virtually impossible for economic development to succeed without good, trusting relationships and healthy structures of governance, conflict resolution and leadership accountability, concepts developed by Manley A. Begay, Jr. of the Harvard project on indigenous economic development. There also need to be values of fairness, honesty, transparency and mutual goodwill.

In many cases, the values and structural conditions needed for economic development are sabotaged by lateral violence. This can be seen in the crab effect – community members pulling down anyone who seems to be getting ahead. Lateral violence can be expressed in the phrase, "If you have something that I desire and I can't have it, I will make (damn well) certain that you can't have it either." The result is destroyed businesses, character assassination through gossip, cheating on an employer, or failure to pay money owed.

Manley A. Begay, emphasizes the need for capable and effective governance institutions. These include a mechanism, evident in traditional governance structures, whereby the community through clan mothers or some other group can hold leaders responsible if they get onto a wrong path. Related is political piracy whereby a leader is corrupt, plays favourites, or uses community resources for his or her personal benefit. Political piracy is related to lateral violence. Both of these are based on a web of violent conflict in which various groups within a community justify what they are doing on resentment and hatred born of past victimization.

To address these impediments to economic development, Catherine Twinn, Verna McGregor and Vern Neufeld Redekop have developed a three-day community consultation process. The idea is that no-one but community representatives can turn around a conflict situation. However, many communities are at an impasse and no-one quite knows how to begin a process of change.

The community dialogue does not come in with solutions; rather it provides a framework and a set of questions. Examples are the following:

- What is the relationship between lateral violence and problems with economic development?
- Since economic life works as a system with each part working in relation to others, how can economic development be done strategically so that one initiative will encourage others to get started?
- What values are important if economic life is to flourish and how can they be cultivated?
- What difference would it make to economic development if there was reconciliation?
- What are the dreams, visions and desires of the community for economic development?

During the community dialogue, participants will work in groups of 6 to 8 on the questions. Each working group will have a trained facilitator and a recorder who will write down what is said. At the end of the process the group will have determined some priority items to work on.

A key to the success of the dialogue will be the gathering process. There need to be Elders and youth participating. The group will need the expertise of people in business and those working on economic development. Since governance structures are key, political leaders as well as representatives from different sub groups within a community need to be there.

Questions of value, goodwill, sharing and generosity call for a return to traditional teachings. As such, it is clear that they are questions of spirituality. One way of putting it is, how can a good spirit be established in the community so that people work together toward the greater good of all? This means that the community consultation is not just about coming up with good ideas, even though they might be important, rather it is about a representative group within a community starting to work together on a common initiative.

CANDO is partnering with Verna McGregor, Catherine Twinn and Vern Neufeld Redekop, Associate Professor of Conflict Studies at Saint Paul University to first test the community dialogue process, then to evaluate and refine it, and finally to start a program to make it broadly available in indigenous country in Canada (and, who knows, perhaps the world). This partnership was greatly strengthened when Victor Buffalo, President, International Organization of Indigenous Resource Development, and Dr. Manley Begay joined the partnership circle. Dr. Manley A. Begay, Jr. is Faculty Chair, Native Nations Institute for Leadership, Management, and Policy; Associate Social Scientist/Senior Lecturer, American Indian Studies Program; and Co-Director, Harvard Project on American Indian Economic Development.

"...how can a good spirit be established in the community so that people work together toward the greater good of all?"

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Cost of Benefits

The ability of the Trusts to pay out benefits depends largely on the success of the businesses owned by the Trusts. The businesses have to generate a certain rate of return in order to remain viable and provide the money to pay benefits.

For this reason, the Trusts have to move cautiously to implement benefits since the costs of these benefits could easily outstrip the money that is available.

With the economic downturn in 2008, it has become more difficult to plan any large expansions in benefits plans. The businesses the Trusts own in the hospitality sector are especially prone to being affected by the economy.

The Trustees are monitoring the situation carefully and and making sure that the most needed and affordable benefits are set up first. This is not an easy process and requires looking at how existing assets can be improved as well as how the Trusts can develop new assets to provide the best return for the Trusts and the beneficiaries.

Another factor affecting the cost of benefits is the total number of beneficiaries. At this stage, only beneficiaries from the 1986 Trust have been identified. A process is underway to identify the beneficiaries from the 1985 Trust. If additional beneficiaries are identified during this process, the overall cost of benefits could also go up dramatically and the Trusts have a limited resource that has to be developed for this and future generations.

Along with the identification of beneficiaries, the Trusts are also working on a Passing of Accounts. This is a legal process to identify all the assets of the Trusts since their creation and to chart their progress over time. This report will be presented to all the beneficiaries, along with reporting to the Court, so that everyone knows what the Trusts are doing to develop this limited resource.

As more information comes available, it will all be provided to the beneficiaries so that they can work with the Trustees and the trusts Administrator to get the greatest benefit out of this investment for everyone.

Beneficiary Determination Process!

The Trustees will be going to the Court for the appointment of a tribunal to review the applications that have been sent in to our office over the last several months. If you are one of the applicants, you should know that the Court process is expected to take a few months. The tribunal will then advise all the applicants and will likely begin reviewing the applications over the Winter. The final list will have to be submitted to the Court, probably in Spring 2011 before we can proceed.

PB013.03-Vol 2 No 1, Spring-Summer 2011.pdf

SAWRIDGE TRUSTS

Sawridge Trusts News

VOLUME 2, NUMBER 1 SPRING-SUMMER 2011

SPECIAL POINTS OF INTEREST:

ParticipACTION
http://participaction.com

Canadian Diabetes Association
http://www.diabetes.ca/

INSIDE THIS ISSUE:

Applicants Directed to First Nation

After consulting extensively with the Trusts' lawyers, the Trustees have come to the conclusion that the trust documents for the 1985 and 1986 Trusts set out that all beneficiaries "...must be members of the Sawridge First Nation, as determined by the Sawridge Band" (to quote the description used by the Trust Deeds.)

In December 2009, the Trustees placed a notice in the daily and weekly newspapers in Alberta, British Columbia and Saskatchewan inviting anyone who felt that they had a claim to submit an application. This type of notice is required by law when trusts or estates are being settled.

The Trusts received over 100 applications from people who felt that they had some connection to the Sawridge First Nation and the Sawridge Trusts.

After the Trustee meeting in December 2010, a letter was sent out to all these applicants informing them that they now needed to apply to the First Nation to be considered for membership. Before they make application to the First Nation, they will have to apply through Indian and Northern Affairs Canada for registration as status Indians under the Indian Act.

It is expected that the First Nation will receive a number of applications over the next few months. This will put some pressure on the First Nation but the Trusts have offered the services of the Trust Administrator and the Trusts' lawyer to help resolve any problems that arise because of the increased number of applications.

The Trusts may have to publish a second notice during the court application to get the Court's advice on the 1985 Trust. This may result in more applications and these applicants, too, will be directed to apply directly to Sawridge First Nation.

Court Application for 1985 Trust

The 1986 Trust is clear that whoever is designated as a member of the Sawridge First Nation, under the Indian Act prior to 1985 or under the First Nation's Membership Code now, is automatically a beneficiary.

The definition of beneficiary in the 1985 Trust has caused some difficulty.

This definition is based on sections of the Indian Act, RSC 1970 as they stood on 15 April 1982. Some of these sections of the Act have since been repealed or amended. The Trustees and the Trusts' lawyers have been unsure whether the Court would accept the use of the 1985 definition to decide who qualifies as a beneficiary, as the language of the Trust Deed now stands.

In order to answer this question, the Trustees have decided to make an application to the Court of Queen's Bench in Alberta to ask the Court's advice on the definition. If the Court accepts the definition as it stands, the rules for beneficiary selection set out in the 1985 Trust Deed will be applied. If the Court does not accept the definition, a new definition will have to be applied and the permission of those affected will have to be obtained before amending the 1985 Trust documents.

This process is expected to take some months but will result in some clarity for the Trustees who have been struggling to address this question for some years.

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Benefits for Beneficiaries

Policies are now in place for a number of benefits including: the Compassionate Care and Death Benefit, the Personal Development Benefit, the Seniors' Support Benefit, the Health Support Benefit, the Cash Disbursement Benefit and the Special Rates at Sawridge Inns.

A pamphlet has also been sent out on how to access information on benefits through the Sawridge Trusts web site which is now in operation.

Two new benefits are scheduled to go into effect soon. These are the Education Support Benefit and the Addictions Treatment Support Fund.

Over the next few years, the Trusts are hoping to develop benefits for Children with Special Needs, a Housing Purchase Support Benefit, a Housing Repair Support Benefit, an Entrepreneurship Support Fund and a reserve Housing Fund as funds come available.

If you have any feedback on your experience with the existing benefits or have any thoughts on the proposed benefits, we would appreciate hearing from you.

Passing of Accounts

Work has been going on for over one year to present a Passing of Accounts before the Court and the beneficiaries. A Passing of Accounts is a legal process whereby a complete statement of all the financial activities of a trust is presented to the Court and the beneficiaries as a means of maintaining the accountability of the trust.

The Sawridge Trusts' Passing of Accounts has been somewhat complicated. The Trusts have been in existence since 1985 and this process has never been implemented before.

As complete a record as possible has been prepared of all the documents and accounts of the Trusts and the Sawridge companies owned by the Trusts. From this record, a history of the Trusts is being developed that will explain how the Trusts were set up and what they have been doing since 1985. An accounting is being prepared that will show the money and assets that were placed in the Trusts and what has happened to that money and those assets since 1985.

Work is now nearing completion on these preparations. It is expected that the Passing of Accounts will take place sometime during the coming year.

Beneficiaries will be invited to special meetings to hear the presentation and view the documents when the application has been made to the Court.

This should happen soon after the matter of the beneficiary definition in the 1985 Trust has been settled. All of the affected parties will be informed when the process in underway.

PB013.04-Vol 2 No 2, Fall-Winter 2011.pdf

SAWRIDGE TRUSTS

Sawridge Trusts News

VOLUME 2, NUMBER 2 FALL-WINTER 2011

INSIDE THIS ISSUE:

Application to Identify Beneficiaries Filed in Court

Sawridge Trusts has submitted an application to the Alberta Court of Queen's Bench for advice and direction on the beneficiaries to the Sawridge Band Inter-vivos Settlement (1985 Trust).

The present definition of who qualifies as a beneficiary in the 1985 Trust Deed leaves some question in the mind of the Trustees of the Trusts as to whether the definition meets the requirements of current federal legislation.

In this Application to the Court, the Trustees are asking the Court to advise them whether the present definition meets current requirements or if it needs to be modified.

All interested parties will have an opportunity to respond to this application before the Court and will receive notice when the documents are submitted or can look up the documents and responses on the Trusts' website at http://www.sawridgetrusts.ca/courtdoc.

The Court will hear the Application in January 2012 once all interested parties have had an opportunity to respond.

This Application is expected to pave the way toward normalizing Trust, company and benefits operations by making it clear who are the beneficiaries to the 1985 Trust.

The applications also seeks to get Court to give its approval to transfers that occurred between the original 1982 Trust and the present 1985 Trust.

Alberta Government Appoints New Assistant Deputy Minister, Child and Family Services

Trustee Catherine Twinn has been appointed as Assistant Deputy Minister for Aboriginal Policy and Initiatives for the Alberta Ministry of Child and Youth Services.

In an email to the Ministry staff, Steve MacDonald, the Deputy Minister, said: "I am pleased to advise you that Ms. Catherine Twinn will be joining Children and Youth Services as the Assistant Deputy Minister, Aboriginal Policy and Initiatives beginning September 6, 2011.

Catherine brings over 30 years experience in policy development, advocacy, mediation, strategic planning and project management, team building, leadership and board governance, and an impressive record of community service.

"She is a member of the Sawridge First Nation, has provided legal counsel to several First Nations and has an excellent understanding of Aboriginal rights and values.

I believe that Catherine's experience, wisdom and collaborative approach will be very beneficial as we continue our important work together to improve outcomes for our Aboriginal children, youth and families."

PB013.04-Vol 2 No 2, Fall-Winter 2011.pdf

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Modifications to Health Benefits

The Trusts have made some modifications to the Great West Life health benefits available to beneficiaries. Beginning in September 2011, the Trusts' Health Benefits Plan will now cover vision care up to $350 for glasses and $80 for eye exams every 24 months and orthodontic benefits has been increased to $2,500 lifetime benefit.

In addition to these changes to the health benefits plan, the Trustees are reviewing the Morneau Shepell Member Assistance Plan which provides counselling services. Counselling has been available for the past year through email, telephone and in person but no one has made use of the service.

Trustees are considering whether to continue with the service or whether to develop another type of benefit that beneficiaries would find more useful.

Student Support Fund Benefit

With the beginning of a new academic year for post-secondary students, beneficiaries are reminded that the Trusts have a fund that is designed to assist students meet their post-secondary educational goals.

The Fund will assist students meet some of any shortfall in funding where federal funding support through the Lesser Slave Lake Regional Council and other funding sources does not cover the total cost of the students' academic and living expenses.

The Trusts' Office has an electronic application form that students can fill in to apply for support. Anyone interested should contact the Trusts' Administrator by telephone at 1-888-988-7723 or by email at paul at sawridgetrusts.ca.

Funding is limited and applications are considered on a first-come-first-served basis so qualifies beneficiaries and their dependants should apply soon if support is needed.

Bellwood 3rd Annual Addiction Symposium

Trustees Bertha L'Hirondelle and Clara Midbo and beneficiaries Frieda Draney and Kristina Midbo will be attending the 2011 Bellwood Addictions Symposium in Toronto from 4 October to 7 October.

The Symposium will look at both the clinical and corporate aspects of addictions and addictions treatment.

Bellwood Health Services is a well-known Canadian addictions treatment centre. It works with individuals, families and organizations to treat alcohol and drug addictions, eating disorders, sexual addiction, problem gambling and post traumatic stress disorders.

This annual Symposium presents a number of recognized experts in the field of addictions treatment and prevention. Among the topics being addressed in this year's Symposium are various treatment approaches, dealing with addictions in the workplace, and the role of integrative medical approaches in addictions treatment.

The Symposium also will look at the role of co-workers, family members and friends in supporting the treatment and healing of persons with addictions.

TAB H

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

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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

responded, or do you need to take that as an undertaking?

A If you correct an error on the list, so there is an error on the list.

Q Is this of Exhibit C?

A Exhibit C. So Number 30 should actually -- the vote should be ascribed to Number 49 instead of Number 30.

So all of the people who returned a ballot received a potential beneficiary letter.

Q Okay.

A So instead of, for Number 30, you would have received that letter instead. So it is Alexander G., not Alexander L.

Q Okay. Thank you for that correction, Mr. Bujold.

So if I could ask you, then, to turn to your Exhibit A again, and it would be the first page. So sort of midway through the third paragraph it says, "Under Section 42 of the Trustee Act of Alberta the potential beneficiaries can vote on a new definition but 100 percent of these persons would have to agree to the new definition."

When I read that I understood the Trustees' intention to be saying that interested persons potentially didn't have a vote. But then that is not quite my understanding from what we just discussed. What was the Trustees' intention?

A Well, the Trustees' intention was to give potential

beneficiaries, regardless of who identified them as potential beneficiaries, whether it was the Trustees or one of the other two parties, an opportunity to vote. So the OPGT and Catherine Twinn may have identified other persons who they felt were potential beneficiaries but the Trustees didn't agree, and they should -- those persons should also have an opportunity to vote and did get an opportunity.

Q But you would agree with me that paragraph 3 of that letter it doesn't say the potential beneficiaries and interested persons can vote. It says potential beneficiaries can vote.

A We felt that the paragraph, the next paragraph down says you, begins with "you are receiving".

Q M-hm?

A In the two letters, so one says that you are receiving this because you have been identified as a potential beneficiary, but the other one says that you have been identified as a person of interest under the current definition of beneficiaries. We thought that whoever read that would understand that if they are a person of interest under that definition that must mean they are a potential beneficiary.

Q So going to the persons who may have an interest letter, Mr. Bujold, I was -- I noted that there was very different language used between the two letters in this regard. So I am just -- in fairness to you I

would like to take you to those. So the second-last paragraph in the beneficiary letter says, "You are receiving this notice because our preliminary analysis has determined that you may be a beneficiary of the Trust under the current definition."

The person of interest letter says "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".

So it doesn't tell them that they are considered a potential beneficiary, correct? It tells them that they are a person of interest.

A Well, I mean in terms of --

Q Or a person who may have an interest, I apologize.

A Are you finished?

Q Sorry, it tells them that they are a person who may have an interest, correct?

A Any person who has an interest in a trust is a beneficiary, as far as I understand.

Q So I will just take you to the last page of the two versions of the letter. In the potential beneficiary letter it says 100 percent of those, I'm looking at the very end, 100 percent of those being asked to vote for a definition, if they choose the same definition, sorry, this definition will be proposed to the court as a proposed new definition. But then when we look at

the person of interest letter there is a paragraph that we don't see in the beneficiary letter which says, "As a person who has not yet been identified as a potential beneficiary your vote will be presented to the court as a vote of a person of interest."

But if I understand your evidence, you are saying that the Trustees intended to present votes of a person of interest as if they were votes of a potential beneficiary, if they come in, is that what you are saying?

A No.

Q Okay. Help me understand what you are saying.

A Well, the Trustees have a list of people that they consider potential beneficiaries. The other parties have proposed other people that the Trustees have considered and haven't agreed to. The Trustees want to be sure that everyone has an opportunity, whether it is something or someone whom the Trustees have proposed or someone whom the other parties have proposed, that everyone has an equal opportunity to vote on a proposed definition. When the definition -- when a vote is complete the Trustees would have presented those that they felt were potential beneficiaries had voted in a certain percentage, and those who were persons of interest would have voted in a certain percentage to the court. The court would then be left to decide how they wanted to deal with that information.

Q And I am just still not understanding how the Trustees proposed to distinguish between votes from potential beneficiaries versus votes from persons of interest.

So if all of the potential beneficiaries had come back with a vote for one, the same definition --

A Yes.

Q -- but persons of interest had not voted 100 percent for that definition, were the Trustees proposing to still present the definition of potential beneficiaries voted for as the new definition, or would the lack of consensus with persons of interest have prevented that? I am not understanding how the Trustees saw the two groups.

A I really don't understand your confusion. I really don't. You have to be really thick not to understand.

Q Okay, well maybe you could help me.

A If the Trustees are going to present the two definitions and the number of votes for each definition, and the source of votes for each definition to the court, and then leave it up to the court to decide how to respond to that, what confusion is there?

Q Well, it is your letter, Mr. Bujold, that causes my confusion, because the letter says if 100 percent 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. So that is not leaving it up to the court, that is presenting to the

court a proposed new definition.

I am asking you what the Trustees were requiring in terms of consensus between the two groups to be able to propose the new definition to the court? Did you need 100 percent?

A 100 percent.

Q Of both groups?

A I presume of both groups, yes.

Q Well, I'd ask you not to presume. It was your process. What was it that you were seeking? 100 percent consensus from potential beneficiaries or 100 percent consensus from both groups? What is your understanding?

A I am going to have to say both groups, you know. As I have explained before there isn't an agreed-on list of who the potential beneficiaries are, so the parties proposed one list, the Trustees proposed another list. So there are three lists floating around.

How are the Trustees or any of the parties to determine who constitutes those who have a valid vote if there isn't agreement? You indicated earlier on that the parties thought that the Trustees should agree to the definitions that were being sent out by consensus. So why wouldn't they have consensus on the list? I don't think the Trustees were saying one way or the other. They were trying to avoid, in fact, saying these are the beneficiaries and these other

people are just hangers on.

So, you know, the Trustees were trying to ensure that they were meeting the limitations under Section 42 which had said 100 percent of the beneficiaries needed to vote for a definition in change.

Q Thank you, Mr. Bujold. You have clarified the point for me.

A Okay.

Q I appreciate your help. Mr. Bujold, I am showing you a document from your Affidavit of Records, Sawridge Production Number 6. It is a letter dated December 21st, 2009 signed by yourself. Do you recognize that letter?

A I do.

Q That is your signature?

A It is.

Q Could we mark that as our first exhibit, please.

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

Q MS. HUTCHISON: At the same time as this mail-out was done, Mr. Bujold, my understanding is that the Trustees also published a notification in the newspaper. Is that also your understanding?

A Yes, it is.

Q And I am just going to show you Sawridge Document 564

A I have been working for the Sawridge Trust since September of 2009. During that process I have been in touch on and off with every single person who is listed as a beneficiary for the 1986 Trust and a number of other people. In all of those cases over the years I have noticed that it is very difficult to get a response from the beneficiaries to mail, email, telephone, or verbal requests for information. That is what informed my --

Q But that is --

A Let me finish my answer, that is what informed that paragraph. Not this specific incidence of information providing, not the newsletters, not a specific letter, but my general experience as it says in that paragraph, my experience has been that it has been very difficult to get any kind of response.

Q So you are not referring in this paragraph specifically to 1985 Trust beneficiaries, you are referring to all of the beneficiaries?

A I am.

Q Okay. When you did this 2011 mail-out that we see at Exhibit 3, Mr. Bujold, did you use the same mail-out list that you used in 2009?

A Sorry?

Q When you did the mail-out in 2011, I am looking at your letter dated September 1st, 2011, were you using the same mail-out or mailing list as you used in 2009?

A No.
Q Okay. Did you use the 2011 mailing list in 2018?
A No.
Q Okay. Could I get a copy of your 2011 mailing list, please?
MS. BONORA: The 2011 mailing list is under court direction, and was following the court order given in August of 2011. That is the purpose of this letter. So it was done by virtue of the court order. So you can follow the court order in terms of who received this letter.
MS. HUTCHISON: I take it, counsel, that you are refusing to grant that undertaking; is that correct?
MS. BONORA: I believe the -- yes, I think it is irrelevant.
A Can I add something?
MS. BONORA: Yes.
A You actually have this list already. It was provided in one of my undertakings. It is called the Notice List, and you have it.
Q MS. HUTCHISON: Okay, thank you, Mr. Bujold. And Mr. Bujold, you agree with your counsel that the 2011 mail-out was done because it was directed by the court?
A Yes.
Q Are you aware of any mail-out of any kind to potential beneficiaries or interested persons between September 1st, 2011 and your October 2018 mail-out?

MS. BONORA: You have just asked him that question and he has given you several answers in respect of that.

Q MS. HUTCHISON: Would you indulge me, Mr. Bujold, and answer the question?

MS. BONORA: No, he is not going to repeat several pages of transcript. He has told you about several things. If you have something more specific to ask, you are welcome to ask that. If not, that question has been asked and answered.

MS. HUTCHISON: Thank you, Ms. Bonora.

MS. BONORA: I am certainly leaving the floor open if you have something more specific to ask about. You are welcome to ask more questions about that.

Q MS. HUTCHISON: Mr. Bujold, we talked about a 2009 mail-out, a 2011 mail-out, newsletters that we will hear back from you as to whether or not they ever occurred after September 1st, 2011, and of course the 2018 mail-out that is the subject of your Affidavit.

Have there been any other mass communications with the 1985 Trust beneficiaries that we haven't discussed?

A No.

Q Have there been any sort of informational or consultation meetings held specifically for the 1985 Trust beneficiaries since the action was commenced?

A It is hard to hold a meeting with people that you can't identify.

Q Is that a no?
A That is a no.
Q Were there any attempts at all to organize such a meeting?
A It is hard to identify a list of people and therefore it is hard to organize a meeting for people that you can't identify.
Q Mr. Bujold, you talked about the fact that you had a list in 2009, 2011, and you have told me that there were multiple lists circulating between the parties. Were there any attempts made to try to organize a consultation or information meeting with the people on any of those lists prior to the 2018 mail-out?
A No.
Q Thank you. Turning to your Affidavit, first paragraph 3(b) you state, "The Trustees are not confident that the list is exhaustive for the reasons set out below."

And then in paragraph 5 of your Affidavit you state that you do not believe that the list of people to whom the list was sent was exhaustive. And then you state the three parties to this litigation do not agree on the beneficiaries of the 1985 Trust.

I am trying to understand, Mr. Bujold, is the only reason that you don't believe the list to be exhaustive because the parties don't agree on it, or is there something else that informs your opinion?
A I don't agree that the list is exhaustive because the

the potential 1985 Trust beneficiaries?
A The Trustees discussed it and felt that they couldn't identify the potential beneficiaries since there is no definition.
Q And this is despite the fact that you knew it was difficult to get a response to written communications from these people?
A I am sorry, I don't see the link.
Q In paragraph 4 of your Affidavit you describe your general experience as CEO and that it is difficult to get responses from the beneficiaries?
A Yes.
Q Despite this experience and knowing it was difficult to get responses you didn't attempt to organize any face-to-face meetings with these people?
A No.
Q So after the responses came in, which I believe are identified at Exhibit C of your Affidavit; is that correct?
A Yes.
Q Okay. Did you attempt to follow up with these individuals who did vote and find out why they voted the way they did?
A No.
Q Did you attempt to organize any meetings with the potential beneficiaries to discuss the result?
A No.

TAB I

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

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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 #: A Fort Identification
Date: February 11, 2019
Exam of: Paul Bujold
Court Reporter: Susan Stelter, CSR(A)

HUTCHISON LAW

Our File: 51433 JLH

SENT BY EMAIL ONLY

July 27, 2018

Dentons LLP
Suite 2900 Manulife Place
10180 – 101 Street
Edmonton, Alberta T5J 3W8

Attention: Doris Bonora and Mandy England

Dear Mesdames:

Re: In the Matter of the Sawridge Band Inter Vivos Settlement – Court of Q.B. Action No. 1103 14112

We are writing in response to the Trustees' proposed consent order and covering correspondence dated June 22, 2018 and related matters. We note that this letter is with prejudice, including for the purpose of cost allocations.

A. Trustees' March 21, 2018 Correspondence

As you are aware, Denton's March 21, 2018 without prejudice correspondence was related to the beneficiary definition discussions. In Denton's June 22, 2018 correspondence, and related correspondence, it was suggested the OPGT did not provide any response to that March 21, 2018 without prejudice correspondence. However, the March 21, 2018 letter was discussed extensively with Trustees' counsel in the settlement meeting held on March 29, 2018. While the discussions on the substance of the matter were without prejudice, I specifically sought confirmation from Trustees' counsel at the conclusion of the meeting that, based on our discussions, no further response was expected from the OPGT until such time as an Agreed Statement of Facts was finalized (or the parties confirmed no agreement was possible).

We trust this clarifies what occurred sufficiently and that the Trustees' comments suggesting the OPGT did not respond at all to the March 21, 2018 will not be raised again in the future, particularly not in relation to cost allocations.

#190 Broadway Business Square, 130 Broadway Boulevard, Sherwood Park, Alberta, T8H 2A3
Telephone: (780) 417-7871, Fax: (780) 417-7872
Email: jhutchison@jlhlaw.ca Website: www.jlhlaw.ca

B. Steps Required Before Beneficiary Definition Change

We appreciate the Trustees' June 22, 2018 correspondence represents a commitment to moving this matter forward towards a resolution and, in that regard, appreciate the discussions and exchanges it has and will generate. We trust that our client's response on this matter will serve as the basis for a further discussion, rather than a court application without further discussion. In that regard, we note the Court's recent decisions have suggested, if not stated, that the parties should be working towards:

i.) A non-adversarial process;
ii.) Avoiding applications that do not have merit and/or are unlikely to succeed;
iii.) A litigation approach that unnecessarily dissipates trust resources or fails to have regard to economic realities.

We also note the OPGT's approach on all matters remains informed by the commitments made by all parties in the January 22, 2018 Discrimination Order, namely the commitment "*to protecting the existence of the 1985 Trust and the interest of the beneficiaries.*" We trust those commitments will guide all parties' responses to this correspondence.

Given the above and given that our client is clearly committed to continuing discussions on these matters, we trust that is what will occur. We will be responding in a separate, without prejudice letter, to the Trustees' request for a list of issues the OPGT wishes to discuss in future settlement meetings. We note, however, that our comments herein are one of the more important topics we suggest be addressed at a future settlement meeting that should include Mr. Molstad and Ms. Golding.

The Trustees' have requested the parties advise if they:

i.) Do not agree with the analysis set out in the June 22, 2018 correspondence;

ii.) Do not agree with the terms of the Order.

Our client's general comments on the above are as follows:

i.) The Trustees' have not provided their legal analysis of these issues in the June 22, 2018 correspondence, rather stating positions. It would be very useful to receive all case law the Trustees are relying on. Further, if there are any legal opinions supporting the positions stated in the June 22, 2018 that can be shared with beneficiaries, the OPGT would suggest it would be efficient and cost effective to share those documents at this juncture, even if on a without prejudice basis;

ii.) The OPGT does not, based on the evidence and law it has been made aware of to date, concur that grandfathering cannot be dealt with until after the beneficiary definition is amended in the manner proposed. Indeed, that proposed approach involves removal of existing beneficiaries vested rights. The OPGT is not able to support a position that such removal would be in the best interests of existing beneficiaries;

iii.) The Court's decision in *Sawridge #5* (QB) was also quite clear in indicating the Court could not conceive of a situation where existing rights holders would lose their rights. The current proposed order would remove Shelby Twinn's rights as a beneficiary (and all minors who have similar fact situations). Patrick Twinn (and all minors in similar situations) would also lose his otherwise irrevocable rights as a current beneficiary, in exchange for a revocable right. This raises real concerns for the OPGT that the proposed order would be seen as an indirect challenge to Court findings that were not appealed.

iv.) As discussed further below, there is an unresolved issue as to the source of the Court's jurisdiction to grant the form of order the Trustees' have proposed. That matter is to be the subject of an application, as also discussed below. It seems likely that in considering the source of its jurisdiction, and the level of beneficiary consent and notice involved in each possible scenario, the Court will be inclined to take the most conservative approach (i.e. 100% beneficiary consent under s. 42 of the *Trustee Act*) if the order before it has significant negative impacts on beneficiary interests. While the OPGT accepts a court may ultimately direct 100% beneficiary consent is required, we are conscious that with a different approach on the beneficiary definition than currently proposed by the Trustees, the Court may be more receptive to a more flexible approach on beneficiary notice and consent.

v.) As discussed further below, the OPGT also has concerns that until the two remaining applications directed by the Court of Appeal in *Sawridge #5* are brought and decided, seeking a beneficiary definition change is premature and the application likely to fail.

vi.) The OPGT supports going forward with an application on the beneficiary definition that the Court is likely to be in a position to approve, as it recognizes that a failed application on the beneficiary definition could have the potential to prompt the SFN to move forward with the application referred to in its September 18, 2017 correspondence to the Court.

While we regret that the OPGT is not currently in agreement with the timing and terms of the proposed Consent Order, the OPGT is extremely optimistic about the ability of the parties to work cooperatively through the steps that are needed in order to be in a position to present the Court a joint submission or Consent Order on final remedy. The OPGT is hopeful that the Trustees review the comments herein will result in a return to the settlement meetings and that the parties may resume work on developing agreement and joint submissions rather than proceeding on the basis of contested applications.

i. Court's Jurisdiction to Vary

As the Trustees are aware, the Court has not yet been asked to identify the source of its authority to change the beneficiary definition in the 1985 Trust. This topic was canvased in the course of the *Sawridge #5* appeal and the Court of Appeal directed an application to the case management judge on the application of s.42 of the *Trustee Act* be brought forthwith.

We recognize the parties have been involved in important work in settlement meetings since the Court of Appeal decision was issued. We also recognize that the Trustees have brought 2 of the 4 applications the *Sawridge #5* appeal decision directed. As such, our comments around the lack of an application on this jurisdiction issue are not intended in any way as a criticism. Rather, we would suggest that the June 22, 2018 proposal has been a useful catalyst to bring into focus the need to proceed with that application before seeking an order from the Court regarding final remedy.

We suggest that a practical, and economical, approach to that application would be to present the Court with a joint submission that outlines the range of options available to the Court in terms of its jurisdiction to vary the Trust and provides the Court with the "pros and cons" of each option. In this manner, the parties can avoid disputes and simply work together to provide the Court with an objective and thorough overview of the available options. Such an application would also provide the OPGT with useful direction regarding whether it must provide the Court with evidence proving consent of all minors over the age of 14 to satisfy the provisions of the *Minor's Property Act*. Once the Court issues a decision on that issue, all parties will have a clear understanding of what will be required in relation to beneficiary consent, in order to proceed forward with a final remedy application.

ii. Notice to Beneficiaries/ Participation

The other task the Court of Appeal requested be the subject of an application was: "*A second issue is what procedure will be implemented for beneficiaries and/or potential beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. ... To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.*"

Indeed, this topic has been discussed amongst that parties and our understanding as of March 30, 2018 was that the Trustees would be providing all parties with a proposal to respond to. As with the above, our notation that this has not occurred to date is not intended as a criticism. All counsel have been engaged in important and productive work around settlement discussion, investigation of beneficiary lists based on all the new information received in 2018 and work on the Agreed Statement of Facts. However, the June 22, 2018 proposal again served as a useful catalyst to remind all concerned of this important step that will be necessary for a successful final application.

As above, we suggest the parties attempt to address this issue by way of a joint submission to the Court once it has determined the source of its jurisdiction.

C. Advancing Discussions Around the Beneficiary Definition/ Final Remedies

While the above noted steps are being taken, the OPGT suggests the parties can still work productively on the matter of what remedy, or variation, is most likely to protect the best interests of the beneficiaries and result in an Order that can bring this proceeding to a conclusion.

As the Trustees will appreciate, regardless of what source of jurisdiction the Court concludes would permit a variation of the beneficiary definition in the 1985 Trust, the Court will have to be satisfied that the changes are in the best interests of the current beneficiaries.

For this reason alone, the OPGT is not in agreement with the Trustees that the preservation of the existing beneficiaries' rights (which we have taken to referring to as "grandfathering") can be dealt with separately from, and indeed after, the vested rights of existing beneficiaries are removed by changing the beneficiary definition as proposed by the Trustees' June 22, 2018 proposal. The OPGT continues to be conscious of the Court's findings in *Sawridge #5* (QB) to the effect that there are not foreseeable circumstances where existing beneficiaries would lose rights. We regard that as a robust message from the Court that existing rights holders must be protected in the remedy stage of this proceeding.

However, the OPGT is also of the view that developing a solution to preserve the vested rights of existing beneficiaries by way of a consent order is possible as long as the parties continue to work co-operatively towards that goal.

An option that the parties have yet to discuss in any depth is a revision to the beneficiary definition that leaves the current definition largely unchanged (*consistent with the settlor's original intentions that beneficiaries should be able to continue to qualify in the future, despite the possible repeal of the 1970 Indian Act – see preamble & para 2(a) of the 1985 Trust) and simply adds in a second beneficiary group, being the current members of Sawridge First Nation. We recognize that there may be individuals that could qualify both under the 1970 Act and as SFN members, but this can hardly be said to negatively affect the interests of those beneficiaries and so should not be an impediment.

Possible wording that could achieve this goal is:

> *"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. ~~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 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 ~~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;

We appreciate that the Trustees are currently of the view that the Court's jurisdiction to amend a Trust to address public policy issues is limited to deletion. However, we have yet to locate case law that suggests such a restrictive approach to this plenary common law jurisdiction. We have located two authorities that would support the position that if authority to vary or amend exists, it will not be interpreted as narrowly as limiting changes to deletions:

i.) *Re: The Esther G.Castanera Scholarship Fund* (2015) MBQB 28; and
ii.) *Sprott Estate (Re)* (2011) NSSC 327

The advantages of the OPGT's proposed definition are multiple:

i.) No rights are removed from existing beneficiaries;

ii.) As such, the revisions remain as true as possible to the Settlor's intention;

iii.) By avoiding the loss of rights of existing beneficiaries, the Court may be more inclined to waive any requirements for unanimous, or close to, beneficiary consent that could be argued to exist under the Trust Deed or under legislation;

iv.) The discrimination against Bill C-31 members, or indeed, others who became SFN Members after April 15, 1982 and who do not qualify as members under the 1970 *Indian Act* provisions, is addressed by SFN's ability to grant any of those individuals membership, and thus beneficiary status;

v.) The parties have a well-developed list of existing beneficiaries and SFN Members. This definition would then allow the Trustees' to easily identify the objects of the Trust in order to move ahead with the distribution application once the definition is varied.

We recognize that there are remaining complexities around interpretation and application of aspects of the 1970 *Indian Act* to determine beneficiary status on a go forward basis, but the OPGT would suggest these concerns need not be a barrier to final relief that does not involve a loss of rights for existing beneficiaries. Considerations on this front include:

i.) Although there are possible interpretation arguments in relation to specific fact situations as applied to sections 11-12 of the *Indian Act* as it existed on April 15, 1982, the reality is that this registration/membership scheme was administered successfully by the Registrar of Indian Affairs for decades prior to its repeal by Bill C-31. There is no risk of a serious argument about lack of certainty of objects in such a fact situation;

ii.) As part of the application, which is an advice and direction application, the Trustees can seek the Court's guidance on particularly challenging fact situations. The parties can continue work in settlement meetings, if useful, to develop the examples or categories where all concerned would benefit from Court direction.

As you are aware, the OPGT has been extremely encouraged by the progress made in 2018 around beneficiary identification and has greatly appreciated all the new information received since February 15, 2018. As you will also gather from our client's response on the Agreed Statement of Facts, while there is work remaining to be done, the OPGT is also of the view that if the parties work co-operatively, substantial progress can still be made on a joint submission of fact and law. If the parties all commit to continuing work on that document while the jurisdiction and beneficiary notice applications are dealt with, the OPGT is currently of the view that a significant portion of the work required for a final remedy application will already be done and ready to present to a Court.

As noted, we understand the June 22, 2018 correspondence was intended to open a dialogue on, and progress forward with, the issues affecting the final remedy that should be sought in this proceeding. We look forward to work with all parties in a co-operative and constructive manner – that also has regard for the need to proceed forward with settlement discussions rather than contested applications.

In closing, our complete response to the Trustees' request for a list of productive issues for future settlement meetings will follow in the near future. In the interim, we would suggest the issues addressed in this letter would serve as an extremely valuable starting point for our next settlement meeting and would appreciate discussing available dates in August for such a meeting.

Thank you for your attention to this matter.

Yours truly,

HUTCHISON LAW

PER: JANET L. HUTCHISON
JLH/cm

cc: Client

cc: K. Platten, Q.C. and C. Osualdini, McLennan Ross LLP

TAB J

ANSWERS TO UNDERTAKINGS FROM

QUESTIONING OF PAUL BUJOLD FEBRUARY 11, 2019

1. UNDERTAKING NO. 1: (UNDER ADVISEMENT) – PROVIDE THE MINUTES OF THE TRUSTEES' MEETING WHICH GAVE THE DIRECTION FROM THE TRUSTEES INDICATED IN PARAGRAPH 3 OF MR. BUJOLD'S AFFIDAVIT.

   ANSWER: The minutes are protected by solicitor-client privilege and cannot be produced.

2. UNDERTAKING NO. 2: (UNDER ADVISEMENT) – PRODUCE DOCUMENTATION RESPECTING HOW AND WHEN THE TRUSTEES APPROVED THE DRAFT LETTER REFERENCED IN PARAGRAPH 3 BEFORE IT WENT OUT.

   ANSWER: The draft letters were sent to the Trustees for comments by email, which communication is protected by solicitor-client privilege. A subsequent call with the Trustees gained the Trustees' approval for the mail-out format and the content of the letters.

3. UNDERTAKING NO. 3: (UNDER ADVISEMENT) – PRODUCE MINUTES OF THE TRUSTEES' MEETING WHERE DISCUSSIONS OCCURRED RESPECTING MS. TWINN'S CONCERNS ABOUT THE MAIL-OUT BEING PREMATURE AND SUGGESTING IT WAS IMPORTANT THAT THE MAIL-OUT BE CLEAR AND INFORMATIVE AND AVOID UNNECESSARY CONFUSION.

   ANSWER: There are no minutes that reference the discussion of Catherine Twinn's letter.

4. UNDERTAKING NO. 4: (UNDER ADVISEMENT) – PROVIDE A COPY OF THE EMAIL COMMUNICATION RECEIVED FROM JONATHON POTSKIN.

   ANSWER: We are seeking the approval from Jonathan Potskin to release his answer.

5. UNDERTAKING NO. 5: (UNDER ADVISEMENT) – PROVIDE PORTIONS THAT ARE NOT PRIVILEGED OF THE MINUTES FROM THE JANUARY 2017 TRUSTEES' MEETING AT WHICH MS. BONORA, MIKE MCKINNEY, MANDY ENGLAND AND MR. BUJOLD WERE PRESENT.

   ANSWER: There are no official minutes of this meeting. Any notes taken during this meeting are protected by solicitor and client privilege

6. UNDERTAKING NO. 6: - REVIEW THE LIST AT EXHIBIT B OF MR. BUJOLD'S AFFIDAVIT AND ADVISE WHICH INDIVIDUALS RECEIVED THE POTENTIAL BENEFICIARY LETTER AND WHICH RECEIVED THE INTERESTED PERSON LETTER.

   ANSWER: See attached document Section 42 Potential Beneficiaries Mailing List and see attached document Section 42 Persons of Interest Mailing List.

7. UNDERTAKING NO. 7:– PROVIDE THE NUMBER OF APPLICATIONS RECEIVED IN RESPONSE TO THE MAIL-OUT AND NEWSPAPER ADS IN 2009.

   ANSWER: The applications are produced at Undertaking #24 from the May 27 & 28, 2014 questioning of Paul Bujold.

8. UNDERTAKING NO. 8: (UNDER ADVISEMENT) – PROVIDE A COPY OF THE 2009 MAIL-OUT LIST.

   ANSWER: While we take the position that the 2009 mail-out is irrelevant to this jurisdiction application, in the interests of efficiency and to avoid the cost of any subsequent application, we attach this document. The mail out list is attached Sawridge Band Members Mailing Lists.

9. UNDERTAKING NO. 9: (UNDER ADVISEMENT) – ADVISE IF ANY NEWSLETTERS WERE SENT OUT AFTER THE DATE OF EXHIBIT 3.

   ANSWER: While we believe that the issue of a newsletter is irrelevant to the jurisdiction application, which is largely a question of law, in the interests of saving costs, and in the interests of efficiency, we advise that there was a newsletter sent in the Fall-Winter of 2011. Paul Bujold is unclear of the exact date it was sent.

10. UNDERTAKING NO. 10: (UNDER ADVISEMENT) – PRODUCE ANY MINUTES OF TRUSTEES' MEETINGS OR ANY OTHER FORMS OF COMMUNICATION THAT INCLUDE THE TRUSTEES' DISCUSSIONS ON WHY THEY ARE NOT CONFIDENT THAT THE 2018 MAIL-OUT LIST IS NOT EXHAUSTIVE THAT HAVE NOT OTHERWISE BEEN PRODUCED IN THE AFFIDAVIT OF RECORDS.

    ANSWER: There does not appear to be any further minuted discussions or other forms of communication other than what has already been produced in this action or such discussions are protected by solicitor client privilege. However, Mr. Bujold advises that this subject matter has been discussed on numerous occasions with the trustees and not always as part of the formal minutes. His evidence remains that the list of beneficiaries remain uncertain as there continues to be disagreement among the parties as to who constitutes a beneficiary under the current definition.

11. UNDERTAKING NO. 11: - PROVIDE DATE OF QUESTIONING IN WHICH UNDERTAKING NUMBER 24 WAS PROVIDED.

    ANSWER: The undertaking was given at the questioning on May 27 & 28, 2014.

12. UNDERTAKING NO. 12: - CONFIRM ALL OF THE LETTERS THAT WERE SENT TO THE OFFICE OF THE OPGT ON BEHALF OF THE MINORS OR INDIVIDUALS WHO WERE MINORS AT THE OUTSET OF THE LITIGATION.

    ANSWER: See attached document Section 42 Minors Mailing List. We are informed by the OPGT that the OPGT did not receive the mailout for Autumn J. Twin.

Section 42 Potential Beneficiaries Mailing List

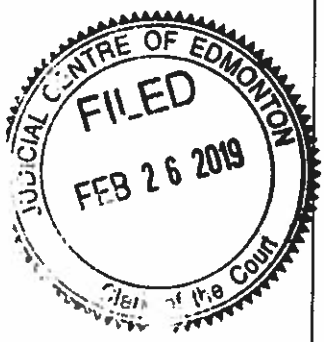
No.	Name	Initial Age Status	Current Age Status
2	Cardinal, Kieran	Adult	Adult
5	Lamouche-Twin, Everett	Minor	Minor
10	McDonald, William	Adult	Adult
13	Megley, Melissa	Adult	Adult
16	Potskin, Keanu N. A.	Minor	Minor
17	Potskin, Aaron	Adult	Adult
18	Potskin, Ethan E.R.	Minor	Minor
19	Potskin, Jaise A.	Minor	Minor
20	Potskin, Jeanine	Adult	Adult
21	Potskin, Jonathon	Adult	Adult
23	Potskin, Trent	Adult	Adult
24	Potskin, William	Minor	Minor
25	Quinn-Twin, Kaissac P. C.	Minor	Minor
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
48	Twin, Yvonne	Adult	Adult
49	Twinn, Alexander G.	Minor	Adult
50	Twinn, Ardell	Adult	Adult
51	Twinn, Arlene	Adult	Adult
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

TAB K

COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-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

Clerk's Stamp



APPLICANTS

ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST

DEFENDANT(S)

DOCUMENT **AFFIDAVIT OF SHELBY TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Self-Represented
Telephone: 780-264-4822
c/o 10721-214 St, Edmonton, AB, T5S 2A3
Email: S.twinn@live.ca
File No.:

Sworn on the 25th day of February, 2019

I Shelby Twinn, of the City of Edmonton, make oath and say that:

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

2. I have read the affidavit of Paul Bujold sworn January 9, 2019.

3. The Trustees seek the Court's approval to vary the beneficiary definition of the 1985 Trust to band membership determined by the Chief and Council who currently recognize 44 band members. I am not a band member. I will lose my 1985 Trust beneficiary status if the Trustees succeed in changing the current definition to their proposed definition.

4. Paul Bujold swears that he mailed a "Notice to Potential Beneficiaries", attached as **Exhibit A** to my Affidavit. I did not receive this Notice from Mr. Bujold, despite being a beneficiary of the 1985 Trust.

5. Paul Bujold has for a number of years had my email address which remains unchanged. We have communicated on a number of occasions by email. Attached as **Exhibit B** to this my Affidavit are some of those communications.

6. I am advised by Isaac Twinn and do verily believe he did not receive the Notice to Potential Beneficiaries either, despite his belief that he is a 1985 Trust beneficiary.

7. I make this Affidavit as an unrepresented 1985 Trust beneficiary who is trying to participate in this costly litigation process so that I can protect my beneficial interest in the 1985 Trust against the relief sought by the Trustees in this litigation, which would have the effect of taking away my beneficiary status.

SWORN BEFORE ME at the)
City of EDMONTON,)
in the Province of Alberta)
the 25 day of FEBRUARY, 2019)

)

)

)

A Commissioner for Oaths in and)
for the Province of Alberta

ROBERT A PHILP, Q.C.

TABLE OF EXHIBITS

Exhibit Letter	Brief Description of Exhibit	Page Number
A.	Sawridge Trusts Notice to Potential Beneficiaries, Sawridge Band Intervivos Settlement Trust (1985 Trust)	3
B.	Sample of email communications between Shelby Twinn and Paul Bujold: November 18, 2015; March 18, 2016; October 5, 2016;	
C.		
D.		
E.		
F.		
G.		
H.		
I.		
J.		
K.		
L.		
M.		
N.		
O.		
P.		
Q.		
R.		
S.		

This is Exhibit "A" referred to in the Affidavit of Shelby Twinn
Sworn before me this 25th day of February A.D. 2019
R.A. Phillip Q.C.

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.

This is Exhibit "B" referred to in the Affidavit of Shelby Twinn
Sworn before me this 25th day of February A.D., 2019
R.A. PHILP Q.C.

RE: Education Support Benefit Form

Paul Bujold <paul@sawridgetrusts.ca>
Wed 2015-11-18 8:56 AM
To: Shelby Twinn <s.twinn@live.ca>

Shelby,
You do not qualify as a beneficiary to the 1986 Trust unless you are a member of the Sawridge First Nation and you are not on their list. The Trustees are not distributing any benefits from the 1985 Trust until the court decides on who qualifies as a beneficiary.

You could apply through Freehorse http://www.freehorse.org/, or have a look at Scholarships Canada http://www.scholarshipscanada.com/.

Paul Bujold
Trusts Administrator
Sawridge Trusts
Office (780) 988-7723

Notice of Confidentiality:
This message, transmitted by electronic mail, is intended only for the use of the individual or entity to whom it is addressed and may contain information which is confidential and privileged. Confidentiality and privilege are not lost by this e-mail having been sent to the wrong person. Any dissemination, distribution, or copying of this communication by anyone other than the intended recipient is strictly prohibited. If you have received this communication in error, please destroy the original document.

From: Shelby Twinn [mailto:s.twinn@live.ca]
Sent: Wednesday, November 18, 2015 9:51 AM
To: Paul Bujold <paul@sawridgetrusts.ca>
Subject: Education Support Benefit Form

Good Morning Paul,

My name is Shelby Twinn. I am Paul Twinn's daughter and a beneficiary.
Attached is my application for education funding.
I will be happy to answer any questions you may have.

Sincerely,
Shelby Twinn

RE: 1985 Trust Accounting

Paul Bujold <paul@sawridgetrusts.ca>

Fri 2016-03-18 5:58 AM

To: Shelby Twinn <S.Twinn@LIVE.CA>

Shelby,
We cannot provide you with this information at the moment.
Thanks,

Paul Bujold
Trusts Administrator
Sawridge Trusts
Office (780) 988-7723

Notice of Confidentiality:
This message, transmitted by electronic mail, is intended only for the use of the individual or entity to whom it is addressed and may contain information which is confidential and privileged. Confidentiality and privilege are not lost by this e-mail having been sent to the wrong person. Any dissemination, distribution, or copying of this communication by anyone other than the intended recipient is strictly prohibited. If you have received this communication in error, please destroy the original document.

From: Shelby Twinn [mailto:S.Twinn@LIVE.CA]
Sent: Wednesday, March 02, 2016 9:29 AM
To: Paul Bujold <paul@sawridgetrusts.ca>
Subject: 1985 Trust Accounting

March 2, 2016

Good Morning Paul,

I am a beneficiary of the 1985 Trust. I qualify under section 11 (1) (d) of the Indian Act, as it stood April 17, 1982. I write on behalf of myself and others who qualify under these Indian Act provisions. We are entitled to an accounting of the 1985 Trust assets. To start we will need copies of all legal accounts by March 8, 2016, received by the Trust, whether paid or not, arising in relation to the 1985 Trust. We want the full accounting on or before April 4, 2016.

Sincerely,

Shelby Twinn

RE: File Brief

Paul Bujold <paul@sawridgetrusts.ca>

Wed 2016-10-05 6:30 AM

To: Shelby Twinn <S.Twinn@LIVE.CA>
Cc: Doris Bonora <doris.bonora@dentons.com>; Brian Heidecker <brian@sawridgetrusts.ca>

Shelby,
You should only be communicating with me through your counsel.

The information on the 1103 14112 action is all posted on the website in the chronological order in which it was received, as indicated by the file dates (e.g., 160101 indicating 2016 January 01) located at the end of the title.

The court required only the information from the 2011 action to be posted to the website. 2014 and 2015 documents are not posted but can be accessed through the court.

A blog will not be established on the website since it is neither legally appropriate nor technically possible at the present time.

For your information, all documents in the 2011 action are posted to the website according to the directions of Justice Thomas in the 2011 procedural order posted to the website and are not governed by the trustees or their solicitors nor the beneficiaries or interested parties and their solicitors.

Paul Bujold
Trusts Administrator
Sawridge Trusts
Office (780) 988-7723

Notice of Confidentiality:
This message, transmitted by electronic mail, is intended only for the use of the individual or entity to whom it is addressed and may contain information which is confidential and privileged. Confidentiality and privilege are not lost by this e-mail having been sent to the wrong person. Any dissemination, distribution, or copying of this communication by anyone other than the intended recipient is strictly prohibited. If you have received this communication in error, please destroy the original document.

From: Shelby Twinn [mailto:S.Twinn@LIVE.CA]
Sent: Tuesday, October 04, 2016 6:00 PM
To: Paul Bujold <paul@sawridgetrusts.ca>
Subject: File Brief

October 4, 2016

Hi Paul,

Attached is our Brief filed on Friday, September 30, 2016. If you could please post it on the Sawridge Trust Website, that would be much appreciated.

We've noted that not all of the 2011 Action information is posted on the website nor in any kind of chronological order, and we can not find anything on the 2014 and 2015 Actions either.

We're also requesting your assistance with being able to establish a Blog on the Sawridge Trust Website which will enable us to communicate with those who visit the site.

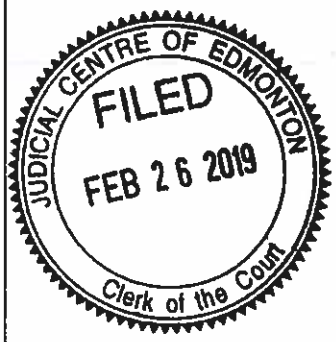
Sincerely,
Shelby Twinn

TAB L

COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-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

Clerk's Stamp



APPLICANTS

ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST

DOCUMENT **AFFIDAVIT OF PATRICK TWINN**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Self-Represented
Telephone: 780-718-9661
Mail C/O: 354, 10113 - 104 Street, Edmonton, AB, Canada T5J 1A1
Email: patricktwinn77@hotmail.com

Sworn on the 25th day of February, 2019

I, Patrick Twinn, of the Sawridge Indian Reserve 150 G and the City of Edmonton, make oath and say that:

1. I am a beneficiary of the 1985 and 1986 Trust and as such have personal knowledge of the matters deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. The Trustees seek the Court's approval to vary the beneficiary definition of the 1985 Trust to band membership determined by the Chief and Council who currently recognize 44 band members (43 adults, one child).

3. In mid-late October, 2018 I received by mail a Vote Proposal from Paul Bujold offering two possible beneficiary definitions. Other than the Vote Proposal, I have not received any other materials from the Trusts concerning a vote. My wife Melissa Megley is a beneficiary of the 1985 Trust. I am advised by Melissa and do verily believe she did not receive the Vote Proposal from Paul Bujold and has never received any communication from the Sawridge Trusts.

4. I read the affidavit of Paul Bujold sworn January 9, 2019. I note that Haitina Twinn, wife of Roland Twinn, Chief of the Sawridge First Nation and a Trustee, voted differently from Roland Twinn.

5. I received a "Notice of Beneficiary Annual General Meeting" attached as Exhibit A to my Affidavit, for "*only approved beneficiaries of the Sawridge Trust (1986). That includes only members of the Sawridge First Nation.*" This specifically limited the Annual General Meeting to 44 people on the Sawridge band list controlled by the Sawridge Chief and Council.

6. As a result of the Notice for the 1986 Trust AGM, I attended the 1986 Trust Annual General meeting held Sunday, October 14 2018 in Edmonton. Paul Bujold, in the presence of Brian Heidecker, Roland Twinn and others, commented on the current 2011 court action to change the definition to band membership and gave the 1986 Trust beneficiaries/band members an update on its status.

7. Despite seeking the 1985 Trust beneficiaries' approval for the change in definition, the 1985 Trust beneficiaries were not invited to the October 2018 AGM.

8. I make this Affidavit as an unrepresented 1985 Trust beneficiary who is trying to participate in this costly litigation process so that I can protect my beneficial interest in the 1985 Trust against the relief sought by the Trustees in this litigation,

which would have the effect of diminishing my beneficiary status and leaving it to the pleasure of Chief and Council of the Sawridge First Nation.

SWORN BEFORE ME at the)
City of EDMONTON,)
in the Province of Alberta)
the 25 day of FEBRUARY, 2019)
)
)
A Commissioner for ~~Oaths in~~ and)
for the Province of Alberta)

ROBERT A PHILP, Q.C.

TABLE OF EXHIBITS

Exhibit Letter	Brief Description of Exhibit	Page Number
A.	Sawridge Trusts Notice of 1986 Beneficiary Annual General Meeting 2018 "that includes only members of the Sawridge First Nation."	3
B.		
C.		
D.		
E.		
F.		
G.		
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Q.		
R.		
S.		

SAWRIDGE TRUSTS

This is Exhibit "A" referred to in the Affidavit of Patrick Twinn
Sworn before me this 25th
of February A.D. 2019
A Commissioner for Oaths in and for the Province of Alberta
R.A. PHILP QC.

NOTICE OF BENEFICIARY ANNUAL GENERAL MEETING 2018

The Trustees of the Sawridge Trust (1986 Trust) have recently passed a policy to hold an annual meeting with the beneficiaries of the Trusts. The first such meetings will be held on:

Saturday, 13 October 2018
10:00 AM to 4:00 PM
Sawridge First Nation Office, Slave Lake, AB

AND

Sunday, 14 October 2018
10:00 Am to 4:00 PM
Jasper Room, Sawridge Inn-Edmonton South, Edmonton, AB

At this meeting, Trustees will present:

- An explanation of the Trusts,
- An explanation of the current actions being undertaken by the Trusts,
- An explanation of the benefits, and
- The audited financial statements for 2017.

In addition, the Trustees will consult with the beneficiaries about future directions for the Trusts and the benefits programs.

Only approved beneficiaries of the Sawridge Trust (1986 Trust) may attend this meeting. That includes only members of the Sawridge First Nation. If you are receiving this notice, you may attend but are not permitted to bring any guests or non-approved beneficiaries. You may attend either one of these meetings as the same information will be presented at each meeting.

PLEASE LET ME KNOW WHICH MEETING YOU WILL BE ATTENDING SO THAT WE CAN PLAN THE MEALS AND REFRESHMENTS.

214, 10310-124 Street NW
Edmonton, AB T5N 1R2
Office: 780-988-7723
Fax: 780-988-7724
Toll Free: 888-988-7723
Email: general@sawridgetrusts.ca
Web: www.sawridgetrusts.ca

TAB M

COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-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

Clerk's Stamp

APPLICANTS

ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST

DOCUMENT **AFFIDAVIT OF ANGELINE DOROTHY WARD (Angie)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Self-Represented
Telephone: 780-516-1476
Mail: P.O Box 1155, Slave Lake, AB T0G 2A0
Email: Angieward792@hotmail.com

Sworn on the 26th day of February, 2019

I, Angeline Dorothy Ward (Angie), of the Town of Slave Lake, near the Sawridge Indian Reserve 150 G, make oath and say that:

1. I believe I qualify as a beneficiary of the 1985 and 1986 Trusts under the current definitions and as such have personal knowledge of the matters deposed to unless

stated to be based upon information and belief, in which case I verily believe the same to be true.

2. The Trustees seek the Court's approval of their variation from the current beneficiary definition of the 1985 Trust to band membership determined by the Sawridge Chief and Council, who currently recognize 44 band members (43 adults, one child).

3. On February 26, 2019, I reviewed a post on the Trusts' Web Site from the Administrator of the Sawridge Trusts' which states that Beneficiaries must presently meet the following requirements set out in the Trust Deeds of the two Trusts:

> (A) The Sawridge Band Inter-Vivos Settlement, 15 April 1985
>
> "The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to 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 April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985."
>
> (B) The Sawridge Trust, 15 August 1986
>
> "The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of The Sawridge Indian Band as they 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."
>
> (C) SAWRIDGE TRUSTS
>
> (780) 988-7723
> (780) 988-7724 [fax]
> administrator@sawridgetrusts.ca

4. In about 2009 Paul Bujold located me and my family and mailed us applications to complete so the Trusts could identify beneficiaries of the Trusts under the current definitions. I submitted an application under my full legal name, Angeline Dorothy

Ward (Angie). My father, Frank Joseph Ward also submitted an application. These applications have sat with Paul Bujold since they were submitted.

5. After I submitted my application, in around 2010 I contacted Paul Bujold on a number of occasions. At first I was told the Trusts were still deciding. Later I was told I was not on the Sawridge Band list so I was not a beneficiary of the Trusts.

6. My mailing address, Box 1155, Slave Lake Alberta, is unchanged since I submitted my application to the Sawridge Trusts in 2009.

7. I have never received any mail outs or correspondence from the Sawridge Trusts other than the original application which I submitted to Paul Bujold.

8. I read the affidavit of Paul Bujold sworn January 9, 2019. I see my name is listed but I never received the Vote Proposal. I am listed on the Mailing List and Vote Tabulations List as Angie Ward, #72, and my mother, Elvina Beatrice Ward, #73.

9. I make this Affidavit as an unrepresented 1985 Trust beneficiary who is trying to participate in this costly litigation process to protect my beneficial interest in the Sawridge Trusts against the relief sought by the Trustees in this litigation, which would have the effect of taking away or diminishing my beneficiary status, leaving it to the pleasure of Chief and Council of the Sawridge First Nation.

SWORN BEFORE ME at the)
City of Slave Lake,)
in the Province of Alberta)
the 27 day of February, 2019)
)
)
Valerie Sinclair)
A Commissioner for Oaths in and)
for the Province of Alberta

COMMISSIONER OF OATHS
VALERIE SINCLAIR CERTIFICATE #273489
Effective Date Expiry Date
January 18, 2017 January 13, 2020

TAB N

COURT FILE NO.	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT R.S.A. 2000, CT-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, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, AS TRUSTEES FOR THE 1985 SAWRIDGE TRUST**
DOCUMENT	**AFFIDAVIT OF Ronald George Ward**

Clerk's Stamp

JUDICIAL CENTRE OF EDMONTON
FILED
FEB 27 2019
Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Self-Represented
Telephone: 780-516-1476
Mail: P.O Box 1155, Slave Lake, AB TOG 2A0

Sworn on the 26th day of February, 2019

I, Ronald George Ward, of the Town of Slave Lake, near the Sawridge Indian Reserve 150 G, make oath and say that:

1. I believe I qualify as a beneficiary of the 1985 and 1986 Trusts and as such have personal knowledge of the matters deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. The Trustees seek the Court's approval to vary the current beneficiary definition of the 1985 Trust to band membership determined by the Sawridge Chief and Council who recognize 44 band members (43 adults, one child).

3. A post on the Trusts' Web Site from the Administrator of the Sawridge Trusts' states that Beneficiaries must presently meet the following requirements set out in the Trust Deeds of the two Trusts:

> A. The Sawridge Band Inter-Vivos Settlement, 15 April 1985
> "The beneficiaries of The Sawridge Band Inter-Vivos Settlement at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band No. 454 pursuant to 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 April 15, 1985, all persons at such particular time as would qualify for such membership pursuant to the said provisions as they existed on April 15, 1985."
>
> B. The Sawridge Trust, 15 August 1986
> "The beneficiaries of The Sawridge Trust at any particular time are all persons who at that time qualify as members of The Sawridge Indian Band under the laws of Canada in force at that time, including the membership rules and customary laws of The Sawridge Indian Band as they 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."
>
> C. SAWRIDGE TRUSTS
> (780) 988-7723
> (780) 988-7724 [fax]
> administrator@sawridgetrusts.ca

4. In about 2009 I and other members of my family submitted applications to the Trusts believing the Trusts would identify its current beneficiaries of both Trusts. My application was under my full legal name, Ronald George Ward. My sister, Angeline Dorothy Ward and my father, Frank Joseph Ward also submitted applications. These applications have sat with Paul Bujold since they were submitted.

5. My mailing address – Box 1155 Slave Lake - remains unchanged since I submitted my application to the Sawridge Trusts in 2009.

6. I have never received any mail outs or correspondence from the Sawridge Trusts.

7. I make this Affidavit as an unrepresented 1985 Trust beneficiary who is trying to participate in this costly litigation process so that I can protect my beneficial interest in the Sawridge Trusts against the relief sought by the Trustees in this litigation, which would have the effect of removing or diminishing my beneficiary status and leaving it to the pleasure of the Chief and Council of the Sawridge First Nation.

SWORN BEFORE ME at the)
VM Town ~~City~~ of Slave Lake,)
in the Province of Alberta)
the 21 day of)
February, 2019)
)
Valerie Sinclair)
A Commissioner for Oaths in and)
for the Province of Alberta

COMMISSIONER OF OATHS
VALERIE SINCLAIR CERTIFICATE #273489
Effective Date Expiry Date
January 18, 2017 January 13, 2020

Tab 1

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365

Date: 20120612
Docket: 1103 14112
Registry: Edmonton

2012 ABQB 365 (CanLII)

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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

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

Respondent

- and -

Public Trustee of Alberta

Applicant

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

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2012 ABQB 365 (CanLII)

I. Introduction

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

[2] The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

[3] At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

[4] On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

[5] On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

[6] Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

II. The History of the 1985 Sawridge Trust

[7] An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

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

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

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

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

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

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

III. Application by the Public Trustee

[14] In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

1. to determine which minors should be represented by it;

2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and

3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.

[15] The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge

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Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

IV. Should the Public Trustee be Appointed as a Litigation Representative?

[16] Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "*Rules*", or individually a "*Rule*"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (***E. v. Eve (Guardian Ad Litem)***, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: ***R.W. v. Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 412 at para. 15, 44 Alta. L.R. (5th) 313. In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

[17] The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

[18] In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

A. Is a litigation representative necessary?

[19] Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

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[20] In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: ***R.B. v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315 at 317-318, 122 D.L.R. (4th) 1. Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788 at para. 19, 365 A.R. 179; ***C.H.S. v. Alberta (Director of Child Welfare)***, 2008 ABQB 620, 452 A.R. 98.

[21] The Sawridge Trustees take the position at para. 48 of its written brief that:

> [i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

[22] The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

> ... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

[23] In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: ***Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.***, 2011 SCC 23 at para. 148, [2011] 2 S.C.R. 175. It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 ["*Waters' Law of Trusts*"]. Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23 minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately $1.1 million in assets of the Sawridge Trust.

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[24] In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

> firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and
>
> secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximate $1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately $1.1 million each.

[25] It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

[26] I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

[27] The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

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[28] I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[29] This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

B. Which minors should the Public Trustee represent?

[30] The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

[31] There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

[32] The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

[33] The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

V. The Costs of the Public Trustee

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[34] The Public Trustee is clear that it will only represent the minors involved here if:

1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and

2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

[35] The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust: ***Deans v. Thachuk***, 2005 ABCA 368 at paras. 42-43, 261 D.L.R. (4th) 300, leave denied [2005] S.C.C.A. No. 555.

[36] Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

[37] Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: ***Horse Lake First Nation v. Horseman***, 2003 ABQB 114, 337 A.R. 22; ***Blueberry Interim Trust (Re)***, 2012 BCSC 254.

[38] The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in ***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 S.C.R. 38 ["***Little Sisters***"] and ***R. v. Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78. They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

[39] Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The ***Little Sisters*** criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in ***Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.*** (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

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> In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: ***Residential Warranty Co. of Canada Inc. (Re)***, 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4th).

[40] I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

[41] The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

[42] The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes

[43] The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the

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application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

[44] The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and

B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

A. In this proceeding are the Band membership rules and application processes relevant?

[45] The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

[46] The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

[47] The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

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[48] The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

[49] I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in ***Barry v. Garden River Band of Ojibways*** (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 61 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

B. Exclusive jurisdiction of the Federal Court of Canada

[50] The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

[51] As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In ***783783 Alberta Ltd. v. Canada (Attorney General)***, 2010 ABCA 226, 322 D.L.R. (4th) 56, the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in ***Canada v. Addison & Leyen Ltd.***, 2007 SCC 33, 365 N.R. 62 indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

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> ... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

[52] The legal issue in ***783783 Alberta Ltd. v. Canada (Attorney General)*** was an unusual tort claim against the Government of Canada for what might be described as "negligent taxation" of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

[53] I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and

2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

[54] Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.

[55] In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

VII. Conclusion

[56] The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

2012 ABQB 365 (CanLII)

Heard on the 5th day of April, 2012.
Dated at the City of Edmonton, Alberta this 12th day of June, 2012.

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

Appearances:

Ms. Janet L. Hutchison
(Chamberlain Hutchison)
for the Public Trustee / Applicants

Ms. Doris Bonora,
Mr. Marco S. Poretti
(Reynolds, Mirth, Richards & Farmer LLP)
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge Band / Respondents

2012 ABQB 365 (CanLII)

Tab 2

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2013 ABCA 226

Date: 20130619
Docket: 1203-0230-AC
Registry: 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)

Between:

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust

Appellants (Respondents)

- and -

Public Trustee of Alberta

Respondent (Applicant)

- and -

**Sawridge First Nation,
Minister of Indian Affairs and Northern Development,
Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney**

Interested Parties

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 12th day of June, 2012
Filed on the 20th day of September, 2012
(Docket: 1103 14112)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of "beneficiaries" under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

[2] The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

[3] The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365. A short summary is provided for purposes of this decision.

[4] On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately $70,000,000.

[5] The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982."

[6] The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of "beneficiaries" is potentially discriminatory. They would like to redefine "beneficiaries" to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

[7] Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition

of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

[8] When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

[9] The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

[10] The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

[11] The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[12] The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

[13] The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book and Art Emporium v Canada (Commissioner of*

Customs and Revenue), 2007 SCC 2, [2007] 1 SCR 38, were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

[14] In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

[15] The appellants advance four grounds of appeal:

> (a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.
>
> (b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.
>
> (c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.
>
> (d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

[16] A chambers judge ordering advance costs will be entitled to considerable deference unless he "has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts": *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the *Little Sisters* criteria?

[17] The Trustees argue that advanced interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

[18] We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees' application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, "independent" litigants. They are simply potentially affected parties.

[19] The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as "neutral", as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee's acceptance of the appointment was conditional upon receiving advance costs and exemption.

[20] There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application before the court. As this court observed in *Deans v Thachuk*, 2005 ABCA 368 at para 43, 261 DLR (4th) 300:

> In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. **The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund.** The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply. [emphasis added]

[21] Moreover, the chambers judge observed that the Trustees had not taken any "pre-emptive steps" to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

[22] It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton* quote above.

[23] In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

> 41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,
>
> (a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and
>
> (b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

[24] It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to "impose terms and conditions" upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

> 2.21 The Court may do one or more of the following:
>
> (a) terminate the authority or appointment of a litigation representative;
>
> (b) appoint a person as or replace a litigation representative;
>
> (c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

[25] The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Child, Youth and Family Enhancement Act, Director) v DL*, 2012 ABCA 275, 536 AR 207, in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged" (para 4).

[26] In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

[27] In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the children potentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

[28] The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an "unknown number of potentially affected minors" – the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children's interest required protection,

and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

[29] The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

C. Did the chambers judge err in granting an exemption from the costs of other participants?

[30] Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v Alberta (Child Services)*, 2003 ABQB 308 at paras 117-119, 335 AR 85; and *LC v Alberta (Metis Settlements Child and Family Services)*, 2011 ABQB 42 at paras 53-55, 509 AR 72.

D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

[31] Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

[32] The appeal is dismissed.

Appeal heard on June 5, 2013

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2013

Authorized to sign for: Costigan J.A.

O'Brien J.A.

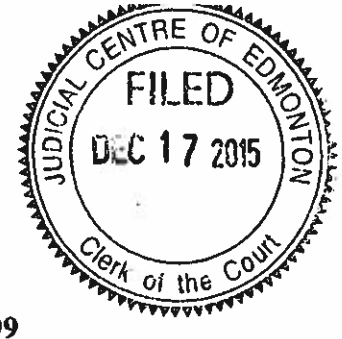
McDonald J.A.

Appearances:

F.S. Kozak, Q.C.
M.S. Poretti
for the Appellants

J.L. Hutchison
for the Respondent

Tab 3



Court of Queen's Bench of Alberta

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

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

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

Respondents

- and -

Public Trustee of Alberta

Applicant

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

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Table of Contents

I Introduction

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

II. Background

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

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

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

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

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

February 14, 2012 - The Public Trustee applied:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The 1985 Sawridge Trust

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

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

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

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

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

IV. The Current Situation

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

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

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

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

V. Submissions and Argument

A. The Public Trustee

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

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

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

B. The SFN

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

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

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

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

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

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

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

C. The Sawridge Trustees

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

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

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

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

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

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

VI. Analysis

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

A. Rule 5.13

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

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

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

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

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

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

B. Refocussing the role of the Public Trustee

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

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

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

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

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

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

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

4. Supervising the distribution process itself.

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

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

Task 1 - Arriving at a fair distribution scheme

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

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

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

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

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

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

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

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

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

Task 3 - Identification of the pool of potential beneficiaries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[59] This information should:

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

2. allow timely identification of:

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

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

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

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

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

Task 4 - General and residual distributions

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

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

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

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

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

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

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

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or
2. on a pro rata basis:

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

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

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

C. Disagreement among the Sawridge Trustees

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

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

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

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

D. Costs for the Public Trustee

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

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

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

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

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

Appearances:

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

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

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

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

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

Tab 4

of Buckley on the Companies Act in the 11th edition at page 173: "cannot be evaded by making what is in fact "a mortgage or charge in form an absolute assignment, or "otherwise adopting a form which does not accord with the "real transaction between the parties." Mr. Buckley very properly pressed on me that the court should not be astute so to construe the letter as to bring it within the terms of the section. On the other hand, looking at the matter as best I can, and giving to it such reality as I can, I think if I were to hold that this was an out-and-out sale I should be guilty of being astute: to extract from what appears to me the reasonably plain language of this section a result which in my view upon its language can never have been intended by the parties.

For these reasons I propose to declare in answer to question 1 of the summons that the two letters of authority which I have read constitute charges on the book debts of the company under s. 79 (2) (*e*) of the Companies Act, 1929, and not having been registered under that section are void as against the appellant.

Solicitors: *Kenneth Brown, Baker, Baker; McMillan & Mott.*

H. L. L.

In re DOMINION STUDENTS' HALL TRUST.

DOMINION STUDENTS' HALL TRUST *v.* ATTORNEY-GENERAL.

Charity—Education—Students' hostel—Restriction—Dominion students "of European origin"—Colour bar—Objects of charity—Community of citizenship, culture and tradition in British Commonwealth of Nations—Fulfilment—"Impossibility"—Meaning.

A company limited by guarantee maintained a hostel for male students of the overseas dominions of the British Empire. The company asked by summons for the sanction of a scheme by which the charity (the benefits of which were restricted to dominion students of European origin) might be administered as part of a wider charity for the benefit of all such students regardless of their racial origin. The company asked also, by petition, for the confirmation of a special resolution to alter its memorandum of association with respect to its objects by deleting, in a paragraph

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of the memorandum, the words "of European origin" which immediately followed the word "students":—

Held, in authorizing the scheme and sanctioning the petition, that to retain the condition that the hostel should be confined to members of the British Empire of European origin might defeat the charity's main object of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations, and might antagonize both white and coloured students. It was, therefore, "impossible," within the meaning of that word as used in the authorities, that the intention of the charity should be carried out unless the "colour bar" was removed and, accordingly, it was proper that the court should authorize the scheme and sanction the petition.

In re Weir Hospital [1910] 2 Ch. 124; *In re Campden Charities* (1881) 18 Ch. D. 310 and *In re Robinson* [1923] 2 Ch. 332 considered and applied.

ADJOURNED SUMMONS.

PETITION TO CONFIRM RESOLUTION.

This summons was taken out, and this petition presented, by the charity known as Dominion Students' Hall Trust, a company limited by guarantee, which maintained London House, Bloomsbury, as a hostel for male students of the overseas dominions of the British Empire. The summons asked that a scheme might be sanctioned by which the charity (the benefits of which were, up to the date of this application, restricted to dominion students of European origin) might be administered as part of a wider charity for the benefit of all such students regardless of their racial origin. The petition asked for the confirmation of a special resolution, duly passed at an extraordinary general meeting of the charity on June 19, 1945, that the provisions of the memorandum of association with respect to its objects might be altered by deleting in para. (*a*) of cl. 3 of the memorandum the words "of European origin" in both places where they occurred in that paragraph. In both places the word immediately followed the word "students."

The Attorney-General was respondent to the summons and the petition was served on the Board of Trade.

J. H. Stamp for the charity on the summons. The object of this charity is to promote the ties of Empire. The existence of the "colour bar" is contrary to public policy. Therefore it ought to be removed, as defeating the object of the charity and promoting disharmony. The charity's purpose is to promote community of citizenship, culture and tradition among all members of the British Commonwealth of Nations.

When the charity was constituted it might have been easier to do that by confining the Hall to members of the Empire of European origin. Times have changed, however, especially since the war of 1939–1945, and if the charity continues to do that now, it may defeat the very object for which it was constituted and may antagonize both white and coloured students, while what it really sets out to do is to keep their good will. Also, if the " colour bar " is removed, the charity's object will not be defeated. Those who are intended to benefit, namely, students of the overseas dominions, will receive not less benefit but more. The correct way to view the matter will be as if there were two charities side by side, one for white and the other for coloured students, being administered simultaneously. Thus, the present is a case in which the court can administer the trusts of the charity cyprès: *In re Weir Hospital* (1) and, unless this " colour bar " is removed, the objects of the charity will prove impossible to carry out within the meaning of " impossible " as used in *In re Campden Charities* (2) and *In re Robinson* (3).

Gordon Brown for the charity on the petition. The alteration in the memorandum which the court is asked to allow by confirming the resolution has the support of 75 per cent. in value of the subscribed capital. That, moreover, is a result achieved on an incomplete circularization of the subscribers, for it has not been possible to circularize them all. Further, there has not been any opposition forthcoming. The position, therefore, is one in which it is proper for the court to confirm the resolution.

Danckwerts for the Attorney-General. The matter has to be considered from the point of view of charity generally and from that of the charity in the present case. From the point of view of charity generally, the principles of charity will be preserved if the scheme is sanctioned and the resolution confirmed. Undoubtedly the continued existence of the " colour bar " will frustrate the purposes of the charity, and the proposals now before the court do not do anything more than end the " colour " bar." They do not run counter to any of the principles which govern charity generally. The Attorney-General takes the view that the application is entirely meritorious and is one to which the court has jurisdiction to accede, and he does not oppose either the summons or the petition.

EVERSHED J. The purpose of both the petition and the

(1) [1910] 2 Ch. 124.
(2) (1881) 18 Ch. D. 310.
(3) [1923] 2 Ch. 332.

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DOMINION STUDENTS' HALL TRUST, *In re.*

DOMINION STUDENTS' HALL TRUST *v.* ATTORNEY-GENERAL.

summons is that a restriction which has hitherto been characteristic of the charity, limiting its objects so as to exclude coloured students of the British Empire, should be removed and that the benefits of the charity should be open to all citizens from the Empire without what is commonly known as the "colour bar." Having regard to the interest of the Inns of Court in Imperial students, I have thought it right to be particularly careful to see that I have jurisdiction to authorize the scheme and to sanction the petition. The proposed removal of the "colour bar" restriction has been put to a substantial number of the subscribers. Owing to the necessities of the case, it has not been possible to put it to all, but those to whom it has been put represent over 75 per cent. in value of the subscription and none dissents from what is now proposed.

It is plain that I have to bear in mind the general proposition contained in the headnote to *In re Weir Hospital* (1), which is to the effect that funds given by a testator for a particular charitable purpose cannot be applied cyprès by the court unless it has been shown to be impossible to carry out the testator's intention. True, the present is not a case of a testator and the court is, perhaps, not quite so strictly limited as in the case of a will. It is true, also, that the word "impossible" should be given a wide significance: see *In re Campden Charities* (2); *In re Robinson* (3). It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.

I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the Hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain. The case, therefore, can be said to fall within the broad description of impossibility illustrated by *In re Campden Charities* (2) and *In re Robinson* (3)

(1) [1910] 2 Ch. 124.
(2) 18 Ch. D. 310.
(3) [1923] 2 Ch. 332.

There is also this further point. On the facts of the case, as proved in evidence, including particularly the substantial promises received of further financial support if the "colour "bar" is removed, it seems clear that the original class of beneficiaries, so far from being adversely affected by the proposed change, should gain as a consequence. Notionally, there might be two complementary charities, one for white and one for coloured students, both of which the trust could administer and, in practice, should administer, together.

In the circumstances, I am happy to think that I can make the order which I have been asked to make. I am also assisted by the circumstance that Mr. Danckwerts, for the Attorney-General, who has considered the matter from all points of view both of charity generally and of the original subscribers, did not feel that the case was one in which he could offer opposition, either on merits or on jurisdiction.

Solicitors: *Messrs. Freshfields, Leese & Munns; Treasury Solicitor.*

K. R. A. H.

JARRETT *v.* BARCLAYS BANK LIMITED AND ANOTHER. NASH *v.* JARRETT.

Emergency legislation — Mortgage — Mortgagor bankrupt — Mortgagee's realization of security—Application to court for leave to sell—Allegation of undervaluation—Person occupying mortgaged property jointly liable with mortgagor for mortgage debt—Right of objection in those capacities—"Persons affected by the granting of the appli-"cation"—Courts (Emergency Powers) Act, 1943 (6 & 7 Geo. 6, c. 19), s. 4, sub-ss. 3, 4—Courts (Emergency Powers) Rules, 1943 (St. R. & O. 1943, No. 1113/L. 22), r. 20, paras. 1 (iv.), 2, 3.

A wife charged her freehold property to a bank to secure the overdraft on the joint account of herself and her husband. The wife having been adjudicated bankrupt, the husband was authorized by the Official Receiver, as the wife's trustee in bankruptcy, to carry on his own business on the property. No payments in reduction of the increasing overdraft having been made over a considerable period, the bank entered into a conditional contract of sale of the property, and issued a summons under the Courts (Emergency Powers) Act, 1943, for leave to realize the security. The Official Receiver was made respondent to the application, but stated that he had no objection to sale. Neither husband nor wife was made respondent, nor were their names left in chambers

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Tab 5

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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Waters' Law of Trusts in Canada, 4th Ed.

14 — Charitable Trusts
Editor: Donovan W.M. Waters. Contributing Editors: Mark R. Gillen and Lionel D. Smith

14.VI — "The Scheme Making Power": Administrative and *Cy-près* Schemes

14.VI — "The Scheme Making Power": Administrative and *Cy-près* Schemes

A. — Administrative Schemes

Once it is ascertained that a trust object is charitable, then, as we have seen, it will not fail for uncertainty. The court has an inherent jurisdiction to compose a scheme, or to direct its officials to draw up a scheme, whereby any uncertainty is removed and the gift made operative. [1] This was, and remains in jurisdictions where it has not been rendered statutory, the administrative scheme making power. As can be seen from the older case law, a scheme may have been approved in order to clarify the charitable purpose in terms of what is to be done, to deal with excess income above expenditure needs, to appoint new trustees where, for instance, trustees are neglecting their office or have made away with trust property, or more recently to remove a racially discriminating condition barring certain persons from qualifying for benefit. [2] In the last century this inherent judicial power has been more frequently exercised in the variation of trustees' investment powers. Trustees faced with restrictive investment powers that were drawn in days when the market and accepted investment practice were very different have turned to this judicial authority. [3]

In England the Charity Commissioners also have the power to draw up a scheme and put it into effect, a power which can be exercised on the application of the charity concerned, on the matter being referred to the Commission by the court, or even in circumstances when the Commission considers it in the best interests of a charity. [4] In each common law jurisdiction of Canada, however, it is still the court alone which has the power.

When uncertainty is found in a testamentary or *inter vivos* charitable trust, and in Canada it is the testamentary trust which seems to have been most extensively employed, the approach taken by the courts in exercising their powers is to discover and implement the donor's intent. For instance, where the testator has incorrectly recorded the name of a charitable institution, the court will take considerable care to discover, if at all possible, the actual institution which he had in mind; it will not be content merely to assume that an institution [5] doing similar work to that described must have been the body intended. Where details have been omitted in the setting out of the administrative machinery of the trust, or where the testator has failed to record the names of his beneficiary institutions, having said they are to be "religious" or "universities", for example, the court by scheme will fill in the details and have names supplied, drawing its criterion from whatever evidence there is of what the testator would have wished to do. [6] If the evidence is entirely ambiguous, the court will come as close as it can to the various possibilities of the testamentary situation. If on the other hand it becomes evident that, though the objects are clearly and fully expressed, it is impossible to carry them out, then the court will make or direct a scheme *cy-près* which contains objects approximating as nearly as possible to the testator's objects.

It is possible for there to be different opinions on whether the particular scheme-making requested of the court is a matter of administration or *cy-près*. In *Re Killam Estate* [7] a number of trusts for educational and cultural purposes, in order that they might endure in perpetuity, had been set up in an endowment manner. As a consequence income only might be expended by the trustees; moreover, this was clearly the intention of the testatrix. However, following an exceptional

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Tab 6

ESSENTIALS OF
CANADIAN LAW

THE LAW OF TRUSTS

THIRD EDITION

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IRWIN LAW

EXAMPLE: A trust is established to provide scholarships for students attending law school. Is this a charitable trust, a trust for persons, or a registered charity?

Although this trust will benefit certain students, its paramount intention is to provide scholarships, so it is not a trust for persons. It is not a registered charity, as there is no indication that the tax authorities have registered it. To be a charitable trust, the trust must be recognized by the courts as having satisfied the legal requirements for a charity. Trusts to promote education are accepted as charitable trusts. Thus, in the example given, the trust is a charitable trust.

Because society has deemed that philanthropy is to be encouraged, a trust that the law characterizes as charitable is accorded significant advantages. First, considerable tax relief is granted by the federal, provincial, and municipal levels of taxation for charitable trusts. The tax relief comes in the form of concessions for income tax and capital gains tax, and concessions for municipal tax purposes.

The second advantage is that the rules regarding certainty of objects do not apply to charitable trusts. As we have seen, when the objects of a non-charitable trust are uncertain, the trust will fail and a resulting trust for the settlor arises. In the case of charitable trusts, the trust will not fail even if its purposes or objects are uncertain, so long as the settlor revealed a general charitable intention. Even trusts for abstract purposes will be upheld as valid charitable trusts so long as the settlor revealed a general charitable intention.

If a charitable trust cannot take effect, but the settlor had a general charitable intention, the trust property will be applied *cy-près*, under a scheme formulated by the court, to some other charitable purpose that resembles the original purpose as closely as possible. Thus, a charitable trust that would otherwise fail for uncertainty of purpose or object will be salvaged through application of the *cy-près* doctrine. Where the donor of property intended to create a trust that is seen as charitable in the eyes of the law, yet the purpose is impossible to achieve, has never existed, or has ceased to exist, then the court will direct that the subject matter be devoted to the charitable purpose most closely approximating the settlor's intention.

The relaxation of the certainty of objects requirement must not be overstated, however. If the choice of words used in describing the purposes is too vague, and may include non-charitable purposes, the trust will fail. For example, if a trust is set up for "worthy causes," it will fail because the trustee can apply the money for many "worthy" purposes

Tab 7

Citation: Estate of F.G. McConnell
2000 BCSC 0445

Date: 20000313
Docket: 00 0061
Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: THE ESTATE OF FLORENCE GERTRUDE McCONNELL, DECEASED

BETWEEN:

THE UNIVERSITY OF VICTORIA as represented by THE UNIVERSITY OF VICTORIA FOUNDATION

PETITIONER

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA as represented by THE MINISTRY OF THE ATTORNEY GENERAL and FRANCES GAGNON, EXECUTRIX OF THE ESTATE OF FLORENCE GERTRUDE McCONNELL, DECEASED

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACZKO

(IN CHAMBERS)

Counsel for Petitioner: Shannon Williams

No-one appearing for Respondents:

Date and Place of Hearing: January 27, 2000
Victoria, BC

2000 BCSC 445 (CanLII)

[1] This is an application by the petitioner, the University of Victoria as represented by the University of Victoria Foundation, for directions and for construction of two provisions of the Will of Florence Gertrude McConnell, deceased (the "Deceased"). The petitioner is the trustee of two shares of the residue of the Deceased's estate and is concerned that the religious qualifications placed on the shares may violate the *British Columbia Human Rights Code* R.S.B.C. 1996 c. 210 (the "*Human Rights Code*") or violate public policy.

[2] If the court finds the provisions do violate the *Human Rights Code* or public policy, the petitioner asks the court to approve a *cy-pres* scheme whereby the offending provisions could be removed from the terms of the trusts. If such be the case, the respondent Frances Gagnon, Executrix of the Deceased's estate, has consented to the proposed trust variation.

[3] This is a rather unusual case in that none of the parties is taking an adverse position in this application. The petitioner simply seeks the directions of the court. The respondent Queen in Right of the Province of British Columbia as represented by the Ministry of the Attorney General, which is an interested party pursuant to its supervisory

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jurisdiction over charities at large and as a potential heir by way of *bona vacantia*, did not appear at the hearing but presented written submissions to the court. I should also note that the Attorney General is responsible for the administration of the *Human Rights Code*. The Attorney General, in his brief, reviewed the relevant law. The Attorney General made no submission on the issue of whether the provisions of the Deceased's Will may violate the *Human Rights Code* or public policy. However, the Attorney General stated that if the court does so find, the court should sever the offending provisions and/or direct the administration of the bequests according to a *cy-pres* scheme. The *cy-pres* scheme the Attorney General suggests is that proposed by the petitioner with a slight modification.

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FACTS

[4] The Deceased died on January 12, 1994, leaving a Will which she executed on September 29, 1992 (the "Will"). Under the Will, the petitioner was appointed trustee of two-twentieths of the residue of the Deceased's estate. The relevant provisions of the Will are as follows:

> (vii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA**, as a bursary for a practicing Roman Catholic student in the third or fourth year of Education;

> (viii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA** for a bursary in music to be given to a Roman Catholic student preferably interested in the liturgy of the Roman Catholic Church.

(hereinafter referred to as the "Bursaries"

[5] The Executrix of the estate transferred the Bursaries to the petitioner in three instalments between August, 1994 and September, 1995. The petitioner has not distributed any of the funds it holds for the Bursaries because of its concern that restricting the Bursaries to Roman Catholic students may violate the *Human Rights Code* or offend public policy. The current value of the Bursaries as at March 31, 1999 is approximately $90,148.00.

[6] The Will does not provide a gift over in the event of a failure of any of the shares of the residue of the Deceased's estate. The probate documents disclose that there are no known intestate heirs of the Deceased, so there are no other parties interested in these proceedings.

[7] The petitioner seeks directions from the court as to whether the Bursaries do in fact violate the *Human Rights Code* or public policy and, if so, can the Will be amended so that the words, "practicing Roman Catholic" in clause 3(h)(vii) and the words "a Roman Catholic student preferably interested in

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the liturgy of the Roman Catholic Church" in clause 3(h)(viii) of the Will are deleted in their entirety such that the amended clauses would provide as follows:

> (vii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA**, as a bursary for a deserving student in the third or fourth year of Education;
>
> (viii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA** for a bursary in music to be given to a deserving student.

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LAW

[8] The analysis of the issues in the present case involves a two-staged process. The threshold issue is whether the terms of the Bursaries violate s. 8(1) of the *Human Rights Code* or public policy. If they do not, the petitioner may carry out the Bursaries on the terms provided in the Will. If, on the other hand, the Bursaries do violate the *Human Rights Code* or public policy, the court must then consider whether it is appropriate to apply the *cy-pres* doctrine and amend the terms of the Bursaries to remove the offending provisions. If the court determines it is not appropriate to apply the *cy-pres* doctrine in the present case, the Bursaries will fail and, as there are no known intestate heirs, the funds will go to the Crown by way of *bona vacantia*.

Do the Bursaries violate section 8(1) of the *Human Rights Code* or are they invalid as being contrary to public policy?

[9] Section 8(1) of the *Human Rights Code* provides as follows:

> 8(1) A person must not, without bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodations, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

[10] There is no reported decision that considers the application of s. 8(1) to a university acting as trustee administering bursaries or scholarships. The case most closely on point appears to be the Supreme Court of Canada decision in ***Berg v. University of British Columbia***, [1993] 2 S.C.R. 353 (S.C.C.). ***Berg*** involved a student accepted into a master's program at the University of British Columbia. As a student, she consistently performed above average but she suffered from a mental disability and displayed some behavioural problems. As a result, she was denied a key to the building despite the fact other master's students were

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provided with one. In addition, a faculty member refused to complete her rating sheet which she required for an application for a hospital internship.

[11] The court held that the student was a member of the "public" to which the University provided educational services and facilities. The court further held that the provision of keys and a rating sheet constituted a "service customarily available" to the University's public and that by denying Ms. Berg keys and a rating sheet, the University discriminated against Ms. Berg contrary to the *Human Rights Code*. It is important to observe, however, that the relevant section of the *Human Rights Act* in place at the time (i.e. s. 3(1)) was similar to the s. 8(1) of the current *Human Rights Code* with the notable exception that the previous s. 3(1) did not include the defence of "without a bona fide and reasonable justification" which was added in 1992.

[12] In determining whether s 8(1) of the *Human Rights Code* applies to the present case, the first consideration is whether the relationship between the petitioner, as trustee administering the Bursaries, and the students creates a "public" relationship for the purposes of the *Human Rights Code*. While finding that the relationship between the University and its students in *Berg* constituted a "public"

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relationship, the court was careful to limit this finding to the facts of the case. In a lengthy and reasoned consideration of the term "public", Mr. Justice Lamer confirmed that not "all of the activities of an accommodation, service or facility provider are necessarily subject to scrutiny under the Act just because some are." (at page 384, para. d). Mr. Justice Lamer further found that:

> Instead, in determining which activities of the School are covered by the Act, one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility. Some services or facilities will create public relationships between the School's representatives and its students, while other services or facilities may establish only private relationships between the same individuals. (at page 384, para. g)

[13] In the present case, the petitioner is merely a trustee administering the Bursaries, the terms and conditions of which were established by a private citizen and contained in her Will. The Deceased, exercising her testamentary autonomy, chose to provide financial support to students of the Roman Catholic faith and chose the petitioner as the conduit through which the Bursaries could be administered. The petitioner would have had no involvement in formulating the terms of the Bursaries and is not provided any discretion in their

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administration, apart from the selection of the recipients from the designated faith.

[14] In my view, the relevant relationship to consider in the present case is not the relationship between the petitioner and its students. Instead, the relevant relationship to consider is the relationship between the Deceased and the potential beneficiaries. Clearly, this latter relationship is a private relationship and by definition is not one to which the *Human Rights Code* applies.

[15] However, if I am wrong and it is determined that the relevant relationship to consider is the relationship between the petitioner and its students and that on the facts of this case the relationship between them is a "public" relationship, before finding a statutory violation, I must first examine whether there is a *bona fide* and reasonable justification for the discrimination. I find there is a *bona fide* and reasonable justification in this case.

[16] First, the "discriminatory" language in the Bursaries is relatively innocuous, especially in comparison to the offending provisions at issue in ***The Canada Trust Company v. Ontario Human Rights Commission*** (1990), 69 D.L.R. (4th) 321 (Ont. C.A.) ("***Re Leonard***") where the terms of the trust were based on blatant religious supremacy, racism and sexism. In

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determining if there is a *bona fide* and reasonable justification, one must balance the interest of avoiding a relatively inoffensive breach of the *Human Rights Code* against the interest of upholding the freedom of testamentary disposition which is an important social interest that has long been recognized in our society and is firmly rooted in our law (***Blathwayt v. Lord Crawley***, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.)).

[17] In my view, it is not offensive in and of itself for an individual to establish a charitable trust to benefit adherents to one's faith and were a court to find that this constituted discrimination, it would seem to follow that charitable gifts preferring anyone, other than those who have historically suffered systemic discrimination (e.g. women, disabled people, people of colour), would be discriminatory if administered by public bodies. In my view, such a far reaching prohibition could not have been the intention of the legislature in enacting the *Human Rights Code*. If the court were to invalidate charitable giving in this manner, the freedom of testamentary disposition would be severely circumscribed and the social utility of enabling students of individual faiths to obtain a post-secondary education correspondingly compromised.

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[18] Second, if the Deceased had appointed anyone other than the petitioner or a similar institution as Trustee, the *Human Rights Code* would not apply and the Bursaries could be administered on their terms. It would, in my view, be arbitrary and manifestly inappropriate to circumscribe such a fundamental principle as testamentary autonomy simply based on who is chosen as trustee of a bursary. Accordingly, to the extent the terms of the Bursaries may be discriminatory, I find there is a *bona fide* and reasonable justification for such discrimination.

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[19] For the reasons expressed above, I conclude that the terms of the Bursaries do not violate the *Human Rights Code*.

Do the Bursaries violate public policy?

[20] The petitioner also asked if the terms of the Bursaries violate public policy. In determining if it is appropriate for it to intervene on public policy grounds, the court should be alive to the danger of making such pronouncements. As Robins J.A. observed, public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds" (***Re Leonard*** at page 12, para. 2). In the words of Professor D.W.M. Waters in the Law

of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984) at p. 240:

> 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. (at page 12, para. 2)

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[21] In ***Re Leonard***, the court was asked to determine if an educational trust, whose terms were blatantly racist, sexist and based on religious supremacy, violated public policy. The facts in ***Re Leonard*** were quite exceptional and warrant some description. The recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the Worlds along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire as a

> whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> AND WHEREAS the Settlor believes that, so far as possible, the conduct of affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

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

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

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[22] The terms of the trust excluded from benefit "all who are not Christians (in its Protestant form), of the White Race, and who were not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual." The trust instrument also provided that the amount of income spent on female students could not exceed one-quarter of the funds available for all students in any given year. In addition, the power to select recipients of the scholarships was given to a committee, the members of which had to possess the same qualifications as the potential recipients, and the trust specifically provided that in the event the trustees required directions from the court, the judge also had to possess the same qualifications as the potential recipients.

[23] In ***Re Leonard,*** the court held that the trust in question was void as offending public policy to the extent that it discriminated on the grounds of race (colour, nationality, ethnic origin), religion and sex. However, in making this finding the court was wary of the "unruly horse of public policy" and sought to confine the decision to its facts. Robins J.A. noted that there are many scholarships that

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restrict eligibility or grant preference on the basis of such factors as an applicant's religion:

> 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. (at page 13, para. 2)

2000 BCSC 445 (CanLII)

[24] Tarnopolsky J.A. in the final paragraph of his reasons also sought to restrict the precedential value of the decision:

> 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 for discrimination and are

> therefore contrary to public policy. (at page 25, last paragraph)

Re Ramsden Estate, (1996), 139 D.L.R. (4th) 746, ("***Re Ramsden***") a decision of the Prince Edward Island Trial Division, is similar on its facts to the present case. In ***Re Ramsden***, the deceased by her will gave a gift to the University of Prince Edward Island for the purpose of founding scholarships or bursaries to be awarded to Protestant students. McDonald J., having distinguished ***Re Leonard*** on the basis that the scholarships created therein were based on blatant religious supremacy and racism, declined to rely on ***Re Leonard*** as authority for invalidating a trust virtually identical to the one before me:

> In my view, that case is as distinguishable from the present one, in that the trust in that case was based on blatant religious, supremacy and racism. There is no such basis for the trust in this case. Therefore, I can see no ground of public policy which is considered an impediment to the trust proceeding...(at para. 13)

[25] I find that the Bursaries do not violate public policy. The terms of the scholarship in ***Re Leonard*** are clearly offensive and distinguishable from those before me. In my view, I have no hesitation in concluding that a scholarship or bursary that simply restricts the class of recipients members

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of a particular religious faith does not offend public policy. Accordingly, I find that the Bursaries may be administered by the petitioner in accordance with their terms. While I would have come to the same result in the absence of ***Re Ramsden***, that decision supports my finding in the present case.

[26] In conclusion, I find that the Bursaries neither violate s. 8(1) of the *Human Rights Code* nor offend public policy. It is therefore unnecessary for me to consider the application of the *cy-pres* doctrine to the Bursaries before me. The University is accordingly required to administer the Bursaries as intended by the Testatrix and in accordance with their terms.

[27] The petitioner shall have its reasonable costs of this application out of the capital of the funds held in trust for the Bursaries.

"F. Maczko, J."
The Honourable Mr. Justice F. Maczko

2000 BCSC 445 (CanLII)

Tab 8

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*).

Exception

(2) Paragraph (1)(*e*) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 11; 1956, c. 40, s. 3.

Persons not entitled to be registered

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 descendant of a person described in subparagraph (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.

Protest re illegitimate child

(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.

Certificate

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

Exception

(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 descendant of a person described in paragraph (*a*) of this subsection.

Idem

(5) Subsection (2) applies only to persons born after the 13th day of August 1956. R.S., c. 149, s. 12; 1956, c. 40, ss. 3, 4; 1958, c. 19, s. 1.

Admission to band and transfer

13. Subject to the approval of the Minister and, if the Minister so directs, to the consent of the admitting band,

(*a*) a person whose name appears on a General List may be admitted into membership of a band with the consent of the council of the band, and

(*b*) a member of a band may be admitted into membership of another band with the consent of the council of the latter band. 1956, c. 40, s. 5.

Woman marrying outside band

14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. 149, s. 14.

Payments to persons ceasing to be members

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

(*a*) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and

(*b*) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

Payments not to be made in certain cases

(2) A person is not entitled to receive any amount under subsection (1)

(*a*) if his name was removed from the Indian register pursuant to a protest made under section 9, or

(*b*) if he is not entitled to be a member of a band by reason of the application of paragraph 11(1)(*e*) or subparagraph 12(1)(*a*)(iv).

Payments to minors

(3) Where by virtue of this section moneys

Tab 9

Province of Alberta

MINORS' PROPERTY ACT

Statutes of Alberta, 2004
Chapter M-18.1

Current as of June 1, 2015

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Minors' Property Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Minors' Property Act		
Minors' Property	240/2004	*8/2005, 199/2014*

MINORS' PROPERTY ACT

Chapter M-18.1

Table of Contents

Consequential Amendments, Repeal and Coming into Force

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "clerk" means the clerk, deputy clerk or acting clerk of the Court at a judicial centre and includes a person authorized by the clerk;

(a.1) "Court" means the Court of Queen's Bench;

(b) "deliver property" includes pay money;

(c) "property" includes money;

(d) "person obligated to a minor" means a person, including the Crown, who is under an obligation to deliver property to a minor or who would be under an obligation to deliver property to a minor if the minor were an adult;

(e) "Public Trustee" means the Public Trustee under the *Public Trustee Act*;

(f) "trust instrument" means a will, deed, declaration or other instrument in writing by which a person creates a trust;

(g) "Rules" means the *Surrogate Rules* (AR 130/95), or any successor to those rules, and the *Alberta Rules of Court* (AR 390/68 and AR 124/2010), or any successor to those rules;

(h) "trusteeship order" means an order under section 10(1) appointing a trustee.

2004 cM-18.1 s1;2014 cE-12.5 s53

Court-authorized Dispositions, Contracts and Settlements

Disposition of minor's property

2(1) The Court, on application, may by order authorize or direct a sale, lease or other disposition of or action respecting property of a

minor if in the Court's opinion it is in the minor's best interest to do so, except that the Court shall not authorize a disposition or action prohibited by an instrument that created the minor's interest in the property.

(2) An order under subsection (1) may give any direction as to the method of carrying out a sale, lease, disposition or action authorized by the order and may impose any restriction or condition that the Court considers appropriate.

(3) The proceeds of any disposition authorized or directed under this section must be delivered

(a) to a trustee appointed by the Court under section 10, if the trustee is authorized by the appointment or the order under this section to receive the proceeds,

(b) to the Public Trustee, or

(c) as the Court directs, if the total amount of the proceeds does not exceed the amount prescribed by the regulations.

Court confirmation of minor's contracts

3(1) The Court may, on application, if in the Court's opinion it is in a minor's best interest to do so, confirm any contract

(a) the minor has entered into or proposes to enter into, or

(b) the minor's guardian has entered into or proposes to enter into on behalf of the minor.

(2) If the Court confirms a contract, the Court may

(a) determine the person to whom a person obligated to a minor under the contract may deliver the relevant property to discharge the obligation, and

(b) give any other direction relating to the contract that the Court considers to be in the minor's best interest.

(3) A person obligated to a minor under a contract that has been confirmed by the Court may discharge the obligation only by delivering the relevant property

(a) to the person determined under subsection (2)(a), or

(b) if no person has been determined under subsection (2)(a), to

(i) a trustee appointed by the Court under section 10 who is authorized by the appointment to receive the property, or

(ii) the Public Trustee.

(4) Subject to subsections (2) and (3), a contract confirmed by the Court under this section has the same effect that it would have if the minor had entered into the contract as an adult.

(5) This section does not

(a) apply to a settlement to which section 4 applies, or

(b) diminish the effect that any contract made by or on behalf of a minor has apart from this section.

Settlement of minor's claim

4(1) In this section,

(a) "claim" means a claim that, if proved in a court of competent jurisdiction, would result in a money judgment as defined in the *Civil Enforcement Act*;

(b) "indemnity" means an agreement by a minor's representative, given in connection with a settlement of the minor's claim, to compensate a person for liability or costs incurred by that person in the event that a claim is subsequently made by or on behalf of the minor regarding a matter covered by the settlement;

(c) "representative" means the guardian or litigation representative of a minor who has a claim.

(2) If a representative has agreed to a settlement of a minor's claim, the Court may, on application, confirm the settlement if in the Court's opinion it is in the minor's best interest to do so.

(3) A settlement of a minor's claim is binding on the minor only if the settlement is confirmed under subsection (2).

(4) Any money payable to a minor under a settlement that is confirmed under subsection (2) must be paid

(a) to a trustee appointed by the Court under section 10 who is authorized by the appointment or by the order confirming the settlement to receive the money,

(b) to the Public Trustee, or

(c) as the Court directs, if the total amount payable to the minor under the settlement does not exceed the amount prescribed by the regulations.

(5) An indemnity given by a minor's representative is void.

2004 cM-18.1 s4;2011 c14 s19

Discharge of Obligations to a Minor

Discharge by person obligated to a minor

5 Notwithstanding any other Act, a person obligated to a minor may discharge the obligation only as provided in sections 3(3), 4(4) and 6 to 9.

Discharge of obligation under contract with minor

6(1) Subject to the regulations, where a minor has entered into a contract, including a contract for salary and wages, under which a person is obligated to the minor, the person may discharge the obligation by delivering the relevant property to the minor.

(2) If a contract is not otherwise binding on a minor, nothing done in accordance with subsection (1) makes the contract binding on the minor or prevents the minor from obtaining any relief otherwise available to the minor.

(3) This section does not apply to a contract confirmed by the Court under section 3.

Discharge by delivery to trustee

7 A person obligated to a minor may discharge the obligation by delivering the relevant property to a trustee who is authorized by a trust instrument or court order to receive the property.

Small obligations

8(1) This section does not apply to any obligation that

(a) exceeds the prescribed amount,

(b) arises out of a contract entered into by a minor,

(c) may be discharged in accordance with section 7, or

(d) is of a class prescribed by the regulations.

(2) A person obligated to a minor may discharge the obligation by

(a) delivering the relevant property to

(i) the minor, if the minor has a legal duty to support another person, or

(ii) a guardian who has the power and responsibility to make day to day decisions affecting the minor,

and

(b) obtaining an acknowledgment in the form prescribed by the regulations from the person to whom the property is delivered.

(3) A person obligated to a minor is entitled to rely on a representation in the acknowledgment.

(4) A guardian who receives property under subsection (2) holds the property as trustee for the minor.

(5) Nothing in this section affects the duty of a trustee to deal with trust property in accordance with the terms of the trust.

Discharge by delivery to Public Trustee

9(1) A person obligated to a minor who cannot discharge the obligation in accordance with section 6, 7 or 8 may discharge the obligation by delivering the relevant property to the Public Trustee.

(2) Notwithstanding that a person obligated to a minor could discharge the obligation in accordance with section 6, 7 or 8, the person may discharge the obligation by delivering the relevant property to the Public Trustee if the Public Trustee is willing to accept the property.

(3) Nothing in this section affects the duty of a trustee to deal with trust property in accordance with the terms of the trust.

Court Appointment of Trustee of Minor's Property

Jurisdiction

9.1(1) An affidavit made in support of an application to the Court for a trusteeship order and deposing that the minor is a resident of Alberta or owns property in Alberta is proof, in the absence of evidence to the contrary, for the purposes of giving the Court jurisdiction.

(2) If an application is pending and it is proved that the minor neither is a resident of Alberta nor owns property in Alberta, the

Court may stay the proceedings and make any order as to the costs of the proceedings that the Court considers appropriate.

2014 cE-12.5 s53

Procedure to avoid duplication of applications

9.2(1) If 2 or more applications for a trusteeship order have been made, all the applications are stayed and the clerk must send a notice of the stay by mail to each of the applicants.

(2) Any of the applicants may apply to the Court for an order as to which application is to proceed.

(3) The Court may order costs to be paid by any applicant or out of the minor's property.

(4) The orders provided under this section are final.

2014 cE-12.5 s53

Application to appoint trustee

10(1) The Court may, on application in accordance with the *Surrogate Rules*, appoint one or more persons as trustee of

(a) particular property to which a minor is entitled or is likely to become entitled and for which no trustee has been appointed by a trust instrument, or

(b) the minor's property generally.

(2) The Court may appoint a trustee under subsection (1)(a) only if in the Court's opinion it is in the minor's best interest to do so, having regard at least to the following:

(a) the apparent ability of the proposed trustee to administer the property;

(b) the merits of the proposed trustee's plan for administering the property;

(c) the potential benefits and risks of appointing the proposed trustee to administer the property compared to other available options for administering the property.

(3) The Court may appoint a trustee under subsection (1)(b) only if the Court is of the opinion that it would be in the minor's best interest to do so, having regard at least to

(a) the matters referred to in subsection (2), and

(b) whether the interest of the minor is likely to be better served by an order under subsection (1)(b) than by an order under subsection (1)(a).

(4) An order under subsection (1)(a) applies to the particular property identified in the order and to any property derived from the investment or disposition of that property.

(5) Subject to any limitation in the order, an order under subsection (1)(b) applies to all property

(a) to which a minor is entitled at the time the order is made, and

(b) to which the minor becomes entitled while the order is in effect,

excluding property for which a trustee has been appointed by a trust instrument.

(6) An order appointing a trustee under subsection (1) may include any provision, condition, limitation or direction that the Court considers to be in the minor's best interest, and, without limitation, may

(a) require the trustee to submit the trustee's accounts at specified intervals for the examination and approval of the Court,

(b) limit the duration of the trusteeship,

(c) specify or limit the types of investment in which the trustee may invest the trust property, or

(d) provide for compensation of the trustee.

(7) Except as otherwise provided by an order appointing a trustee under subsection (1),

(a) the trustee has the same powers and duties regarding the property to which the order applies as would a trustee appointed by a trust instrument, and

(b) the *Trustee Act* applies to the trustee and the trust.

Security

11(1) Subject to subsections (3) and (4), a person may be appointed trustee under section 10 only after providing a sufficient

bond or other security for the performance of the person's duties as trustee.

(2) The bond or other security must be of a nature and value and subject to terms approved by the Court.

(3) A bond or other security is not required if the trustee, or one of the trustees, is a trust corporation.

(4) The Court may dispense with the requirement of a bond or other security if the Court is of the opinion that it would be in the minor's best interests to do so, having regard to other safeguards that are or will be in place.

Subsequent applications regarding order

12 Where a trustee has been appointed by an order under section 10, the Court, on a subsequent application, may, if in the Court's opinion it is in the minor's best interest to do so,

(a) vary the terms of the order,

(b) remove or discharge the trustee,

(c) order the trustee to reimburse the minor for any loss caused by any act or omission of the trustee,

(d) substitute or add a trustee,

(e) terminate the appointment and require any property held by the trustee to be transferred to the Public Trustee, or

(f) make any other order or give any other directions that the Court considers appropriate.

Filing of caveat

12.1(1) Before or after an application is made under section 10(1), a person may, in accordance with the Rules, file a caveat against the issue of a trusteeship order.

(2) Despite the filing of a caveat, an application for a trusteeship order may be made by any person.

(3) After a caveat is filed no further proceedings may be taken with respect to the application for a grant until the caveat

(a) has expired,

(b) has been discharged or withdrawn, or

(c) has been otherwise dealt with in accordance with the rules.

2014 cE-12.5 s53;2014 c13 s2

Expiry of caveat

12.2(1) Unless it is discharged or withdrawn in accordance with this Act and the Rules, a caveat remains in force for 3 months from the date it was filed, unless the Court orders otherwise.

(2) If a caveat has expired or has been discharged or withdrawn in accordance with this Act and the Rules, no further caveat in respect of the same minor may be filed by or on behalf of the same caveator without the permission of the Court.

2014 cE-12.5 s53;2014 c13 s2

Discharge of caveat

12.3 A person whose application for a trusteeship order is affected by a caveat may apply in accordance with the Rules requesting that the caveator be required to show cause why the caveat should not be discharged.

2014 cE-12.5 s53

General

Court directing delivery of minor's property to Public Trustee

13 The Court, on application, may, if in the Court's opinion it is in a minor's best interest to do so, direct a person who is in possession of property of the minor to deliver the property to the Public Trustee.

Procedure on application

14(1) The practice and procedure on applications to the Court under this Act are governed by the *Alberta Rules of Court* or the *Surrogate Rules*, as the case may be.

(2) An application to the Court under this Act may be made by any person the Court considers appropriate to make the application.

(3) An application under this Act relating to a minor who is 14 years of age or older may be made only with the minor's consent, unless the Court otherwise allows.

(4) The powers conferred under this Act on the Court may be exercised by a judge of the Court in chambers.

Notice to Public Trustee

15(1) The Public Trustee must be given at least 10 days' notice of any application

(a) under this Act, or

(b) in which the existence, extent, nature or disposition of a minor's or unborn person's interest in property is in issue.

(2) An application referred to in subsection (1) may be dealt with only if the Public Trustee is represented on the application or has expressly declined to be represented.

(3) The Public Trustee may make representations on any application referred to in subsection (1) but, unless otherwise expressly provided by an enactment, is under no duty to do so.

(4) Subsection (1) does not apply to applications governed by the *Estate Administration Act*.

(5) Where the Public Trustee is not given notice in accordance with subsection (1), the Public Trustee may apply to the Court to rescind or vary any order made on the application.

2004 cM-19.1 s5;2014 cE-12.5 s53

16 Repealed 2011 c14 s19.

Regulations

17 The Lieutenant Governor in Council may make regulations

(a) respecting the maximum amounts for the purposes of sections 2(3)(c), 4(4)(c) and 8(1)(a);

(b) respecting contracts to which section 6 does not apply;

(c) respecting the class of obligations to which section 8 does not apply;

(d) respecting forms for the purposes of this Act.

Consequential Amendments, Repeal and Coming into Force

18 to **22** *(These sections amend other Acts; the amendments have been incorporated into those Acts.)*

Repeal

23 The *Minors' Property Act*, RSA 2000 cM-18, is repealed.

Coming into force

24 This Act comes into force on Proclamation.

(NOTE: Proclaimed in force January 1, 2005.)

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Tab 10

Samoil v. Samoil, 1999 ABQB 526

Date: 19990630
Action No. 9903 08790

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

1999 ABQB 526 (CanLII)

BETWEEN:

IRMGARD SAMOIL

Applicant

- and -

DEANNE NICOLE SAMOIL, DAVID MICHAEL SAMOIL,
ERIK EDWARD SAMOIL, NORMAN LEWIS WITTEN
EXECUTOR OF THE ESTATE OF EUGENE BUOB, DECEASED,
AND THE PUBLIC TRUSTEE FOR THE PROVINCE OF ALBERTA

Respondents

[Note: An Erratum was filed on October 13, 1999; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE LEE

I THE APPLICATION

[1] The issues for consideration on this application are:-

1. Whether the Court should terminate the trust in the will of Eugene Buob (the "Deceased") dated October 11, 1980 in accordance with the proposed arrangement as executed by the Applicant, Irmgard Samoil, the daughter of the deceased and her three children, Deanne Nicole Samoil, David Michael Samoil and Erik Edward Samoil.

2. Whether the Court should consent to the Proposed Arrangement and terminate the trust on behalf of any person who has, directly or indirectly, an interest, whether

vested or contingent, under the trust and who by reason of minority is incapable of consenting, including the minor and unborn grandchildren of the Deceased.

II FACTS

[2] The Deceased died testate on August 20, 1984 and appointed Joseph Raymond Schille and Norman Lewis Witten, Q.C. as executors and trustees of his will dated October 11, 1980.

[3] Mr. Schille predeceased the Deceased and Mr. Witten became the sole executor and trustee (the "Trustee") of the estate. A grant of probate was issued to the Trustee by the Surrogate Court of Alberta in 1984.

[4] The will of the Deceased in paragraph V(c) gives 30% of the residue of his estate to his friend, Irmgard B. Vitali.

[5] The will of the Deceased in paragraph V(d) directed that the remainder of the residue of the estate be held in a testamentary trust ("Testamentary Trust") on the following terms:-

> To hold and keep invested the remaining Seventy (70) percent of the rest and residue of my estate and to pay the net income derived therefrom to or for my daughter, IRMGARD SAMOIL, of the said City of Edmonton, during her lifetime, for her own use absolutely and forever.

[6] The will of the Deceased also provided in paragraph V(e) the following:-

> Upon the death occurring of my said daughter, IRMGARD SAMOIL, I DIRECT my Trustees to transfer and deliver all the rest and residue of my estate in equal shares unto my grandchild alive of the date of their mother's death, PROVIDED THAT if at the time of their said mother's death any of my said grandchildren have predeceased their said mother, leaving issue surviving, then the share to which that grandchild would have been entitled had he or she survived their said mother shall be paid in equal shares to that grandchild's children alive at the time of their parent's death.

[7] The Deceased was survived by his daughter, Irmgard Samoil, born August 21, 1936. At the date of death of the Deceased and at the date of the execution of the Proposed Arrangement Irmgard Samoil has three children namely:

a. Deanne Nicole Samoil, born November 9, 1965;
b. David Michael Samoil, born October 14, 1966; and
c. Erik Edward Samoil, born June 15, 1968.

1999 ABQB 526 (CanLII)

[8] Since the Testamentary Trust was established, the capital amount has decreased.

[9] The accounting provided by the Personal Representatives in previous accounting years reveal that the capital amount in the trust has been diminishing since its onset.

1999 ABQB 526 (CanLII)

III THE APPLICANT'S SUBMISSIONS

[10] The Applicant is concerned that if the capital amount of the Testamentary Trust continues to shrink, the diminished capital amount will not provide adequate financial support for the Applicant during her lifetime and will not provide the financial support to her children and grandchildren upon her death.

[11] The restricted types of investments made by the Trustees, being guaranteed investment certificates, provide for no capital growth as the return on the interest rates have been low on these types of investments.

[12] The Trustee's fees and the expenses paid with every passing of accounts are also diminishing the capital of the Testamentary Trust.

[13] The Applicant believes that the reason the Deceased signed his will, which included the Testamentary Trust, was because the Applicant was in a dysfunctional marriage. The Applicant believes that her father did not want her spouse to be able to obtain any of the capital amount of her inheritance. The Applicant divorced this spouse in April, 1982.

[14] The Applicant has been living in a common-law relationship since October, 1986. A Co-Habitation Agreement has been signed by both the Applicant and her common-law spouse whereby her common-law spouse has agreed that he will not make any claim against any of her assets, including the capital of the Testamentary Trust if this Court grants this application.

[15] The Applicant has retained the services of a fee-for-service financial planner to review the management of her personal assets and to provide a financial plan for the investment of her inheritance should this Court grant this application. The financial planner states in his financial plan that it is his opinion that the Applicant has done a good job of accumulating and retaining her personal investment capital and that the Applicant has been very conservative in her investments.

[16] The financial planner analysed the income that could be earned from the proceeds of the Testamentary Trust and has set out three separate scenarios for the long-term effect of investing the capital of the Testamentary Trust fund. He concluded that:-

a. If the Testamentary Trust was not terminated, the capital would shrink to approximately $60,000.00 by age 90 if it is managed in the same way as at the present time.

b. If the Testamentary Trust was terminated and the Applicant managed the money herself using similar kinds of investments as the Trustee of the Testamentary

Trust without incurring the Trustee's fees and expenses, the Applicant's retirement income would increase slightly by age 90 and grow to approximately $775,000.00.

c. The third scenario reveals that if the Testamentary Trust was terminated and the Applicant managed the money herself by following the investment strategies recommended by the financial planner, without incurring any trustee's fees and expenses, her retirement income would more than double by age 90 and the capital would grow to approximately $1,400,000.00 by age 90.

1999 ABQB 526 (CanLII)

[17] All of the adult beneficiaries of the estate are concerned that the capital of the Testamentary Trust is being diminished by payment of the Trustee's fees and estate administration expenses. As a result, the income from the Testamentary Trust is also being reduced.

[18] It is submitted that all the adult beneficiaries of the estate are in agreement with terminating the Testamentary Trust and to allow for the immediate distribution of the entire estate of the Deceased remaining on trust.

[19] As evidence of the agreement of all adult beneficiaries to revoke or terminate the Testamentary Trust, a Proposed Arrangement was drafted for the approval of all concerned parties. The Proposed Agreement was executed by the Applicant, the life estate beneficiary, and the Applicant's children.

[20] The Proposed Agreement provides for the termination of the Testamentary Trust. It also provides a benefit to the minor great-grandchild and unborn great-grandchildren of the Deceased by payment of $50,000.00 to the Public Trustee on trust for any grandchildren of Irmgard Samoil for her lifetime and a division of the remainder of these funds equally amongst the grandchildren of Irmgard Samoil upon her death. The remainder of the trust funds would then be paid absolutely to Irmgard Samoil. The Proposed Arrangement also requires that Irmgard Samoil maintain the life insurance policy on her life in the amount of $70,000.00 and to irrevocably designate her children as beneficiaries, with a gift over to grandchildren in the event a child predeceased her.

[21] At the date of the execution of the Proposed Arrangement, Deanne Nicole Samoil is the mother of one child, Tyler Timothy Maltais, who was born on March 17, 1990.

[22] At the date of the execution of the Proposed Arrangement David Michael Samoil and Erik Edward Samoil have no children.

IV ANALYSIS

[23] Section 42(5)(a) and 42(5)(c) of the *Trustee Act* provides that approving any proposed arrangement, the Court may consent to the arrangement on behalf of 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 and any person who is unborn.

[24] Section 42(2) of the *Trustee Act* provides that a trust 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.

[25] The Applicant submits that there are no provisions in the Testamentary Trust, either expressed or implied, that evidence an intention on the part of the Settlor to preclude this Court from consenting to a Proposed Arrangement that would in effect terminate the trust on behalf of residuary beneficiaries including unborn contingent beneficiaries who have an interest in the Testamentary Trust.

[26] Section 42(2) of the *Trustee Act* provides that 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.

[27] The Applicant, being the life estate beneficiary of the Testamentary Trust, and her three children, being the residual beneficiaries of the Testamentary Trust, have all agreed to the terms as set out in the Proposed Arrangement and have signed the said document.

[28] The Proposed Arrangement has been discussed with and reviewed by the Office of the Public Trustee and, after negotiations, the Public Trustee has indicated that he does not object to the proposal on behalf of the minor children and unborn grandchildren.

[29] The two tests which must be satisfied before the Court can approve a proposed arrangement are those set out in s. 42(7). Firstly, the arrangement must appear to be for the benefit of each person on behalf of whom the court may consent. Secondly, that in all of the circumstances the arrangement appears otherwise to be of a justifiable character.

[30] Regarding the first test as set out in s. 42(7) of the *Trustee Act*, Hutchinson J., in ***Salt v. Salt Estate*** (1986) A.J. No. 543 (A.B.Q.B.), states that whereas the potential interest of the infants and unborn beneficiaries is very likely remote, it is nonetheless real, and deserves some protection.

[31] It is submitted that the Proposed Arrangement in the case at bar provides for the benefit of each person on behalf of whom the Court may consent under s. 42(5). The Proposed Arrangement provides for a payment of $50,000.00 to the Public Trustee on trust for the Applicant's grandchildren for lifetime and a division of the remainder of these funds equally amongst her grandchildren (Deceased's great-grandchildren) upon her death.

[32] In addition to the $50,000.00 minor beneficiary and unborn beneficiary trust fund as set out in the Proposed Arrangement, the Applicant has provided a benefit to the residuary beneficiaries of the Testamentary Trust. The Applicant is the owner of a life insurance policy #91-9202298-1, issued by North West Life Assurance Company of Canada, having a face value of $70,000.00.

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[33] Section 260(1) of the *Insurance Act* provides that an insured may irrevocably designate a beneficiary of an insurance policy. An irrevocable designation may not be revoked without the consent of the beneficiary.

> S. 260(1), ***Insurance Act***, R.S.A., c. I-5

[34] The Applicant has signed an Irrevocable Beneficiary Designation; an unsigned copy is marked as Schedule A to the Proposed Arrangement. The terms of the Irrevocable Beneficiary Designation contain a life insurance policy on the Applicant's life. The proceeds of the insurance policy are to be divided and paid equally among the Applicant's three children, who survive her, with a gift over to the deceased child's children. The share of each Applicant's grandchild shall be paid to the Office of the Public Trustee for the Province of Alberta in trust for each individual grandchild until the grandchild reaches the age of 21 years.

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[35] Section 262 of the *Insurance Act* allows an insured to appoint a trustee for a beneficiary of insurance proceeds. The decision of the Alberta Court of Appeal in *Re Goldstein* confirms and makes it clear that such an insurance trust maintains the creditor proof status of the insurance proceeds and that the insurance proceeds will pass outside the estate to the trustees of the insurance proceeds.

> S. 262, ***Insurance Act***, R.S.A., c. I-5
> ***Re Goldstein*** (1984) 31 Alta. L.R. (2d) 80 (C.A.)

[36] The Irrevocable Beneficiary Designation distributes the proceeds of the insurance upon the death of the Applicant in the same manner as set out in the terms of the will of the Deceased.

[37] Regarding the second test as set out in s. 42(7) of the *Trustee Act*, William S. Bernstein's article entitled "The Rule in Saunders v. Vautier and Its Proposed Repeal" discusses the reasons that the Proposed Arrangement must be of justifiable character. Bernstein stated:-

> In considering the Alberta legislation, the policy debate would seem to be as to whether or not it is appropriate to provide a compromise whereby the court can balance the intentions of the settlor with the wishes of the beneficiaries.
>
> > "The Rule in Saunders v. Vautier and Its Proposed Repeal",
> > Estates and Trusts Quarterly, Volume 7, Number 3, March 1986,
> > William S. Bernstein at p. 277.

[38] The Applicant submits that the Proposed Arrangement is of a justifiable character. It provides for the minor contingent beneficiaries and unborn contingent beneficiaries who may have an interest in the Testamentary Trust. The goal of the beneficiaries for the variation of the Testamentary Trust is to stop the capital of the Testamentary Trust from shrinking as outlined in the facts because of a low rate of return on investments and the payment of Trustee's fees and expenses.

[39] With regard to the intention of the Settlor, the Applicant believes that the Deceased included the Testamentary Trust in his will to preserve his daughter's inheritance, to keep his estate within his natural born family and to provide financial assistance to his grandchildren and great-grandchildren.

[40] The Applicant and her common-law spouse have signed a Cohabitation Agreement/Contract which contains terms that guard the Applicant's estate from her common-law spouse. It is submitted that this Agreement/Contract contributes to justifying the termination of the Testamentary Trust as set out in the terms of the Proposed Arrangement.

[41] A financial planner has reviewed the management of the Applicant's personal assets and, in his opinion, finds that the Applicant has done a good job of accumulating and retaining her personal investment capital, and the Applicant has been very conservative in her investments. This evidence, it is submitted, contributes to justifying the termination of the Testamentary Trust as set out in the terms of the Proposed Arrangement.

[42] The financial planner has provided the Applicant with a plan to provide a stable income for her life and to allow the capital to grow for her long-term security, which she wishes to follow.

[43] The method of terminating the Testamentary Trust is the disclaimer by the Applicant of her interest in the trust. The effect of the disclaimer is to cause an acceleration of the remaining interest. This causes the trust fund to then vest in the names of Deanne Nicole Samoil, David Michael Samoil and Erik Edward Samoil, who then assign their interest in the trust to their mother, Irmgard Samoil.

[44] The effect of a disclaimer is explained in *Re Flowers' Settlement Trusts* where Jenkins L.J. said at p. 465:-

> The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails, as for example, because he witnessed the will--or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker. It has been settled that this principle applies not only to reality (in respect of which I think it was first introduced) but equally in respect of personality; and although all the authorities to which we have been referred have been concerned with wills, counsel for the trustees submit--and I do not think that counsel for the Crown disputes--that there is no reason for applying any different rule to a settlement inter vivos.
>
> ***Re Flowers' Settlement Trusts*** [1957] 1 All E.R. 462 (C.A.) as quoted in ***Crosbie v. Andrew Crosbie Lifetime Trust*** [1992] N.J. No. 369, aff'd [1992] N.J. No. 242 (C.A.).

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[45] In the case at bar, the determination of the interest of the first taker, the Applicant, is outlined in the Proposed Arrangement. The result is that the gift to the Applicant fails, her children take immediately and will not be kept waiting until the death of the Applicant. Then, upon the consent of this Court to the Proposed Arrangement varying the Testamentary Trust, the Trustee of the Will of the Deceased will pay and transfer the balance of the funds held on trust after payment of Court costs and court-approved Trustee's fees and compensation, to the persons outlined in the Proposed Arrangement.

Proposed Arrangement, April 27, 1999, page 3, paragraph 2.

[46] Section 42(3)(b)(iii) of the *Trustee Act* provides that without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to any variation or termination of the trust or trusts by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

s. 42(3)(b)(iii) *Trustee Act, supra*

[47] In *Brannan v. British Columbia (Public Trustee)* the facts show that upon the wife's death, the will vested a life interest in the husband. The residue was to go to the children if they survived the husband. Subsequently, the husband disclaimed any interest in the wife's estate with the intent that the gift of the residue to his children would accelerate.

[48] The children petitioned for a declaration that the disclaimer vested immediately and absolutely the residue in the children. The issue was whether the disclaimer accelerated the gift to the children or whether they took only if they survived the father. The British Columbia Court of Appeal held that acceleration is not excluded by the words defining the time of distribution by reference to the natural ending of the particular estate. A proper construction of the will indicated an intention on the part of the testatrix that distribution should occur on the determination of the life estate beneficiary's interest, however caused.

Brannan v. British Columbia (Public Trustee) (B.C.C.A.) 83 D.L.R. (4th) 106

[49] The Applicant submits that the terms of the Proposed Arrangement satisfy the tests as set out in s. 42 of the *Trustee Act* and follow the judgment in *Brannan, supra*.

[50] The Court is asked to consent to the terms of the Proposed Arrangement on behalf of any person who has directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority is incapable of consenting, including the minor and unborn great-grandchildren of the Deceased.

[51] The Trustee cites *Re Goldstein, supra* which states that it is the duty of a Trustee to propound a trust, and the Executor takes a neutral position.

V CONCLUSION

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[52] The sole issue at this time, in my respectful opinion, is whether the Proposed Arrangement complies with s. 42(6) of the *Trustee Act* which reads:-

> (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 thereto.

[53] In the Deceased's Last Will and Testament marked Exhibit A to Mr. Witten's May 21, 1999 Affidavit, the main bequest reads in Clause V as follows:-

(c) To transfer and deliver Thirty (30%) percent of the rest and residue of my estate unto my friend, IRMGARD B. VITALI, of the said City of Edmonton, for her own use absolutely and forever.

(d) To hold and keep invested the remaining Seventy (70%) percent of the rest and residue of my estate and to pay the net income derived therefrom to or for my daughter, IRMGARD SAMOIL, of the said City of Edmonton, during her lifetime, for her own use absolutely and forever.

(e) Upon the death occurring of my said daughter, IRMGARD SAMOIL, I DIRECT my Trustees to transfer and deliver all the rest and residue of my estate in equal shares unto my grandchildren alive of the date of their mother's death, PROVIDED THAT if at the time of their said mother's death any of my said grandchildren have predeceased their said mother, leaving issue surviving, then the share to which that grandchild would have been entitled had he or she survived their said mother shall be paid in equal shares to that grandchild's children alive at the time of their parent's death.

(f) **In the event that there are not any beneficiaries entitled to take a share of my estate as provided in paragraph (e) immediately preceding, I DIRECT my Trustees to transfer and deliver all the rest and residue of my estate in equal shares unto the children of my good friend and partner, JOSEPH RAYMOND SCHILLE, of the said City of Edmonton, namely: CAROL JUDITH TORGERSON, of the City of San Diego, in the State of California, United States of America, BRENDA VEE JENKINSON, of the said City of Edmonton, and PATRICIA JOANNE WHITE, of the Town of Onoway, in the Province of Alberta, in each case for their own use absolutely and forever.** [Emphasis added]

(g) If any of the beneficiaries under this my Will immediately preceding are under the age of Twenty-five (25) years at the date of my death, or at such later date when such beneficiary shall become entitled to a share of my estate, my trustees shall hold and keep invested that beneficiary's share of my estate, and the income and capital or so much thereof as my Trustees in their uncontrolled discretion shall consider advisable, shall be paid to or used for the benefit of any such beneficiary

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> for his or her proper care, maintenance, benefit and education, until he or she attains the age of Twenty-five (25) years or until the time which shall be immediately prior to the latest of the dates defined by Section 104(4) of the Income Tax Act, S.C. 1970-71, c. 63, whichever shall first occur, at which time the capital of such share, or the amount thereof remaining, shall be transferred to such beneficiary, any income not so used or paid in any year to be added to the capital and dealt with as a part thereof.

[54] In my view, the failure to include the children of the Deceased's "good friend and partner" namely, Ms. Torgerson of San Diego, Ms. Jenkinson of Edmonton and Ms. White of Onoway [as they were then referred to in 1980] is presently fatal to the Proposed Arrangement given s. 42(6) of the *Trustee Act*.

[55] While it may be the Applicant's position and the Trustee's position that the provisions of Clause V(f) of the Will do not involve s. 42(6) of the *Trustee Act* for purposes of the Proposed Arrangement, the parties must specifically address this issue before me, which they did not do in either their written materials, or in their oral submissions, or before June 24, 1999 which was the date they were to present any Consent Order.

[56] This Application can be brought back before me on notice to Carol Judith Torgerson, Brenda Vee Jenkinson and Patricia Joanne White, which I conclude is the minimum standard required at this time.

DATED at Edmonton, Alberta this 30th day of June, 1999.

J.C.Q.B.A.

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APPEARANCES:

Marta E. Burns
& Audrey A. Wakeling
Witten Binder
Solicitors for the Executor/Trustee

Philip J. Renaud
Duncan & Craig
Solicitor for the Applicant

Jack Hoffman
Office of the Public Trustee
Guardians of the estates of any minor
beneficiaries and unborn beneficiaries of the
Estate of Eugene Buob, deceased

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ERRATA OF THE REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE LEE

In paragraph 13 the words "....divorced his spouse in April, 1983." should be replaced with "....divorced his spouse in April, 1982."

Also in paragraph 14 the words "...living in a common-law relationship since October, 1996." should be replaced with "...living in a common-law relationship since 1986."

Please replace this page in your copy of the judgment.

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Tab 11

Neutral Citation Number: [1841] EWHC Ch J82
(1841) Cr & Ph 240, (1841) 4 Beav 115 8; 41 ER 482

IN THE HIGH COURT OF CHANCERY

2, 4, 5 June 1841

Between:

SAUNDERS
v
VAUTIER

Richard Wright, by his will, gave and bequeathed to his executors and trustees thereinafter named, all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon until Daniel Wright Vautier, the eldest son of his (the testator's) nephew, Daniel Vautier, should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely; and the testator gave, devised, and bequeathed all his real estates, and all the residue of his personal estate whatsoever and wheresoever, to his executors and trustees thereinafter named, their heirs, executors, administrators, and assigns, upon trust to sell and convert into money all his said real and personal estates immediately after his decease, and to invest the produce arising therefrom in their names in the £3 per cent. consolidated Bank annuities, and to stand possessed thereof upon trust for the said Daniel Vautier and Susannah, his wife, and the survivor of them, during their respective lives, and from and after the decease of the survivor of them, upon trust for their children, equally, when and as they should, severally, being sons, attain the age of twenty-one years, or being daughters, attain that age or be married, with the consent of their trustees and guardians, and in the meantime to apply the interest and dividends of the respective shares of such children for their benefit, education, or maintenance; and in case any child should die before attaining a vested interest in the fund, then the testator directed that the share of the child so dying should go and survive to the others: and the testator nominated and appointed his friends John Saunders and Thomas Saunders his executors and trustees.

The testator died on the 21st of March 1832, at which time a sum of £2000 East India stock was standing in his name. The executors, having proved the will, left that sum standing in the testator's name, but invested the dividends on it, as they accrued, in the purchase of like stock in their own names.

Shortly after the testator's death, this suit was instituted by the executors against Susannah Vautier and her children (Daniel Vautier having died in the testator's lifetime), for the purpose of having the trusts of the will carried into execution under the direction of the Court;

and a decree was accordingly made, directing the usual accounts. A petition was afterwards presented on behalf of Daniel Wright Vautier, who was then a minor, praying the appointment of a guardian, and an allowance for his past and future maintenance: and, the usual reference having been directed, the Master, by his report, found, amongst other things, that the Petitioner's fortune consisted of the sum of £2277, 6s. 7d. East India stock, being the amount of the abovementioned sum of £2000, with the accumulations thereon since the testator's death, and of one-seventh share of the testator's residuary estate, which would be divisible on the death of the Petitioner's mother. He also found that the Petitioner had been educated and maintained, since the death of the testator, by his mother, and that she had properly expended in such maintenance the sum of £338, 2s., which he found ought to be paid to her by sale of a sufficient part of the £2277, 6s. 7d. East India stock; and he found that the sum of £100 per annum would be a proper sum to be allowed for the maintenance and education of the Petitioner for the time to come, during his minority, and that it should be paid out of the dividends of the East India stock.

By an order of the Master of the Rolls (Sir C. C. Pepys), dated the 25th of July 1835, that report was confirmed and carried into effect, and, in pursuance of that order, the trustees continued, during the minority of Daniel Wright Vautier, to pay the sum, of £100 out of the dividends of the stock for his maintenance.

Daniel Wright Vautier attained twenty-one in the month of March 1841, and, being then about to be married, he presented a petition to the Master of the Rolls, praying that the trustees might be ordered to transfer to him the East India stock, or that it might be referred to the Master to inquire whether it would be fit and proper that any and what part of the stock should be sold, and the produce thereof paid to the Petitioner, regard being had to his intended marriage, and for the purpose of establishing him in business.

Upon that petition coming on to be heard before the Master of the Rolls, his Lordship's attention was called to the order of the 25th of July 1835, whereupon he declined to deal with the question raised upon the petition, so long as that order remained; and it was, in consequence, arranged that the petition should stand over, for the purpose of enabling the other residuary legatees to present an appeal petition from that order to the Lord Chancellor.

An appeal of petition was accordingly presented, praying, simply, that the order of the 25th of July 1835 might be discharged or varied; and that petition now came on to be heard.

Mr. Richards and Mr. Dean, for the residuary legatees, contended that the order for maintenance out of this fund was erroneous, inasmuch as the legatee took no interest in it until he attained the age of twenty-five years: for, there being no gift but in the direction for payment on the legatee's attaining that age, it followed, according to the established rule, that the vesting of the legacy was postponed until that period, unless, from particular circumstances, a contrary intention could be collected. In this case, however, there were none of the indicia from which such an intention had usually been inferred. There was no direction in the will to give the legatee the interim enjoyment of the produce of the fund, nor even so much as a provision for maintenance out of it; and it had been held, that even the existence of such a provision afforded no presumption of an intention to vest the capital; *Leake v. Robinson* (2 Mer. 363, see p. 387). The accumulations were not, as in *Hanson v. Graham* (6 Ves. 239), directed to be made for the benefit of the legatee; nor was there any gift of them, any more than of the principal, except in the direction for payment. The gift was, in fact, precisely equivalent to a bequest of a sum of money, with interest, on the legatees attaining a

particular age, which had been held not to give a vested interest in the meantime; *Knight v. Knight* (2 S. & S. 490). The only circumstance in the present case which indicated an intention to vest the legacy, was the direction to pay to the legatee, "his executors, administrators, or assigns:" but these words could not be relied on, as they were merely the technical form of expressing an absolute interest.

They also cited *Batsford v. Kebbell* (3 Ves. 363), *Vawdry v. Geddes* (1 Russ. & Mylne, 203), *Judd v. Judd* (3 Sim. 525), and *Newman v. Newman* (10 Sim. 51), and they observed that the course adopted by the Master of the Rolls shewed that his Lordship considered that the order for maintenance was erroneous, or otherwise he would not have hesitated to order a transfer of the fund at once to the legatee.

THE LORD CHANCELLOR. I cannot recognise the principle that the existence of an erroneous order as to maintenance prevents the Court from making an order inconsistent with it, as to the principal fund. There was nothing to prevent the Master of the Rolls from disposing of the petition which was brought before him, notwithstanding that order. But, with respect to this petition, I do not see to what purpose I can deal with it. If the party were still a minor, and the payment of the maintenance under the order were going on, there might be a reason for applying to stop it for the future; but, by discharging that order, I should be making the trustees liable for the payments they have made for maintenance. The petition presented to the Master of the Rolls is not now before me, or, with the consent of the parties, I would dispose of it.

It was then arranged that a similar petition should be presented, without delay, to his Lordship, and that the argument should, in the meantime, proceed as if such petition were actually before the Court.

Mr. Wigram and Mr. Wood, for Daniel Wright Vautier, admitted the general principle, that where there was no gift but in the direction for payment at a certain time, the legacy was, in the meantime, contingent, unless a contrary intention appeared: but they insisted that the circumstance from which the Court was in the habit of inferring such intention, was not the direction that the legatee should have the interim enjoyment of the fund, but the necessity of separating the principal sum from the bulk of the estate, in order to carry into effect the provisions of the bequest. Wherever such necessity occurred, it was immaterial whether the occasion of it was an immediate gift of the produce of the funds to the legatee, or a gift of a fund to a trustee to improve for his benefit. In either case, it was the separation of the fund that destroyed the contingent nature of the bequest, and raised a presumption that an immediate and absolute gift was intended, unless that presumption were rebutted by a gift over in the event of the legatee dying under the prescribed age; *Vawdry v. Geddes* (1 Russ. & Mylne, 203). That principle was recognised in *Boddy v. Dawes* (1 Keen, 362), and it would be found to be the principle of all those cases in which a gift of this kind had been held to confer a vested interest; *Hanson v Graham* (6 Ves. 239), *Branstrom v. Wilkinson* (7 Ves. 421), *Lore v. L'Estrange* (5 Bro. P. C. 59), *Lane v. Goudge* (9 Ves. 225). The reasoning in *Batsford v. Kebbell* was not very intelligible; but, at all events, the ground of that decision, whether right or wrong, was peculiar to itself, viz., that the dividends of stock and the stock itself were distinct subject-matters of bequest; and if that were so, the gift of the dividends, until the party attained the age at which he was to receive the stock, did not involve an immediate separation of the stock from the bulk of the estate. They also cited *Boraston's case* (3 Rep. 19), *Manfield v. Dugard* (1 Eq. Cas. Abr. 195, pl. 4), *Doe v. Whitby* (1 Burr. 228), and relied on the limitation to "executors, administrators, or assigns," observing that the

legatee could have no "assigns" in the sense which that word was evidently intended to bear, unless the legacy vested before the time appointed for payment arrived.

Mr. Anderdon appeared for the trustees.

Mr. Richards, in reply, said that in all the cases which had been cited there was either an immediate gift of the interim produce of the fund to the legatee, or a trust to apply it for his benefit; and that the mere separation of the fund from the rest of the estate had never been treated as alone sufficient to give the legatee a present vested interest. Still less could it be so considered in this case, in which the trustees of the legacy were also executors and trustees of the will generally.

On the conclusion of the argument, THE LORD CHANCELLOR said that, from what had been stated, he must assume that the Master of the Rolls' impression was that the order for maintenance was erroneous.

Mr. Wigram said he understood that the Master of the Rolls, considering himself bound in point of form by that order, had expressed no opinion upon the merits.

June 4. THE LORD CHANCELLOR. I should not have thought this a case of any difficulty; but the form in which it came before me, namely, a rehearing of an order made by me at the Rolls, though not, as I at first understood, at the suggestion of the Master of the Rolls, has called upon me to give it my most careful attention. I have no recollection of the case, and have no means of knowing how far my judgment was exercised upon the construction of the will. I cannot, however, assume that the order was made without my having considered the state of the property as stated in the Master's report; as that would have been contrary to the course which I have always thought it my duty to adopt in such cases.

It is argued that the testator's great-nephew, Daniel Wright Vautier, does not take a vested interest in the East India stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate gift of the East India stock; it is to be separated from the estate and vested in trustees; and the question is whether the great-nephew is not the *cestui que trust* of that stock. It is immaterial that these trustees are also executors; they hold the East India stock as trustees, and that trust is, to accumulate the income till the great-nephew attains twenty-five, and then to transfer and pay the stock and accumulated interest to him, his executors, administrators, or assigns. There is no gift over; and the East India stock either belongs to the great-nephew, or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it. If the gift were within the rule, there would be circumstances to take it out of its operation. There is not only the gift of the intermediate interest, indicative, as Sir J. Leach observes in *Vawdry v. Geddes* (1 Russ. & Mylne, 203. See p. 208), of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate the legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five. The decision in *Vawdry v. Geddes* and other cases, in which there were gifts over, cannot affect the present question. *Booth v. Booth* (4 Ves. 399) is certainly a strong case, and goes far beyond the present, and so does *Lore v. L'Estrange* (5 Bro. P. C. 59); and it is a decision of the House of Lords. That case has many points of resemblance to the present; and although Lord Rosslyn seems, in *Monkhouse v. Holme* (1 Bro. C. C. 298), to question the principle of that decision, Sir W. Grant, in *Hanson v. Graham* (6 Ves. 239. See p. 248),

justifies it upon grounds, most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was to be inferred, that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case.

It was observed that the transfer is to be made to the great-nephew, his executors, administrators, or assigns. It is true that the addition of those words does not prevent the lapse of a legacy by the death of the legatee in the lifetime of the testator, but they are not to be overlooked, when the question is, whether the legacy became vested before the age specified because if it were necessary that the legatee should live till that age to be entitled to the legacy, then there would be no question about his representatives at that time.

I am therefore of opinion that the order of 1835 was right, and that the petition of rehearing must be dismissed, and with costs; which I should not have ordered if the Master of the Rolls had recommended the parties to adopt that proceeding upon a view of the merits of the case, but which I am now informed was not the case. The order for a transfer of the funds, upon the regular evidence of the legatee having attained twenty-one, will follow this decision upon the construction of the will.

June 5. On the following day, a petition having, in the meantime, been presented *pro forma* to the Lord Chancellor, in pursuance of the arrangement above mentioned, the matter was again spoken to, when

Mr. Anderdon asked for the costs of the trustees, both of that petition and of the similar petition which had been presented to the Master of the Rolls, submitting that although that petition was not before his Lordship, yet that the Petitioner might be put upon the terms of paying the costs of it, as the condition of his obtaining the order which he asked.

THE LORD CHANCELLOR said that he had no jurisdiction on the petition presented at the Rolls; but suggested to the Petitioner that he should consent to those costs being included in the present order, as he would otherwise have to pay the expense of another application to the Master of the Rolls for the purpose of recovering them; which suggestion was acceded to.

Mr. Richards then made a similar application for the costs of the residuary legatees, which was opposed by Mr. Wigram, on the ground that the residuary legatees stood in the situation of parties who had opposed a claim and failed: but

THE LORD CHANCELLOR said that, as the fund had not been carried over to the separate account of the Petitioner, and therefore could not have been obtained without serving the other parties in the cause, the residuary legatees were entitled to their costs; and, accordingly, his Lordship directed that the costs of all parties to that petition, and also, by consent, of the petition at Rolls, should be paid out of the fund.

Tab 12

2015 MBQB 28
Manitoba Court of Queen's Bench

Esther G. Castanera Scholarship Fund, Re

2015 CarswellMan 106, 2015 MBQB 28, [2015] 7 W.W.R. 191,
252 A.C.W.S. (3d) 629, 314 Man. R. (2d) 291, 6 E.T.R. (4th) 253

In the Matter of: The Esther G. Castanera Scholarship Fund An application under The Trustee Act, R.S.M. 1987, c. T160, s. 59

Dewar J.

Judgment: February 23, 2015
Docket: Winnipeg Centre CI 13-01-84085

Counsel: Maria A. Versace, for University of Manitoba
John S. Fergusson, for Public Guardian and Trustee

Subject: Constitutional; Corporate and Commercial; Estates and Trusts; Employment; Human Rights

Headnote

Estates and trusts --- Charities — Nature of gift — Bequest

After graduating from Manitoba high school located in Steinbach, testatrix graduated from university with bachelor of science, went on to earn Ph.D in biochemistry and was resident at prestigious U.S. university at time of death — Testratix had discussion with representatives at former university about establishing award fund to support scholarship for women graduates — Testatrix left 50% of residue of estate to university, earmarked for women graduates of Steinbach Collegiate Institute who will study bachelor of science degree — By virtue of lack of use of fund, it stood at $563,233.93 in 2015 — University brought application to vary fund for it to include men and women graduates from rural Manitoba — Application granted in part — Gift was varied in respect of name of school from which graduates were to come, but not varied to include men, since it was very clear that testatrix intended to use her money to promote women in sciences — It was testatrix intention to benefit graduates of public high school in Steinbach, including secondary school — Qualification in will that fund was to be used for women graduates did not offend Human Rights Code or public policy.

Human rights --- What constitutes discrimination — Sex — Miscellaneous

After graduating from Manitoba high school located in Steinbach, testatrix graduated from university with bachelor of science, went on to earn Ph.D in biochemistry and was resident at prestigious U.S. university at time of death — Testratix had discussion with representatives at former university about establishing award fund to support scholarship for women graduates — Testatrix left 50% of residue of estate to university, earmarked for women graduates of Steinbach Collegiate Institute who will study bachelor of science degree — By virtue of lack of use of fund, it stood at $563,233.93 in 2015 — University brought application to vary fund for it to include men and women graduates from rural Manitoba — Application granted in part — Gift was varied in respect of name of school from which graduates were to come, but not varied to include men, since it was very clear that testatrix intended to use her money to promote women in sciences — Qualification in will that fund was to be used for women graduates did not offend Human Rights Code or public policy — Where gift could be articulated as promoting cause or belief with specific reference to past inequality, there was nothing discriminatory about such gift — There was no offensive motive on testratix's part with her desire to encourage women to follow path that she made in sciences — University policy which focused on numerical fact of discrimination without considering qualitative factors such as background of testator or testatrix, and origin of gift did not adequately respect wishes of person who made gift available in first place.

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APPLICATION by university to vary testratix's scholarship fund for it to include men and women graduates from rural Manitoba.

Dewar J.:

1 On September 27, 1997, Dr. Esther G. Castanera passed away. Dr. Castanera had graduated in 1942 with a Bachelor of Science degree from the University of Manitoba (the "University"). She went on to earn a Ph.D. from the University of California at Berkeley in biochemistry. At the time of her death she was a resident of Berkeley, California. Prior to her attendance at the University, she had attended the public high school in Steinbach, Manitoba.

2 In or around 1991, Dr. Castanera had discussions with representatives at the University about the prospect of her establishing an award fund from a testamentary gift to support a scholarship for women graduates from her high school in Steinbach who enter a program of study in certain sciences. In due course she made her will which, after making two modest specific bequests to a niece and friend respectively, left 50% of the residue of her estate to the University earmarked for women graduates of the "Steinbach Collegiate Institute". The full bequest reads as follows:

> I give, devise and bequeath the remaining fifty percent (50%) of my residuary estate to the UNIVERSITY OF MANITOBA, Winnipeg, Canada for scholarships at the University of Manitoba for needy and qualified women graduates of the Steinbach Collegiate Institute who will study for a Bachelor of Science degree with a major in one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.

3 The other 50% of her residue was left to "the UNIVERSITY OF CALIFORNIA BERKELEY FOUNDATION to be used for fellowships for qualified graduate women students working toward a doctoral degree in the Department of Biochemistry at the Berkeley campus of the University of California."

4 A review of the two bequests demonstrates that Dr. Castanera fully intended to benefit women with her estate. And, in the case of her gift to the University, she intended to direct her generosity to women who came from the same district in which she had spent her youth.

5 The evidence before me indicates that during the discussions between Dr. Castanera and the University about the prospect of making the bequest, the University requested permission from Dr. Castanera to publicize the gift. Therefore, in the fall of 1992, the University inserted an article in a University publication intended to encourage philanthropy. The article was headlined, "Support for women in the sciences: Esther Goossen Castanera establishes new scholarship". It contained these comments, amongst others:

> Esther wants this scholarship to provide an incentive to female graduates of Steinbach Regional who wish to pursue studies in the hard sciences (physics and chemistry) at the University of Manitoba.
>
> . . . . .
>
> The Steinbach community is famous for its work ethic and for the scholars it produces, so the Esther Goossen Castanera Award will assist a continuous flow of bright young scientists.

6 Also in the materials before me were included drafts of a press release which contained a heading "Steinbach Graduate Remembers Her Roots" as well as a sentence:

> ... it is her expressed wish that this scholarship provide an incentive to female graduates of Steinbach Regional desirous of pursuing a study in the hard sciences at the University of Manitoba.

7 The capital of the bequest is $270,120.33. By virtue of the lack of use to date of the fund as well as the return on its investment, as of January 9, 2015, it stood at $563,233.93.

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8 At the time that the will was drafted (May 16, 1991) and the date the will became effective (September 27, 1997), the University had a policy entitled "Non-Acceptance of Discriminatory Scholarships, Bursaries or Fellowships". It had been in place since 1979 and read:

> As a matter of principle, the University of Manitoba will not administer any new scholarship, bursary or fellowship that discriminates on the basis of race, creed, political belief, colour, ethnic or national origin, sex, or age.
>
> Any exceptions to this principle shall be made only with the consent of the unit concerned, the Senate Committee on Awards, and the Senate. A request for such exceptions shall be indicated by the Committee on Awards.

9 When Dr. Castanera's gift became available, the Faculty of Science in late 1998 and early 1999 wrote to the Chair of the Senate Awards Committee recommending that an exception be granted from the policy on Non-Acceptance of Discriminatory Scholarships, Bursaries or Fellowships on the basis that in the four courses then available at the University, namely chemistry, physics, mathematics and biochemistry, "women are and have been almost consistently been, underrepresented in these academic disciplines", submitting therefore that, "This exception constitutes an affirmative action."

10 The request of the Faculty of Science for the exception was not approved by the Senate Awards Committee for mathematics and biochemistry, on the basis that the then most recent numbers of admissions in those disciplines suggested that women were no longer underrepresented. On March 29, 1999, the Associate Dean wrote once again to the Chair of the Senate Awards Committee resubmitting the faculty's request for an exception, and based it upon a reworking of the numbers to reflect the percentage of women who actually graduated when compared to the percentage of men. In April 1999, the Senate Committee on Awards again sent the request back to the Faculty of Science requesting the Faculty to provide new support for its request to exempt all four disciplines from the policy.

11 In July 1999, a further request was made by the Faculty of Science again requesting an exception for all four disciplines and included the enrollments in the honours programs of mathematics and biochemistry which resulted in women enrollment percentages of 50% for mathematics and 46% in biochemistry. It appears that this request was put on hold while the Senate Awards Committee then reviewed its policy. The policy appears to have been completed in the fall of 1999 and it determined (amongst other policy clarifications or changes) that an underrepresentation would only arise if the percentage of women in a discipline was less than 40%.

12 Thereafter, for reasons which are not entirely apparent, but which seem to be directed towards the University's focus on other priorities and changing personnel, the Castanera Trust issue respecting women remained unresolved from the years 2000 to 2012, at which time efforts to deal with it were resurrected. Those efforts resulted in the first application by the University that came before me in June 2013. Along the way, the University brought in a new policy effective November 17, 2009, which policy statement read as follows:

> 2.1 As a matter of principle, the University of Manitoba will not administer any new scholarship, prize, fellowship, or bursary that discriminates on the bases of the 'applicable characteristics' enumerated in section 9(2) of the Manitoba Human Rights Code (proclaimed in force December 10, 1987, and as amended from time to time).
>
> Exceptions are occasionally warranted when it can be demonstrated that systemic discrimination may exist that results in the under-representation of identified sub-populations in Manitoba and/or when the proposed award has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any applicable characteristic referred to in subsection 9(2) of the Manitoba Human Rights Code. Any exception to this principle shall be made only with the consent of the unit concerned, the Senate Committee on Awards, and the Senate. A request for such an exception shall be indicated by the Committee on Awards.

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13 There is a history to the applications that have been made by the University in respect of this fund. In the summer of 2013, the University made application to vary the fund so that it would read:

> Scholarships at the University of Manitoba for needy and qualified men and women graduates from rural Manitoba who will study for a Bachelor of Science degree with a major in one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology, with preference to be given to students who are graduates from Steinbach, Manitoba. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.
>
> [emphasis added]

14 When the initial application came on before me, I expressed some reservation about the proposed variation respecting the extension of the catchment area to rural Manitoba and the widening of the eligibility for the scholarship to men. I was concerned that the suggested changes were not in accordance with conditions for which Dr. Castanera may have had very personal reasons to impose, and that the suggested variations may not have adequately considered the testatrix's wishes. I did not dismiss the application, but rather adjourned it so that the University might consider the matter further. After a prolonged period of consideration, I was provided with an amended application which requested the following relief:

> (a) For the opinion, advice and direction of the court on the following questions affecting the administration of the Esther G. Castanera Scholarship Fund (the "Fund"), established pursuant to a bequest made under the Last Will and Testament of Esther G. Castanera dated May 16, 1991 (herein called the "Will"):
>
> > (i) Was it the testatrix's intention to benefit graduates of the "Steinbach Regional Secondary School", rather than graduates of the "Steinbach Collegiate Institute"?
> >
> > (ii) Does the qualification in the Will that the Fund be used for "women graduates" offend or violate The Human Rights Code, C.C.S.M. c. H175 (the "Code"), or public policy?
>
> (b) If the court finds that the provisions do violate the Code or public policy, for an Order for approval of a cy-pres scheme such that the Fund will be varied in accordance with Schedule "A" or Schedule "B" attached hereto (the "Variation");
>
> (c) For such further and other relief as counsel may advise and this Honorable Court may permit.

15 The variations proposed are as follows:

> **Schedule "A"**
>
> SEVENTH: I give, devise and bequeath the remaining fifty percent (50%) of my residuary estate to the UNIVERSITY OF MANITOBA, Winnipeg, Canada for scholarships at the University of Manitoba for needy and qualified women graduates of the ~~Steinbach Collegiate Institute~~ Steinbach Regional Secondary School who will study for a Bachelor of Science degree with a major in one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.
>
> -or-
>
> Schedule "B"
>
> SEVENTH: I give, devise and bequeath the remaining fifty percent (50%) of my residuary estate to the UNIVERSITY OF MANITOBA, Winnipeg, Canada for scholarships at the University of Manitoba for needy and

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qualified women graduates of the ~~Steinbach Collegiate Institute~~ Steinbach Regional Secondary School who will study for a Bachelor of Science degree with a major in ~~one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology~~ any program in which women are underrepresented. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.

16 The concerns of the University which prompted the request for the opinion of the court are two-fold:

(a) the will contemplated scholarships to graduates of "Steinbach Collegiate Institute". The evidence before me indicates that "Steinbach Collegiate Institute" ceased to exist in the fall of 1972 at which time the Hanover School Division began operations of "Steinbach Regional Secondary School" as the Division's Steinbach high school. Do graduates of "Steinbach Regional Secondary School" fall within the wording in the will respecting graduates of "Steinbach Collegiate Institute"?

(b) The will contemplated that the recipients of the scholarship monies would be women. The University at least initially expressed concern that given the increase in enrollment of women in the undergraduate programs in the Faculty of Science, restricting eligibility to women might be said to contravene the Human Rights Code, C.C.S.M. c. H175 ("the Code"), or alternatively to be in breach of public policy.

17 Prior to the hearing of the amended application, I requested counsel for the University to effect service of the application upon the Human Rights Commission of Manitoba and the University of California, Berkeley. Since one of the questions put to me involved the ambit of the Code, I felt that the Human Rights Commission should have opportunity to make any arguments which might assist in the interpretation of the Code. Since the only other residuary beneficiary in the estate was University of California, Berkeley who might profit from a declaration that the gift was illegal as a result of either of the concerns expressed by the University, I gave instructions to serve that university.

18 I was provided with a letter from counsel for the Manitoba Human Rights Commission which indicated that the Commission did not wish to make any submissions in regard to the matter. I was also provided with a copy of a letter from the University of California, Berkeley that the University of California, Berkeley Foundation did not wish to make any submissions with respect to this matter.

19 The application proceeded in the presence of a representative from the Public Guardian and Trustee who took no position.

20 Unfortunately, I have not had the benefit of any differing views, and the opinion which I express in these reasons may suffer as a result.

21 Finally, with the amended application, I was given an affidavit which contained the following comments:

24. According to data compiled by the University's Office of Institutional Analysis, in the last 5 years the Faculty of Science has had the following percentage of female enrolment in the departments mentioned in the Bequest, excluding molecular biology which no longer exists as an undergraduate degree program:

	Chemistry	Physics	Mathematics	Biochemistry
2013	30%	17%	29%	44%
2012	26%	10%	27%	42%
2011	35%	11%	31%	44%
2010	38%	9%	18%	44%
2009	38%	15%	21%	42%

The gift to graduates of Steinbach Collegiate Institute

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22 In my opinion, the wording in the will relating to "Steinbach Collegiate Institute" should be varied to "Steinbach Regional Secondary School". The evidence before me establishes that the only public high school in Steinbach following the creation of "Steinbach Regional Secondary School" in 1972 was Steinbach Regional Secondary School. It treats its alumni not only as those graduates of Steinbach Regional Secondary School, but also those graduates from Steinbach Collegiate Institute. Further, a review of the correspondence between the University and Dr. Castanera before the gift was made discloses that Dr. Castanera was told that "Steinbach Regional has taken the place of the Steinbach High School that you knew". I infer that this information simply did not get to the solicitor who drafted the will. It is not unusual for someone to continue to call their old alma mater by the name which was familiar to them when they attended. Nonetheless, the intention of Dr. Castanera was to benefit the graduates of the public high school in Steinbach and in my view, that was Steinbach Regional Secondary School at the time the will was drafted. There is nothing untoward in equating Steinbach Regional Secondary School with Steinbach Collegiate Institute. Indeed, in order to give effect to the wishes of Dr. Castanera, they must be equated. To the extent there is any doubt, I am prepared to vary the trust accordingly to make it abundantly clear.

The gift to women graduates

23 The Code contains the following provisions:

> **"Discrimination" defined**
>
> 9(1) In this Code, **"discrimination"** means
>
> > (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
> >
> > (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
> >
> > (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
> >
> > (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).
>
> **Interpretation**
>
> 9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of
>
> > (a) the form of the act or omission; and
> >
> > (b) whether the person responsible for the act or omission intended to discriminate.
>
> **Applicable characteristics**
>
> 9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are
>
> > (a) ancestry, including colour and perceived race;
> >
> > (b) nationality or national origin;
> >
> > (c) ethnic background or origin;

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(d) religion or creed, or religious belief, religious association or religious activity;

(e) age;

(f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender identity;

(h) sexual orientation;

(i) marital or family status;

(j) source of income;

(k) political belief, political association or political activity;

(l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;

(m) social disadvantage.

Affirmative action, etc. permitted

11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code

(a) to make reasonable accommodation for the special needs of an individual or group, if those special needs are based upon any characteristic referred to in subsection 9(2); or

(b) to plan, advertise, adopt or implement an affirmative action program or other special program that

(i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and

(ii) achieves or is reasonably likely to achieve that object.

Discrimination in service, accommodation, etc.

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

24 The University is concerned that limiting the eligibility of the scholarship to women may be construed as discrimination on the characteristic of gender or sex and therefore contrary to the Code. Alternatively, administering a gift which benefits women only may contravene public policy. Both of these concerns arise from the fact that women, once a minority in the sciences, have far greater representation, if not in equal or greater numbers, in many of the relevant undergraduate programs today.

25 There are two court decisions which yield different results but deal with different qualities of discrimination. The first case is the case of *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481, 1990 CarswellOnt 486 (Ont. C.A.), (sub. nom. *Leonard Foundation Trust, Re*) (the "*Leonard Trust*" case). That case dealt with an *inter vivos* trust from which income was to be used for the purpose of educational scholarships called "The Leonard Scholarships". The trust document contained four recitals which read as follows (at para. 14):

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

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

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

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

26 The Leonard Scholarships trust indenture also excluded schools, colleges, or universities which might be subject to the domination or control of the class of persons excluded in the recitals. Furthermore, the trust indenture contained a description of people who would be eligible to receive the scholarships. This description is as follows (at para. 18):

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

(a) Clergymen,

(b) School Teachers,

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

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

(e) Members of the Engineering Institute of Canada,

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

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

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27 The Leonard Scholarships had been administered for more than 65 years before the matter made its way to the Ontario Courts. The issue was whether testamentary freedom would trump modern-day notions and legislation about human equality. Ultimately, the Ontario Court of Appeal declared that the provisions which referenced restrictions with respect to race, colour, creed or religion, ethnic origin and sex were to be deleted from the trust indenture on the grounds that such conditions were void as contravening public policy. The majority felt it unnecessary to decide on whether the conditions contravened the Ontario Human Rights Code whereas the minority opinion included a declaration to that effect.

28 The majority decision contained this language:

> 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 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.

29 The conclusion to be reached upon a reading of the *Leonard Trust* case is that since there was no good reason demonstrated for the discriminatory conditions, they could not withstand modern day notions about equality.

30 The majority decision in the *Leonard Trust* case however took pains to warn that the decision which came from that case could not automatically be applied to every scholarship which contained conditions which violated some discriminatory category. Robins J.A. wrote:

> 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

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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.

31 The minority decision written by Tarnopolsky, J.A. in coming to a similar but not identical ultimate conclusion, contained the same cautions, namely:

> 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.
>
> 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.

32 The cautions expressed in the judgments found in the *Leonard Trust* case were observed by the court in *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 BCSC 445, 185 D.L.R. (4th) 182, 2000 CarswellBC 529 (B.C. S.C. [In Chambers]), a decision of Maczko J. of the British Columbia Supreme Court. In that case, the University of Victoria was named a trustee to administer what amounted to 1/10 of the residue of a testator's estate, and as trustee was to observe the following conditions (at para. 4):

> (vii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA**, as a bursary for a practicing Roman Catholic student in the third or fourth year of Education;
>
> (viii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA** for a bursary in music to be given to a Roman Catholic student preferably interested in the liturgy of the Roman Catholic Church.

33 The eligibility restriction of the two gifts to Roman Catholic students was laid before the court for advice and direction as to whether those restrictions contravened the British Columbia Human Rights Code or public policy and if so, whether an application of the *cy pres* doctrine was available to salvage the gift.

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34 The court approached the problem on two bases. Firstly, the court considered that the University of Victoria, as trustee, ought to be treated in the same way as a testator and that since the testator was able to make private gifts, the public aspect required by the Human Rights Code and the notions of public policy did not exist. The second ground adopted by Maczko J. was that the Leonard Scholarships were based on blatant religious supremacy and racism, and could be distinguished on those facts. He found nothing offensive in a testator of a particular faith wishing to promote others of the same faith if the gift was not motivated by notions of supremacy.

35 One interesting sidelight to the majority decision in the *Leonard Trust* case is that although the majority judges were clearly offended by the settlor's views on race and religion, their reasons do not comment on the settlor's condition that limits women to 1/4 of the distributable annual fund. Nonetheless, they order that the provisions of the trust indenture which referenced restrictions with respect to sex as well as race, colour, creed or religion, and ethnic origin were void as contravening public policy. I do not interpret their decision on the characteristic of sex as a conclusion that every gift that discriminates between the sexes will necessarily be contrary to public policy. The cautions expressed by both the majority and the minority judges are as applicable to cases where the discrimination is based upon sex or gender as it is where the discriminatory characteristic is race, religion, creed, colour or ethnic origin.

36 In my view, it is impossible to lay down a general rule that will apply to every testamentary gift to a university which is to be used for a bursary or scholarship and which contains restrictions on the eligibility of recipients. The *Leonard Trust* case illustrates what is not acceptable, especially with regard to race, colour, ethnic origin and religion. The *University of Victoria* case illustrates that promotion of people with the same religious belief is at least in some circumstances acceptable. Where does the Esther G. Castanera gift fall?

37 I prefer to rest my conclusion on the case before me on the second of the grounds used by Maczko J. in reaching his decision in the *University of Victoria* case. Put very simply, the restrictions which drove the decision in the *Leonard Trust* case were motivated by a belief that white Anglo Protestant people were superior to all other people of different races and different creeds. It is this notion that a select group of people are superior to others simply because of who they are that makes the restrictions in the Leonard Scholarships so offensive. The restrictions contained in the Castanera Scholarship Fund are not motivated by superiority. If anything, they are motivated by a desire to promote women in a field which historically was a male-dominated field. There is no suggestion that women will make better scientists than men. There is only a suggestion that women should be encouraged to enter a discipline which Dr. Castanera appeared to have enjoyed, and which historically was not populated by women. The notion that these conditions can be construed as unreasonably discriminatory is simply not sustainable.

38 To the extent that one might perceive that limiting eligibility to women offends s. 13 of the Code, the Code itself provides for its exception. Section 13 contains the words "unless bona fide and reasonable cause exists for the discrimination." A desire by a woman who has experience in a particular field to promote women in that field in which historically there has been an underrepresentation, in my view, is a bona fide and reasonable cause to direct her money to women only. Furthermore, where that purpose was not unreasonable at the time the gift was contemplated, it is not unreasonable for a University to administer such a gift even when progress towards equality has been achieved, unless the gift in the mind of the public has become so offensive as to require a variation.

39 The prevailing attitude in today's world is that equal opportunities must exist for both men and women. That is a reasonable objective, but in society's desire to promote egalitarianism, there are a number of factors that should go into the assessment. Current enrollment numbers do not always tell the whole story. They certainly do not give consideration to what has happened in the past, or recognize a testator's experience which motivates her desire to make a gift. Additionally, enrollment numbers in undergraduate programs may give a false impression of equality within the discipline if there is a large exodus of women from the discipline after graduation or an underrepresentation in leadership positions within the discipline. I do not propose to tell the University what criteria it should employ in assessing whether a condition is offensive or not. I will suggest, however, that just as the judges in the *Leonard Trust* case said, every situation needs individual assessment, and factors such as the history or motivation of the giftor are factors which merit some

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examination. There should be some attempt to balance the wishes of the testator/testatrix with the fact of discrimination. In short, simple numbers do not tell the whole story and although they may be a good starting point, they should not necessarily be the definitive factor.

40 It should be remembered that when Ms Castanera started her career she was a woman in a field normally reserved for men. Women like Dr. Castanera have demonstrated that old attitudes towards women in certain fields of endeavour were not justifiable. Whether or not she suffered any discrimination, her very presence in the science field was evidence that women could do that work. There is no offensive motive on her part when I see her desire to encourage women to follow the path that she made. Blatant discrimination, even if there may be more women than men in some sciences today, simply does not exist. And if any male graduate feels deprived, so be it. That graduate is not being kept out of the sciences just because he is not receiving this particular scholarship. If he is keen about the hard sciences, he will find other opportunities to get into the field.

41 I can understand the conundrum which the University had when this gift became available. Times change. The underrepresentation of women at the date of the will and earlier, had changed between the time that the gift was contemplated and the time that the gift became effective. Nonetheless, a university policy which focuses on the numerical fact of the discrimination without considering qualitative factors such as the background of a testator/testatrix and the origin of the gift does not adequately respect the wishes of the person who made the gift available in the first place. This gift is not offensive to me in the way that the Leonard Scholarships gift was offensive to the Court of the Appeal in Ontario. It may be that at some future time it will, but presently it is not, and an overreliance upon numbers to conclude discrimination not only lacks an appreciation of history, it does not treat the testator or testatrix with the respect and gratitude to which he or she is entitled. This is especially so given the encouragement that the University gave to Dr. Castanera when she made her will in the first place.

42 Every gift requires a contextual assessment. A one-size-fits-all policy does not fairly provide the necessary comfort to a testator that his/her gift will be treated in the manner anticipated by them. That is not to say that the University cannot make a stricter policy than the law provides and abide by it. However, in those circumstances, it should decline to accept the gift in the first place, or apply early for a variation with service to all of those parties who might benefit if the variation was not allowed. I might add that where the request is grounded on a university policy which is more strict than public policy, such a variation should not, in my view, be automatically granted if the administration of the gift would not offend public policy or any human rights legislation.

43 In my view, any policy adopted by a university should contain language that permits the university to consider the qualitative aspects of any gift made to it.

44 Where the gift can be articulated as promoting a cause or a belief with specific reference to a past inequality, there is nothing discriminatory about such a gift. It may well be that at some point in the future, society will conclude that insufficient opportunities are granted to men simply because they are men, but that does not exist today. In my view, in today's environment, it is not offensive for this gift to benefit women rather than men, and I am not prepared to change it.

45 I have perhaps gone further during these reasons than absolutely necessary given that the numbers provided in the affidavit of Ms Lastra indicate that women are still a minority in each of the disciplines, although the enrollment percentage in biochemistry is between 40 and 50 percent. Nonetheless, I anticipate that there will be times when that number will be exceeded, if not temporarily, perhaps permanently. The purpose of my additional comments in these reasons is simply to say that even in those cases, the condition respecting women will not be unreasonably discriminatory unless societal values have changed so significantly that the condition has become offensive generally to members of society and therefore unreasonable. Time will tell if or when this will ever arise.

46 I therefore answer the questions put to me in the following way:

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(i) Was it the testatrix's intention to benefit graduates of the "Steinbach Regional Secondary School", rather than graduates of the "Steinbach Collegiate Institute"?

Answer: It was the testatrix's intention to benefit the graduates of the public high school in Steinbach, including Steinbach Regional Secondary School.

(ii) Does the qualification in the Will that the Fund to be used for "women graduates" offend or violate The Human Rights Code, C.C.S.M. c. H175 (the "Code"), or public policy?

Answer: The qualification in the Will that the Fund is to be used for "women graduates" does not offend or violate The Human Rights Code, C.C.S.M. c. H175 (the "Code"), or public policy.

47 It therefore follows that I will grant an order which varies the gift in respect of the name of the school from which the graduates are to come. I will not vary it to include men, since it is very clear that Dr. Castanera intended to use her money to promote women in the sciences. The variation which I have approved will therefore read as follows:

SEVENTH: I give, devise and bequeath the remaining fifty percent (50%) of my residuary estate to the UNIVERSITY OF MANITOBA, Winnipeg, Canada for scholarships at the University of Manitoba for needy and qualified women graduates of ~~Steinbach Collegiate Institute~~ Steinbach Regional Secondary School who will study for a Bachelor of Science degree with a major in one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.

48 There was a concern that the catchment area, namely, women graduates of Steinbach Regional Secondary School, was too small to make reasonable use of this gift. In my view, it is premature to change the catchment area. The gift has never been given a chance to operate. It may result in increased interest on the part of graduates from the Steinbach Regional Secondary School. It should be given a chance to operate before any change to the catchment area should be considered.

49 I was not asked to order that costs of the application be paid from the fund, but given the lengthy period of time in which this matter has remained unresolved, I would not be disposed to do so, in any event.

Application granted in part.

End of Document

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Tab 13

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

Between:

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon

Appellants
(Applicants)

- and -

Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo, as Trustees for the 1985 Sawridge Trust (the "1985 Sawridge Trustees" or "Trustees")

Respondents
(Respondents)

- and -

Public Trustee of Alberta ("OPTG")

Respondent
(Respondent)

- and -

Catherine Twinn

Respondent
(Respondent)

- and -

Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley

Not Parties to the Appeal
(Respondents)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed on the 19th day of July, 2017
(2017 ABQB 377; Docket: 1103 14112)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal is part of ongoing litigation involving the 1985 Sawridge Trust (the Trust), which was established by the Sawridge Indian Band No. 19 (the Band, now known as the Sawridge First Nation, or SFN) to hold certain assets belonging to the Band. Disputes regarding membership in the SFN have a history going back decades, but the current Trust litigation deals specifically with potential amendments to the Trust. The Trust litigation has been case managed since 2011, and several procedural orders have been made including the one on appeal: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (Sawridge #5). The specific procedural issues on this appeal are straightforward: did the case management judge err in declining to add three potential parties to the Trust litigation, and did he err in awarding solicitor and his own client costs against those potential parties?

Background to the Sawridge Trust Litigation

[2] In 1982, various assets purchased with Band funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments. Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN: see, eg., *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave denied [2009] SCCA No 248; *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253.

[3] The 1985 Sawridge Trust restricts the Beneficiaries of the Trust to those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982, that is before the legislative amendments of Bill C-31. The Trust is currently administered by five Trustees, at least four of whom are also Beneficiaries. In 2011, the Trustees sought advice and direction from the court with respect to possible amendments to the Trust, and specifically to the definition of Beneficiaries, which the Trustees recognize as potentially discriminatory. It is not clear how the Trust might be amended to address any discrimination,

although there is a suggestion that Beneficiaries could be defined as present members of the SFN. As of April 2012, the SFN had 41 adult and 31 minor members. Most, but not all, of those members qualify as Beneficiaries of the Trust under the existing definition. If the Trust is amended, some individuals may cease to be Beneficiaries, and others, not currently Beneficiaries, may come within the amended definition.

[4] On August 31, 2011, the case management judge issued a procedural order intended to provide notice of the application for advice and direction to potentially affected persons. The current parties to the litigation include four of the Trustees, Roland Twinn, Walter Felix Twinn, Berta L'Hirondelle and Clara Midbo. A fifth Trustee, Catherine Twinn, is a separately named and separately represented party. Ms. Twinn, who was married to the late Chief Walter Patrick Twinn, is a dissenting trustee; although her position is not entirely clear, she seems to take the position that the Trust does not necessarily have to be amended. In 2012, the Public Trustee was added as a party to act as litigation representative for affected minors and those who were minors at the commencement of the proceeding but who have since become adults: 2012 ABQB 365 (Sawridge #1).

The application to be added as parties (Sawridge #5)

[5] The application that gives rise to this appeal was filed by three individuals who wish to be added as party respondents to the Trust litigation. Each of the three is differently situated. Patrick Twinn is the son of Catherine Twinn. He is a member of the SFN and a beneficiary of the Trust. Shelby Twinn is Patrick Twinn's niece (she is the daughter of Paul Twinn, who is Patrick Twinn's half-brother). Roland Twinn, one of the trustees, is also Shelby's uncle. Catherine Twinn is her great-aunt. Shelby is a beneficiary of the Trust but not a member of the SFN. The third applicant, Deborah Serafinchon, is neither a member of the SFN nor a current beneficiary of the Trust. She says that her father is the late Walter Twinn. She is not currently a status Indian under the *Indian Act*.

[6] The appellants submit that their interests are directly affected by the Trust litigation and that they should be added as parties to that litigation. Shelby Twinn, in particular, wishes to argue that she may cease to be a beneficiary under the Trust if it is amended. Both she and Patrick Twinn wish to argue that the Trust cannot and ought not be amended. The position to be taken by Ms. Serafinchon is currently unclear.

[7] The first procedural order, as amended on November 8, 2011, provided that any person interested in participating in the advice and direction application was to file an affidavit no later than December 7, 2011. Two of the three applicants were served with that order. There was no suggestion any of the applicants was unaware of the application and the time lines.

[8] The case management judge denied the applications to be added as parties. He held that the addition of more parties would add to the complexity of the litigation, increase the costs to the

Trust and the assets held in it, and expand the issues beyond those identified during case management.

[9] With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

[10] With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

[11] The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

[12] All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

[13] Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP*

Inc, 2017 ABCA 95 at para 3, [2017] AJ No 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta*, 2013 ABCA 148 at para 13, 553 AR 44.

[14] Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

[15] This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

[16] The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

[17] Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

[18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented

by those existing parties. As a matter of law, the Trustees represent the interests of the Beneficiaries, who include Patrick and Shelby Twinn. Catherine Twinn, as dissenting trustee, is separately represented, has taken an opposing view as to the need for amendment of the Trust, and will place that position before the court. The Public Trustee is tasked with representing the interests of all Beneficiaries who were minors when the litigation began, although it is acknowledged that the Public Trustee does not represent the interests of Patrick and Shelby Twinn (notwithstanding a comment made by the case management judge to the contrary).

[19] Neither the record, nor the oral or written submissions of the appellants, puts forward the positions each of the proposed parties intends to advance. As such, it is impossible for us to conclude that each proposed party has an interest that is not yet represented. Given the absence of information about the actual views of the appellants, we have no foundation to conclude otherwise. It is to be presumed that the Trustees and Public Trustee will put forward the various arguments regarding proposed amendments to the Trust and how those proposed amendments could affect the interests of various categories of current and potential beneficiaries. That there is a separately represented dissenting Trustee before the court adds to the likelihood that all views will be canvassed and all interests protected.

[20] The case management judge has been involved in the Trust litigation for several years, and deference is owed to his assessment of which parties need to be before the court in order for the questions raised in the litigation to be effectively resolved. His cautious approach to increasing the cost burden on the Trust and its beneficiaries, and unnecessarily expanding the Trust litigation, is well founded. Adding all the beneficiaries and potential beneficiaries as full parties to the Trust litigation is neither advisable nor necessary. We would not interfere with the case management judge's decision not to grant party status to the appellants.

[21] The appellants and Catherine Twinn also argue that the process followed here is flawed, as no originating application was filed to commence the Trust litigation. The Trustees say that it was always intended that the Procedural Order made by the case management judge on August 31, 2011 would be the constating document for the application for advice and direction. We agree with the Trustees that the lack of an originating application is not fatal to the litigation. However, the lack of an originating application, setting out specifics of the relief being sought, has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected. The Procedural Order provides details of how the litigation will proceed, including notice provisions and timelines, but it does not address the nature of the relief being sought.

[22] During the oral hearing, this issue and a number of others arose that have not yet been the subject of an application to, or direction from the case management judge. One such issue is whether there is a need for a formal pleading setting forth the position of the Trustees and the relief being sought; specifically, whether the Trust is discriminatory; and if so, what remedy is being sought. A second issue is what procedure will be implemented for beneficiaries and/or potential

beneficiaries to participate in the Trust litigation either individually or as representatives of a particular category of beneficiary. In addition, concern was raised to whether discrete legal issues could be determined prior to the merits of the Trust litigation being heard. These include whether the Trust is discriminatory, and whether s 42 of the *Trustee Act* applies. To date, we understand no formal application has been made to the case management judge on any of these matters. We strongly recommend that they be dealt with forthwith.

Did the case management judge err in awarding solicitor and own client costs?

[23] The case management judge awarded solicitor and own client costs against two of the appellants, Patrick and Shelby Twinn, in favour of the Trustees. His rationale for doing so was "to deter dissipation of trust property by meritless litigation activities by trust beneficiaries": see para 53.

[24] Solicitor and own client costs allow for a complete indemnification of legal fees and other costs for the successful party. This can include payment for "frills and extras" authorized by the client, but which should not fairly be passed on to a third party. They are distinct from solicitor-client costs, which allow for recovery of reasonable fees and disbursements, for all steps reasonably necessary within the four corners of the litigation: *Brown v Silvera*, 2010 ABQB 224 at para 8, 25 Alta LR (5th) 70; *Lufi v Taylor, Zinkhofer & Conway*, 2017 ABCA 228 at para 77, 53 Alta LR (6th) 44.

[25] Awards of solicitor-client costs are reserved for exceptional circumstances constituting blameworthy conduct of litigation; cases where a party's litigation conduct has been described as reprehensible, egregious, scandalous or outrageous: see *Stagg v Condominium Plan 882-2999*, 2013 ABQB 684 at para 25; *Brown v Silvera* at paras 29-35; aff'd 2011 ABCA 109. The increased costs award is intended to deter others from like misconduct. This court has reiterated recently that awards of solicitor and client costs are rare and exceptional; awards of solicitor and "own client" costs are virtually unheard of except where provided by contract: see *Lufi* at para 78.

[26] In an earlier case management decision in the Trust litigation, the case management judge issued an *obiter* warning to all parties, including counsel for Patrick Twinn, who seems to have been in attendance, of the possibility of awards for increased costs, saying:

> I have taken a "costs neutral" approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers) on a punitive or indemnity basis. True outsiders to the

> Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.
>
> *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (Sawridge #4) at para 30.

[27] The case management judge's concerns in this regard may provide the basis for an award of solicitor-client costs in appropriate circumstances, but they do not eliminate the requirement to assess the appropriateness of such an award on a case by case basis. The judgment under appeal here does not set out what exceptional circumstances existed to justify an award of solicitor and own client costs against these appellants on this application, nor is it apparent from the reasons, or from the record, what litigation misconduct on the part of these appellants led to the making of this costs award. Moreover, an award for increased or punitive costs ought not be made in the absence of notice of the possibility of such an order and an opportunity for parties to make submissions as to whether the order is warranted. Although the case management judge raised the prospect of punitive cost awards in Sawridge #4, there was no specific notice or specific submissions on the issue in this application and no party to the proceedings sought those costs. On that basis alone the costs award should be set aside.

[28] In the circumstances, we conclude that there was not a sufficient basis for the award of extraordinary costs against the appellants on this application, and the appeal from the costs award is allowed. The case management judge awarded party and party costs against Deborah Serafinchon in favour of the Trustees, and we make the same award against Patrick and Shelby Twinn.

Appeal heard on November 1, 2017

Memorandum filed at Edmonton, Alberta
this 12th day of December, 2017

REGISTRAR FILED DEC 12 2017 Court of Appeal of Alberta

Paperny J.A.

Veldhuis J.A.

Martin J.A.

Appearances:

N.L. Golding, Q.C.
for the Appellants

D.C. Bonora and A. Loparco
for the Respondents Roland Twinn, Catherine Twinn, Walter Felix Twinn, Bertha L'Hirondelle and Clara Midbo, as Trustees for the 1985 Trust

J.L. Hutchison
for the Respondent The Office of the Public Guardian and Trustee

D.D. Risling
for the Respondent Catherine Twinn

Tab 14

1988 CarswellAlta 195
Alberta Court of Appeal

Zeidler v. Campbell

1988 CarswellAlta 195, [1988] A.W.L.D. 1931, [1988] C.L.D. 2159, [1989] 1 W.W.R. 490, 12 A.C.W.S. (3d) 397, 31 E.T.R. 33, 41 B.L.R. 186, 53 D.L.R. (4th) 350, 63 Alta. L.R. (2d) 1, 91 A.R. 394

ZEIDLER and ZEIDLER HOLDINGS LTD. v. CAMPBELL et al.

Lieberman, Foisy and Côté JJ.A.

Judgment: November 7, 1988
Docket: Edmonton No. 8803-0473-AC

Counsel: *R.A. McLennan, Q.C.*, and *M.G. Stevens-Guille, Q.C.*, for appellant.
S.F. Goddard, Q.C., P.E.J. Curran, and *R. Feraco*, for respondents.

Subject: Estates and Trusts; Corporate and Commercial

Headnote

Trusts and Trustees --- Express trust — Creation — General

Trusts and Trustees --- Express trust — Termination — General

Trusts — Express trusts — Revocation or variation — Section 42(6) of Trustee Act providing power to cancel exercisable only by all persons having any beneficial interest in trust property — "Beneficial interest" not to be narrowly construed and encompassing contingent, defeasible or future interest — Dissenting beneficiary not required to have interest in identical property settled by settlor — Voting trust agreement giving trustee beneficial interest in voting rights of shares settled and future contingent interest in shares trustee might acquire — Trustee's opposition effective to prevent cancellation by settlor.

Trusts — Trustees — Trustee as beneficiary — Section 42(6) of Trustee Act providing power to cancel exercisable only by all persons having any beneficial interest in trust property — "Beneficial interest" not to be narrowly construed and encompassing contingent, defeasible or future interest — Dissenting beneficiary not required to have interest in identical property settled by settlor — Voting trust agreement giving trustee beneficial interest in voting rights of shares settled and future contingent interest in shares trustee might acquire — Trustee's opposition effective to prevent cancellation by settlor.

The applicant, either directly or through her holding company, owned all of the shares of Z.F. Ltd. In order to persuade the respondent to operate Z.F. Ltd., the applicant executed an irrevocable voting trust agreement under which the respondent was made the sole trustee of the applicant's shares and controlled the voting rights attached to them. The agreement also contained an employment contract under which the respondent would earn a salary plus 20 per cent of Z.F. Ltd.'s increase in net income. He also had the option to take the 20 per cent in common shares. The applicant subsequently applied to have the court cancel the trust agreement pursuant to s. 42 of the Trustee Act. The chambers judge held that the agreement was not a true trust, and dismissed the application on the basis that s. 42 did not apply. The applicant appealed.

Held:

Appeal dismissed.

Under the rule in *Saunders v. Vautier*, a trust could be cancelled only if everyone with a beneficial interest in the trust agreed to the cancellation. Section 42 of the Trustee Act has further restricted the power to cancel a trust by providing that it may be exercised only by all persons having any beneficial interest in the trust property, even a contingent, defeasible or future interest. Section 42(6) does not require that all these persons must have a beneficial interest in the property originally settled by the settlor. The concept of what is a "beneficial interest" under a trust should not be narrowly construed. Allowing some beneficiaries to cancel a trust against the will of a beneficiary whose interest is not in the

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identical property settled would emasculate the trust. Assuming that this was a trust, the respondent had a beneficial interest in the voting rights which constituted the trust property because he could use them to effect control of Z.F. Ltd. and to ensure that he would receive any benefits to which he might be entitled. In addition, the option to take new shares gave the respondent at least a future contingent interest in Z.F. Ltd. As the respondent was a beneficiary under the trust, this was not merely a case of a trustee trying to keep the trust alive for the trustee's own benefit.

Appeal from judgment of Cawsey J., 59 Alta. L.R. (2d) 268, 88 A.R. 321, dismissing application to cancel trust.

The judgment of the court was delivered by *Côté J.A.*:

1 The issue here [on appeal from the judgment of Cawsey J., 59 Alta. L.R. (2d) 268, 88 A.R. 321] is whether the court can cancel, or let the settlor unilaterally cancel, an irrevocable voting trust agreement over shares.

1. The agreement

2 Mrs. Zeidler beneficially owns all the shares in an operating company (directly or through a holding company). She wished that her son- in-law, Mr. Campbell, would again manage the operating company, as he had twice before. He would return for a third time only with very strong protection and good payment. She assented, and signed a letter of intent. I will summarize the documents here, deferring quotations to an appendix.

3 Mrs. Zeidler's letter of intent promised to create an irrevocable voting trust giving all the voting attributes of all the shares to Mr. Campbell as sole trustee. The trust would last until certain events happened, which have not occurred. Mr. Campbell would run the business, and be chief executive officer and chairman. His employment contract would give him a salary plus 20 per cent of the company's increase in net income, with an option to take that 20 per cent in common shares (at market value) rather than cash. Any year that earnings exceeded a certain amount, any shareholder could move for a dividend. Such motion would pass or fail under a different scheme of voting giving Mrs. Zeidler but a 20 per cent vote, and giving Mr. Campbell and some of his relatives (who are also Mrs. Zeidler's relatives) the other 80 per cent vote.

4 All concerned then signed a formal "Voting Trust Agreement", appending the letter of intent, a formal employment contract, and a consulting contract for Mrs. Zeidler. The voting trust agreement incorporates all these appendices as part of it. The parties agree to sign the employment contract and the consulting agreement. The voting trust agreement says that it is a unanimous shareholder's agreement under the Business Corporations Act. It and the employment contract follow closely the letter of intent, including the share bonus. Nothing abrogates the letter of intent, and in the event of conflict, its words prevail over the voting trust agreement (cl. 14).

5 Mrs. Zeidler and her holding company contract that if they sell their shares to someone else they will include any bonus shares of Mr. Campbell at the same price and terms and conditions. She also covenants to postpone her shareholder's loan until company earnings reach a certain level and the bank has been repaid in full. To transfer and delegate to Campbell all of the voting attributes of the company's shares and to give him full control, Mrs. Zeidler and her holding company appoint Mr. Campbell to vote the shares in the operating company subject to the terms of the voting trust agreement and during its duration. No voting rights can pass to any other person. The voting trust agreement is expressly irrevocable; it and the employment contract will only end in events which have not occurred.

2. The revocation

6 After about 2 1/2 years, Mrs. Zeidler gave Mr. Campbell a notice purporting to cancel the voting trust agreement. She asks the court to confirm her cancellation, or itself to cancel. She explains that her health has now improved so she can again manage the operating company. Her counsel says that her daughter and Mr. Campbell are still married but no longer live together. No one has yet purported to cancel the employment contract, but (when cross-examined) Mrs. Zeidler said that if the voting trust agreement ends, she will have Mr. Campbell dismissed. In my view, her motives for seeking sole control are irrelevant. She either has the power to do it, or she does not.

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7 She bases her case entirely on s. 42 of Alberta's Trustee Act. It is too long to quote conveniently, so I will instead describe its purpose. Before such legislation, all the persons beneficially interested in a trust could join together and cancel the trust. They could thus override trust terms forbidding that: *Saunders v. Vautier*, Cr. & Ph. 240, 41 E.R. 482, [1835-42] All E.R. Rep. 58. The rationale may have been that a trust exists for the beneficiaries, not for the settlor or the trustee. Alberta has narrowed this rule by s. 42 of the Trustee Act. Now an Alberta judge may refuse such a unanimous request unless (among other things) in his discretion he feels that the request would be "otherwise of a justifiable character".

8 The chambers justice hearing the application asked for argument on whether this was a true trust. In a reserved judgment he concluded that it was not a true trust, so that s. 42 did not apply, and Mrs. Zeidler's application under it failed. He went no further into s. 42 or the merits.

9 Mrs. Zeidler contends that this is indeed a true trust, which Mr. Campbell denies. A very good argument can be made that it is a true trust, in substance and form. Much of the voting trust agreement may use words of contract or of delegation, but cl. 7 begins "The voting *trust* created hereby shall enable Campbell to carry on all operations of" the company [emphasis added]. Clause 8 also starts by referring to "the voting *trust* created hereby" [emphasis added]. Without deciding, I will assume for the sake of argument that it is a trust. Purely for brevity, from now on I will call it a trust.

3. Beneficial interest

10 One thing is critical under *Saunders v. Vautier* and under s. 42: whether Mr. Campbell has any beneficial interest in the trust. It is critical for two reasons. First, this was the only rule of equity which let anyone cancel (or even vary) a trust. Before the statute everyone with any beneficial interest had to join in cancelling: see the textbooks cited below. Mr. Campbell dissents. The Trustee Act does not remove the need for unanimity; quite the contrary. Even before a proposal under s. 42 goes to court:

> 42 ...
>
> (6) ... it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting thereto.

11 The trust property here is the voting rights, and Mr. Campbell has a beneficial interest in them because he may use them. He may use them to effect control, and to ensure that he gets the benefits to which he is entitled. While the operating company earns higher income, he may elect to receive bonus shares without payment (in lieu of his cash bonus). Once he has shares, he can (while income exceeds a set floor) force a vote on dividends, and vote. Counsel for Mrs. Zeidler properly concedes that Mr. Campbell could get specific performance of his share option. Counsel also properly concedes that once Mr. Campbell got bonus shares, he could vote them in his own interest, not holding them or their rights in trust for anyone. A contractual right enforceable by specific performance is usually considered a property interest. Equity looks on that as done which ought to be done.

12 Mrs. Zeidler has several answers to that. She contends that these rights arise under the separate employment contract and not under the voting trust agreement. I do not agree for several reasons. In the first place, it is not accurate; the voting trust agreement itself contains some of these provisions: cls. 6 and 8. Second, it expressly incorporates the employment contract, and calls for its execution: cls. 1(a) and 2(b). Third, this may be all one transaction, as Mr. Campbell argues. Mrs. Zeidler's counsel admits that is a possible interpretation, though not one he would place on the documents. One could not exclude that possibility on hearing this originating notice with brief affidavits.

13 Mrs. Zeidler also contends that any beneficial interest Mr. Campbell has is not in the trust property. There she confuses benefit with beneficial interest. She says that Mr. Campbell's bonus would give him unissued treasury shares, not any of the shares already issued to Mrs. Zeidler or her holding company. The new treasury shares are not the beneficial in terest, but that does not say the beneficial interest does not exist. Moreover, even assuming that he would get treasury

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shares, I cannot see its relevance. Section 42(6) of the Trustee Act expressly requires "all other persons who are beneficially interested under the trust" to consent. It does not say persons beneficially interested in property originally settled by the settlor. Courts of equity are careful to protect beneficiaries. Construing narrowly what is a beneficial interest under a trust would subvert the purposes of trusts. Allowing other beneficiaries to cancel the trust against the will of a beneficiary because his trust interest is not in the identical property settled would emasculate the trust. The same would be true even if his interest were in property to which the original property is not traceable. There are limits on how far one can trace property in equity. Where property remains in the hands of the same trustee and the same trust, I see no reason to cut off beneficial interest where tracing stops. The rules of tracing exist for different purposes entirely.

14 Section 42 does not expand the cancellation power in *Saunders v. Vautier*, it cuts it down. That power to cancel a trust may be exercised only by all those with any beneficial interest in the trust property, even a contingent or defeasible or future interest: Waters, Law of Trusts in Canada, 2nd ed. (1984), p. 965; Pettit, Equity and the Law of Trusts, 5th ed. (1984), p. 325; Lewin on Trusts, 16th ed. (1964), p. 625; *Berry v. Geen*, [1938] A.C. 575 at 582, *(*sub nom. *Re Blake; Berry v. Geen)* [1938] 2 All E.R. 362 (H.L.). The Ontario Law Reform Commission reviews the cases in 2 Report on the Law of Trusts, p. 392 ff. (1984). An option to take new treasury shares gives Mr. Campbell at least a future contingent interest in the operating company.

15 Indeed, one cannot completely isolate Mr. Campbell's option for treasury shares from the issued share he votes. Whether the sole owner of a company transferred (say) half his shares to someone else, or whether he had the company issue to someone else an equal number of new shares, most of the results would be identical. Relative shareholdings and control depend on the percentage of shares held, not the absolute number of shares. At the moment, Mrs. Zeidler and her holding company have full beneficial interest in the company, ignoring the option. But once Mr. Campbell exercises his option and take bonus shares, Mrs. Zeidler and the holding company will not longer have full beneficial ownership of the company. So her interest is at best partly defeasible. She is not the only person interested in the operating company.

16 One may imagine an example. The owner of valuable mineral lands might transfer them irrevocably to an operating mineral company in trust to hold and develop for the settlor, granting to the trustee-operator only a 20 per cent interest in any net revenues of production received (above a set amount). The trustee-operator would likely have no beneficial interest in the settled land or even the extracted minerals (say many decided cases). But it would have a large beneficial interest under this trust. It would be startling if the settlor could watch the operator-trustee invest great sums, skill and care to bring mines or wells into production, then unilaterally use *Saunders v. Vautier* to cancel the trust just before revenues flowed in. In my view, the rule in *Saunders v. Vautier* did not allow that, and neither does s. 42 of Alberta's Trustee Act. The voting trust agreement gives Mr. Campbell enough beneficial interest to veto its cancellation.

4. The court's discretion

17 I need not decide whether cancelling this voting trust agreement would be "otherwise ... of ... justifiable character" under s. 42(7). Mr. Campbell argues that it would not. The parties contracted, for value and obviously with legal advice, to make a formal irrevocable agreement (or trust). Having joined and split forces twice before, they presumably knew what they were getting into. If this trust ends, he will be dismissed. His employment contract will be repudiated. Repudiating a valid contract may not be "justifiable" without evidence to show serious breach of contract. Cancelling the voting trust agreement might entail various breaches of contract or even torts, where money damages might not be an adequate remedy. Courts often find that damages are an inadequate substitute for shares in a private company.

5. Conclusion

18 Mrs. Zeidler says that those and other arguments recited above would make the tail wag the dog, and that trusts exist to serve the settlor and beneficiaries, not to serve the trustee or his trustee's fees. But that again assumes that Mr. Campbell's duties and pay are only incidental to the trust of voting rights. Mr. Campbell bargained for more than just an employment contract, and got more. He can be ousted only in unusual circumstances. He owns 20 per cent of any higher company income, which he may take as common shares. As shown above, this bargain has many other earmarks

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than a mere trust of voting rights. Stripped of form, it could be called a sale to Mr. Campbell of an equity in the business, his bonus shares. His salary or bonuses come under the employment contract, and he does not earn them by the slight labour of voting the shares. He earns them by managing the operating company; presumably he earns the bonus only by managing it well. The voting trust agreement is necessary to set the stage and give him free rein to manage. I do not view this as a case of a trustee trying to save his trustee's fees.

19 In any event, he is a beneficiary under the trust (as described). So this is not a case where a trustee tries to keep the trust alive for his own benefit against the wishes of all the beneficiaries.

20 I would dismiss the appeal for reasons given in Pts. 3 and 5. Unless Mrs. Zeidler shows good reason to the contrary, costs should follow the event.

Appendix of Extracts from Documents

Letter of Intent

My health being such that I have received insructions [sic] from my physician that I have to divest myself of concern regarding the operations of Zeidler Forest Industries Ltd. (hereinafter called the "Company") and whereas I have requested you to undertake the management and direction of the Company's affairs, and you have indicated your preparedness to undertake the management and direction of the Company's affairs; subject only to ensuring that there are no negative tax implications for me arising therefrom, I have agreed and do hereby agree to the following terms, covenants and conditions and have given the necessary instructions to my solicitor to prepare documents to be mutually satisfactory to each of us, in order to bring into full force and effect, the following arrangements:

1. I will enter into a voting trust with you as the sole trustee, whereby the whole of the voting attributes of my shares in the Company are delegated and transferred to you;

2. This voting trust, and all of its terms contained therein, shall be irrevocable;

3. This voting trust shall terminate only on the occurrence of one of the following events:

(a) the unanimous approval of myself and Margaret E. Campbell to sell the Company;

(b) You have been determined by the Court of Queen's Bench to have been incapacitated to such a degree whereby you are physically or mentally unable to exercise your duties as my trustee in the management and direction of the Company's affairs;

(c) your death;

(e) the divorce of you and Margaret E. Campbell, in which event the voting attributes of the shares shall be distributed as follows:

Ken Campbell — 50%

Margaret E. Campbell — 30%

Shaunna Campbell — 10%

Tani Campbell — 10%

5. Concurrently upon the execution of the agreements herein contemplated, I will ensure that the following occurs:

(e) I will ensure that you have an Employment Contract which provides for the following features:

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(iv) you shall be entitled to a bonus to be equal to TWENTY (20%) PER CENT of the net income of the Company, the same to be calculated in accordance with and payable pursuant to the provisions of Clause 2(d)(i) as is set out in the Agreement entered into between us on March 1, 1977; save and except the base earnings would be computed, using a five year term ending October 31, 1984. In lieu of taking the bonus in cash, you may elect to purchase common shares of the Company of a value equal to the amount, otherwise to be taken as a bonus .... whereupon the Company's Auditors shall within SIXTY (60) Days, calculate the value of the shares at their fair market value ... Whereupon the Company shall issue you with the appropriate number of common shares in satisfaction of the bonus otherwise earned and payable.

Voting Trust Agreement

1. (a) This Voting Trust Agreement is and shall have the force of a Unanimous Shareholders' Agreement under all provisions of the Business Corporations Act of Alberta, c. B-15, R.S.A. 1980, as amended (the "Act") and all appendices hereto are deemed incorporated herein and form part hereof;

2. For the purposes of transferring and delegating to Campbell all of the voting attributes of the ZFI shares (save only as herein expressly limited) and to ensure that Campbell shall have full and absolute control and be in charge of all aspects and operations of ZFI and the Related Assets hereinafter described:

(a) Mrs. Zeidler and Holdings hereby appoint Campbell to vote the ZFI shares subject to the terms of this Voting Trust Agreement and for the duration hereof, ...

(b) Mrs. Zeidler, ZFI and Campbell shall concurrently execute an Employment Contract and Consulting Agreement in the forms of Appendices "B" and "C" annexed hereto.

4. The voting trust created hereunder is irrevocable and shall only terminate, and the voting rights of the ZFI Shares shall, revert back and again be exercised by Mrs. Zeidler and Holdings respectively, only upon the happening of any one or more of the following events: ...

6. Notwithstanding the provisions of this Voting Trust Agreement, in the event that ZFI has after tax earnings ... which in any fiscal year exceed ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00), then should any shareholder request that a dividend be paid from After Tax Earnings in excess of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00), the decision whether a dividend shall be paid and in what amount shall be decided by a majority of the persons hereinafter set forth, who shall for this limited purpose only be entitled to vote in the proportions specified beside their names;

Campbell — 20%

Mrs. Zeidler — 20%

Mrs. Campbell — 20%

Shaunna Campbell — 20%

Tani Campbell — 20%

and ZFI shall forthwith declare and pay any dividend so determined.

8. (d) Mrs. Zeidler and Holdings both hereby covenant that they will not sell, assign, transfer or otherwise dispose of any ZFI shares without the prior written consent of Mrs. Campbell other than to each other or to one or more of Mrs. Campbell, Shaunna Campbell, Tani Campbell, or Campbell or a trust for the benefit of one or more of them or a corporation or other entity controlled by one or more of them or Mrs. Zeidler.

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(e) If Mrs. Zeidler and Holdings, with the consent of Mrs. Campbell, wishes to sell all of the ZFI shares (except as permitted pursuant to sub-clause 8(d) hereof) and Campbell has elected to obtain shares of ZFI pursuant to the Employment Contract, then such sale shall not be completed unless Campbell's shares in ZFI are included in the sale at the same price and upon the same terms and conditions as Mrs. Zeidler and Holdings are selling the ZFI Shares. In this event, Campbell agrees to sell his shares of ZFI.

14. The parties covenant and agree to do or cause to be done all acts and things necessary to effect compliance with this Voting Trust Agreement and to implement the true intent and meaning of this Voting Trust Agreement, read with the said Letter of Intent (which in the event of conflict, shall prevail), the Employment Contract and Consulting Agreement and other agreements from time to time which Mrs. Zeidler and Campbell are parties. [sic]

Employment Contract

1. The Company hereby agrees to retain the services of Campbell as its Chairman of the Board and Managing Director (it being agreed that Campbell in his discretion may from time to time assume or delegate the office(s) of President and Chief Executive Officer) commencing on the date hereof and terminating upon the happening of any one of the following events:

(a) Campbell's death; or

(b) Campbell's resignation as Chairman of the Board and Managing Director, for whatever reason; or

(c) the date that all shares of the Company are sold and transferred ... to any person, corporation or other entity not controlled ... or

(d) Campbell's physical disability, illness, injury or incarceration which prevents him from performing, for a continuous period exceeding One Hundred and Eighty (180) Days, the services required of him under this Employment Contract; or

(e) Campbell's disqualification from being a Director of the Company pursuant to the provisions of Section 100(1) of the *Business Corporations Act of Alberta*, being Chapter B-15, R.S.A. 1980, as amended, confirmed by an Order of a Court of competent jurisdiction confirming that such disqualification has occurred as a matter of fact; or

(f) Campbell's willful neglect of duty, or fraudulent action resulting in material loss to the Company confirmed by an Order of a Court of competent jurisdiction that such willful neglect of duty, or fraudulent action occurred as a matter of fact; or

(g) The bankruptcy or dissolution of the Company ...

6. Campbell shall, as additional remuneration hereunder, receive as a bonus due ninety (90) days following the fiscal year end of the Company during each year commencing 1985 of the term of his employment hereunder, a sum equal to TWENTY PERCENT (20%) of the:

EXCESS OF:

(a) the net income for the year ...

OVER:

(b) a sum calculated as the average net income of the Company for the five (5) years ended October 31, 1984 as shown on the audited financial statements after adding back the items referred to in sub-clauses (a)(i), (ii) and (iii) above ...

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PROVIDED HOWEVER, that in lieu of receiving the bonus in cash as specified in this clause 6 Campbell shall have the option to purchase common shares of the Company, up to a value equal to the amount then payable to Campbell as a bonus hereunder.

This election shall be made within thirty (30) days of the receipt of the audited financial statements of the Company, whereupon the auditors of the Company shall, unless Mrs. Zeidler and Campbell agree on the value of the shares, forthwith calculate the value of the shares at their fair market value ...

Upon receipt of such determination, the Company shall issue to Campbell (to the extent of his said election) the appropriate number of common shares and pay the balance (if any) in cash, in full satisfaction of the bonus earned by Campbell for the pertinent fiscal year ...

Appeal dismissed.

End of Document

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